BRB No. 13-0027 BLA

SADIE LEE CHAFFINS (Widow of CHARLES E. CHAFFINS)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 09/06/2013
NATS CREEK MINING COMPANY	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier- Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Administrative Law Judge Larry S. Merck, United States Department of Labor.

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

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

Sarah M. Hurley (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2006-BLA-5389, 2009-BLA-5904) of Administrative Law Judge Larry S. Merck (the administrative law judge) awarding benefits on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves the administrative law judge's application of amended Section 411(c)(4) to award benefits on a survivor's claim.

The miner filed a claim for benefits on October 15, 2002. Director's Exhibit 2. The district director awarded benefits on December 9, 2003. Director's Exhibit 30. At employer's request, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibits 34, 39. However, the miner died on March 17, 2005, before a hearing could be held. Director's Exhibit 97. Claimant, the miner's surviving spouse, filed a survivor's claim on April 27, 2005. Director's Exhibit 88. The district director awarded survivor's benefits on November 7, 2005. The miner's claim and the survivor's claim were consolidated for hearing, which was held on November 16, 2006, before Administrative Law Judge Jeffrey Tureck.

In a Decision and Order dated January 23, 2008, Judge Tureck found that the evidence did not establish that the miner suffered from pneumoconiosis or that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.205(c). Consequently, Judge Tureck denied both claims. Pursuant to claimant's appeal, the Board affirmed Judge Tureck's denial of benefits. *S.C.* [*Chaffins*] *v. Nats Creek Mining Co.*, BRB No. 08-0390 BLA, slip op. at 7 (Dec. 23, 2008) (unpub.).

On January 27, 2009, claimant timely requested modification of the denials in both the miner's claim and the survivor's claim. Director's Exhibit 162. After the district director transferred the case to the OALJ, the administrative law judge scheduled a hearing for August 3, 2011, and provided the parties with notice of the recent amendments to the Act.[1] Claimant later filed an unopposed motion seeking a decision on

[1] 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 total disability or death was due to pneumoconiosis, in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The presumption does not apply to the miner's claim, as it was filed prior to January 1, 2005. Director's Exhibit 2.

the record, and waiving her right to a hearing. The administrative law judge granted claimant's motion on July 27, 2011.

In a Decision and Order dated September 18, 2012, the administrative law judge initially addressed claimant's request to modify the denial of benefits in the miner's claim. The administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge denied claimant's modification request in the miner's claim. 20 C.F.R. §725.310.

In his adjudication of the survivor's claim, the administrative law judge initially considered the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4). The administrative law judge found that claimant established that the miner worked for thirty-six years in underground coal mine employment,[2] and that the miner was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of death due to pneumoconiosis set forth at amended Section 411(c)(4). The administrative law judge further determined that employer did not rebut the presumption. Accordingly, the administrative law judge found that claimant established a mistake in the ultimate determination of fact, and awarded benefits in the survivor's claim.

On appeal, employer argues that the administrative law judge erred in finding that the miner suffered from a totally disabling respiratory impairment, and therefore erred in in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it failed to rebut the presumption.[3] Claimant responds in support of the administrative law judge's award of benefits in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's application of the Section 411(c)(4) presumption in the survivor's claim, and urges the Board to reject employer's argument that the administrative law judge erred in referring to the preamble to the regulations in assessing the credibility of employer's physicians' rebuttal opinions.

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 89. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] Because employer does not challenge the administrative law judge's finding that the miner had more than fifteen years of qualifying coal mine employment, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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. 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).

A party may request modification of an award or denial of benefits within one year of the prior decision. 20 C.F.R. §725.310(a). The sole basis available for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aerojet- General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc*., 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994).

Employer initially argues that the administrative law judge erred in applying amended Section 411(c)(4), because modification is not available based on a change in law. Employer's Brief at 18-19. Employer's argument lacks merit. The amendments to the Act must be applied to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *See Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-52-53 (2012). Here, because claimant filed her claim after January 1, 2005, and timely requested modification of the denial of benefits, amended Section 411(c)(4) applies. *Id*. Furthermore, a claimant may seek modification of the ultimate fact of entitlement in a modification proceeding. *See V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008). Therefore, we agree with the Director that the administrative law judge properly applied amended Section 411(c)(4) in the survivor's claim.

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

Employer argues that the administrative law judge erred in finding total disability established based on the medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] Relevant to the issue of total disability, the record contains the medical opinions of Drs. Mettu, Sundaram, Verma, Jarboe, Fino, and Dahhan. Drs. Mettu, Sundaram, Verma, and Jarboe each opined that the miner was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 11, 54, 13, 49, 79; Employer's

[4] The administrative law judge found that claimant did not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 19.

Exhibits 2A, 4A. Dr. Fino opined that, based on the miner's arterial blood gas studies, he "suspect[ed] that there was a disability related to" chronic obstructive pulmonary disease (COPD), but did not specify whether the disability was total, or only partial. Director's Exhibits 62, 63. Although Dr. Dahhan believed that the miner was unable to return to his prior coal mine work, Dr. Dahhan was unable to determine whether the miner suffered from a totally disabling obstructive impairment, as there was no valid pulmonary function study of record. Director's Exhibits 42, 56, 59, 61; Employer's Exhibits 1A, 3A.

In considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge gave little weight to the opinions of Drs. Mettu, Sundaram, and Verma, as none of these physicians explained his basis for concluding that the miner was totally disabled by a respiratory or pulmonary impairment. Decision and Order at 20-21. The administrative law judge also accorded little weight to the opinions of Drs. Fino and Dahhan, finding that their opinions were equivocal, vague, or insufficiently explained. *Id.* at 24, 26-27. In contrast, the administrative law judge found that Dr. Jarboe's opinion diagnosing a totally disabling pulmonary impairment was well-reasoned and documented, as it was "consistent with the underlying objective medical evidence, fully explained, and thus entitled to full probative weight."[5] *Id.* at 28. The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 29.

Employer contends that the administrative law judge mischaracterized and selectively analyzed Dr. Jarboe's opinion, which, employer asserts, was not an opinion that the miner was totally disabled by a respiratory or pulmonary impairment standing alone. Employer's Brief at 19-21. We disagree. Contrary to employer's argument, substantial evidence supports the administrative law judge's decision to credit Dr. Jarboe's opinion as supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In his medical report, Dr. Jarboe clearly opined that the miner "did not retain the pulmonary respiratory capacity to perform hard manual labor," and that he therefore believed that the miner "was totally and permanently disabled from a pulmonary standpoint." Employer's Exhibit 2A at 17. At a subsequent deposition, Dr. Jarboe reiterated his diagnosis of a totally disabling pulmonary impairment, despite the absence of any valid pulmonary function studies in the record. Employer's Exhibit 4A at 24. Therefore, we reject employer's contention that the administrative law judge mischaracterized or selectively analyzed Dr. Jarboe's opinion.

[5] The administrative law judge relied on Dr. Jarboe's opinion that, although there were no pulmonary function studies, the clinical record of the miner's treatment reflected that he was totally disabled from a pulmonary standpoint, as did the fact that the miner developed hypoxemia that rendered him oxygen-dependent. Employer's Exhibits 2A; 4A at 24.

As employer does not otherwise challenge the administrative law judge's weighing of the evidence at 20 C.F.R. §718.204(b)(2)(iv), or his finding that all of the medical evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2), we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of our affirmance of the administrative law judge's findings that the miner had more than fifteen years of qualifying coal mine employment, and was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of death 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 pneumoconiosis, or by proving that the miner's death did not arise from his coal mine employment. *See* 30 U.S.C. §921(c)(4); 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). Although the administrative law judge found that employer disproved the existence of clinical pneumoconiosis,[6] he found that it failed to disprove the existence of legal pneumoconiosis.[7] Decision and Order at 31, 38. The administrative law judge further found that employer failed to prove that the miner's death did not arise from his coal mine employment. *Id.* at 36-38. The administrative law judge, therefore, found that employer did not establish rebuttal of the Section 411(c)(4) presumption. *Id.* at 38.

With respect to whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Fino, Dahhan, and Jarboe,[8] each of whom opined that the miner's COPD was unrelated to coal

[6] "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).

[7] "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).

[8] The administrative law judge noted that none of claimant's physicians provided a well-reasoned or documented opinion concluding that the miner suffered from legal pneumoconiosis. Decision and Order at 31-32.

mine dust exposure.[9] The administrative law judge discounted the opinions of Drs. Fino, Dahhan, and Jarboe because he found that each opinion was premised on assumptions that were contrary to the scientific views endorsed by the Department of Labor (DOL) in the preamble to the revised regulations. Decision and Order at 32-36. Therefore, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 36.

Employer argues that the administrative law judge erred in finding that the opinions of Drs. Fino, Dahhan, and Jarboe were insufficient to disprove the existence of legal pneumoconiosis. We disagree. The administrative law judge reasonably construed each physician's opinion as relying, in part, on the absence of radiographic evidence of clinical pneumoconiosis as a reason for concluding that the miner's COPD was unrelated to coal mine dust exposure. Decision and Order at 32-35; Director's Exhibit 58 at 13-14; Employer's Exhibits 3-A, 4-A. The administrative law judge appropriately found such reliance to be inconsistent with the definition of legal pneumoconiosis, and the DOL's recognition that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Decision and Order at 32, 34-35.

We further reject employer's assertion that the administrative law judge erred in referring to the preamble to the amended regulations, when weighing the medical opinions relevant to rebuttal of the Section 411(c)(4) presumption. Contrary to employer's assertion, it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles accepted by the DOL, and to consider the preamble to the revised regulations in assessing the credibility of the medical experts' opinions in this case.[10] *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25

[9] Drs. Fino and Dahhan opined that the miner's COPD was due solely to smoking. Director's Exhibit 63 at 9; Employer's Exhibit 3-A at 16. Dr. Jarboe attributed the miner's obstructive lung disease to emphysema due to smoking and asthma. Employer's Exhibit 4-A at 14.

[10] In addition, the United States Court of Appeals for the Fourth Circuit has flatly rejected employer's argument that the administrative law judge could not consult the preamble because it was not subject to notice-and-comment rulemaking. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-03, 25 BLR 2-203, 2-210-12 (6th Cir. 2012).

BLR 2-115, 2-129-32 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Consequently, the administrative law judge permissibly discounted the opinions of Drs. Fino, Dahhan, and Jarboe as to the cause of the miner's COPD, because the doctors relied on an assumption that is contrary to the regulations and the medical science credited by the DOL. As the administrative law judge's basis for discrediting the opinions of Drs. Fino, Dahhan, and Jarboe is rational and supported by substantial evidence, it is affirmed.

The administrative law judge also provided an additional, valid reason for discounting the opinions of Drs. Dahhan and Jarboe. Dr. Dahhan based his opinion, in part, on the miner's use of bronchodilators for treatment, noting that such treatment "is inconsistent with the permanent adverse [e]ffects of coal dust on the respiratory system." Director's Exhibit 56. Similarly, Dr. Jarboe believed that the miner's "clinical picture" indicated a "reversible airways disease" unrelated to coal mine dust exposure, though Dr. Jarboe admitted that there was no valid pulmonary function study in the record. Employer's Exhibits 2-A, 4-A.

The administrative law judge reasonably found that the credibility of the opinions of Drs. Dahhan and Jarboe was undermined, as the record contains no valid pulmonary function study, and neither physician adequately explained how he determined that the miner's impairment was reversible, in the absence of objective evidence. Decision and Order at 34-35; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Furthermore, the administrative law judge permissibly found that, even if there were a valid pulmonary function study that showed reversibility, neither doctor adequately explained why partial reversibility in the results of a pulmonary function study necessarily eliminated a diagnosis of legal pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 34-35. Therefore, we affirm the administrative law judge's decision to discount the opinions of Drs. Dahhan and Jarboe because they did not adequately explain their views on the reversibility of the miner's obstructive impairment.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino, Dahhan, and Jarboe, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-

61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

The administrative law judge next addressed whether employer established rebuttal by proving that the miner's death did not arise from his coal mine employment. The administrative law judge accurately noted that Drs. Fino, Dahhan, and Jarboe opined that the miner's COPD contributed to, or hastened, the miner's death, but that this disease was unrelated to coal mine dust exposure and thus, did not constitute pneumoconiosis. Decision and Order at 37-38; Director's Exhibit 63; Employer's Exhibits 2-A, 3-A. The administrative law judge reasonably found that the same reasons that he provided for discrediting the opinions of Drs. Fino, Dahhan, and Jarboe, that the miner did not suffer from legal pneumoconiosis, also undercut their opinions that the miner's death was unrelated to pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that the miner's death did not arise from his coal mine employment.[11] 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8; *Copley*, 25 BLR at 1-89.

Because claimant invoked 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's award of benefits is affirmed.

[11] We agree with the Director that employer's argument, that the administrative law judge erred in failing to consider "all of the relevant evidence," is meritless. Employer's Brief at 30-31; Director's Brief at 3-4. The administrative law judge correctly refrained from considering the evidence in the miner's and survivor's claims together, and he was under no obligation to "reconcile" the denial of the miner's claim with the award in the survivor's claim. *See Earl Patton Coal Co. v. Patton*, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (en banc).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge