BRB No. 14-0008 BLA

DOROTHY SKALA (Widow of EDWARD F. SKALA)	)	
Claimant-Respondent	)	
v.	)	
FLORENCE MINING COMPANY	)	DATE ISSUED: 08/05/2014
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 Remand Awarding Benefits of Administrative Law Judge Richard A. Morgan, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Margaret M. Scully (Thompson Calkins & Sutter LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2009-BLA-5348) of Administrative Law Judge Richard A. Morgan on a survivor's claim filed on February 22, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In its prior Decision and Order, the Board affirmed Administrative Law Judge Michael P. Lesniak's finding that the miner had at least the fifteen years of qualifying coal mine employment necessary to invoke the presumption set forth in

amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] *Skala v. Florence Mining Co.*, BRB No. 12-0257 BLA, slip op. at 6-7, (Jan. 29, 2013) (unpub). The Board also affirmed Judge Lesniak's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), that Dr. Malhotra's opinion supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), and that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *Id*. at 7, 9-10. The Board vacated, however, Judge Lesniak's evidentiary ruling excluding Dr. Oesterling's deposition testimony, his ultimate finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), and his findings on the issue of total disability causation at rebuttal. *Skala*, slip op. at 5. Accordingly, the Board remanded the case to Judge Lesniak with instructions to make a ruling on the admissibility of Dr. Oesterling's deposition testimony, to advise the parties of his ruling and to provide them with an opportunity to respond appropriately. *Id.* On the merits, the Board instructed the administrative law judge to reconsider whether claimant established total respiratory or pulmonary disability and, therefore, invoked the amended Section 411(c)(4) presumption. *Id.* at 9. If invoked, the administrative law judge was instructed to determine 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. *Id.* at 10.

Judge Lesniak subsequently retired and the case was assigned to Judge Morgan (the administrative law judge). On July 25, 2013, the administrative law judge held a conference call with the parties to discuss the exclusion of Dr. Oesterling's deposition testimony and issued an evidentiary Order on July 30, 2013. The administrative law judge determined that, because Dr. Oesterling's deposition testimony would constitute an additional medical report, and employer failed to show good cause for its admission, the administrative law judge was required to exclude it as being in excess of the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i). The administrative law judge further observed that employer was given the opportunity to redesignate its evidence, but declined.

In the administrative law judge's subsequent Decision and Order on Remand Awarding Benefits, he found that claimant established that the miner was totally disabled by a respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) and, therefore, that claimant invoked the rebuttable presumption that the miner's death was due to

[1] Relevant to this survivor's claim, amended Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis, if 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.

pneumoconiosis, pursuant to amended Section 411(c)(4). The administrative law judge further found that employer failed to rebut the presumption by proving that the miner's death did not arise out of, or in connection with, his coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred: in excluding Dr. Oesterling's deposition testimony; in finding that claimant established total disability to invoke the amended Section 411(c)(4) presumption; and in finding that employer failed to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board.

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).

I. Exclusion of Dr. Oesterling's Deposition Testimony

Dr. Oesterling prepared an autopsy report dated July 24, 2008, and was subsequently deposed by employer. Employer's Exhibit 1. Employer sought admission of both Dr. Oesterling's autopsy report and his deposition testimony. Judge Lesniak excluded Dr. Oesterling's deposition testimony, as it constituted a medical report pursuant to 20 C.F.R. §§725.414(c) and 725.457(c)(2), and employer had already submitted the two medical reports it is allowed under 20 C.F.R. §725.414(a)(3)(i). 2012 Decision and Order at 8. As previously indicated, the Board affirmed Judge Lesniak's determination that Dr. Oesterling's deposition testimony was a medical report, but vacated his ruling excluding it because he issued the evidentiary ruling in his Decision and Order, thereby depriving employer of the opportunity to establish good cause for the admission of an additional medical report. *Skala*, BRB No. 12-0257 BLA, slip op. at 4-5.

Employer's argument with respect to the administrative law judge's determination on remand that good cause was not established for the admission of Dr. Oesterling's deposition testimony, is that it was not in excess of the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(3)(i), as it was obtained to clarify Dr. Oesterling's autopsy report.

[2] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

We reject employer's contention, as the Board's prior holding, that Dr. Oesterling's deposition testimony was a medical report under the terms of 20 C.F.R. §§725.414(c) and 725.457(c)(2), constitutes the law of the case. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990). Accordingly, we decline to revisit our holding and we affirm the administrative law judge's finding excluding Dr. Oesterling's deposition testimony because employer failed to establish good cause and did not redesignate its evidence. *See* 20 C.F.R. §725.456(b)(1); *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55 (2008) (en banc).

II. Invocation of the Amended Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), thereby invoking the amended Section 411(c)(4) presumption of death due to pneumoconiosis. Employer specifically contends that the administrative law judge erred in crediting Dr. Malhotra's diagnosis of a totally disabling respiratory impairment, without first determining that his opinion was reasoned and documented. Employer further maintains that the administrative law judge improperly discredited the opinions in which Drs. Renn and Oesterling determined that the miner was not totally disabled.

Employer's contention regarding the administrative law judge's weighing of Dr. Malhotra's opinion is without merit, as the administrative law judge permissibly relied on the Board's holding affirming Judge Lesniak's determination that Dr. Malhotra's opinion was supportive of a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).[3] Decision

[3] The Board stated:

> [Judge Lesniak] permissibly found that Dr. Malhotra . . . provided sufficient information concerning the degree of the miner's impairment to allow him to infer that the miner was totally disabled from his usual coal mine employment, by comparing Dr. Malhotra's opinion with the exertional requirements of the miner's usual coal mine work. The administrative law judge noted Dr. Malhotra's testimony that the miner was short of breath in his day to day life, and had been on home oxygen for his lungs for ten years prior to his death. The administrative law judge further found that the exertional requirements of the miner's job included shoveling coal, and filling and carrying bags of coal, a finding employer does not contest. Comparing Dr. Malhotra's testimony with the exertional requirements of the miner's usual coal mine work, the administrative law judge rationally concluded that Dr. Malhotra's opinion supports a finding of total respiratory disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). We, therefore, affirm the administrative law judge's conclusion that Dr.

and Order on Remand at 3 n.7. The Board's determination now constitutes the law of the case and employer has advanced no compelling argument for altering it.[4] *See Coleman*, 18 BLR at 1-15; *Brinkley*, 14 BLR at 1-150-51.

We further hold that there is no merit in employer's allegation of error regarding the administrative law judge's finding that Dr. Renn's opinion was entitled to little weight. The administrative law judge observed that Dr. Renn's determination that the miner was not totally disabled was based, at least in part, on a finding that the miner did not suffer from cor pulmonale. Dr. Renn stated:

> [T]he autopsy results permit a retrospective view regarding [the miner's] respiratory status that would have obtained until the date of his demise. The autopsying pathologists found simple coal workers' pneumoconiosis (CWP) which, apparently, they believed only involved 5% of his lung parenchyma. They also found centrilobular and bullous emphysema. However, the 5% CWP and the two types of emphysema had not attained the degree of involvement [necessary] to result in cor pulmonale, a known cardiac consequence of significantly impairing pulmonary parenchymal involvement.

Employer's Exhibit 2B at 1. Because Dr. Renn's analysis of the pathological findings was restricted to whether they supported a diagnosis of cor pulmonale, the administrative law judge rationally determined that, "although the [r]egulations *permit* a finding of total disability where a miner suffered from cor pulmonale with right-sided congestive heart failure, this finding is not *necessary* to establish total disability." Decision and Order on Remand at 4-5; *see* 20 C.F.R. § 718.204(b)(2).

> Malhotra's opinion is sufficient to support a finding of total disability, pursuant to 20 C.F.R. §718.204(b).

Skala, BRB No. 12-0257 BLA, slip op at 8-9.

[4] Employer contends that several flaws undermine the credibility of Dr. Malhotra's opinion: he erroneously relied on twenty-four years of underground coal mine employment; he erroneously cited equal amounts of coal dust exposure and cigarette smoking; he minimized the miner's heart disease; and he did not clarify whether the miner's need for supplemental oxygen was related to his heart disease. These contentions are relevant to the issue of total disability causation at 20 C.F.R. §718.204(c), not total disability at 20 C.F.R. §718.204(b).

In addition, the administrative law judge acted within his discretion in giving little weight to Dr. Renn's opinion, as Dr. Renn erred in stating that none of the pathologists of record found objective evidence of a totally disabling pulmonary or respiratory impairment during the miner's lifetime. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); Decision and Order on Remand at 5; Employer's Exhibit 2B at 2. The administrative law judge correctly determined that, although Dr. Oesterling did not state explicitly that the miner was totally disabled, he found changes indicating that the miner would have experienced "significant respiratory distress." Decision and Order on Remand at 5, *quoting* Employer's Exhibit 1 at 3. The administrative law judge also accurately observed that the autopsy pathologists, Drs. Hou and Heggere, characterized the miner's emphysematous changes as "severe." Decision and Order on Remand at 5, *quoting* Director's Exhibit 11 at 3. The administrative law judge permissibly reasoned, therefore, that "as all of the pathologists found objective evidence *supportive of* a finding of lifetime disability, I give limited consideration to the opinion of Dr. Renn, whose characterization of the underlying evidence is somewhat inaccurate." Decision and Order on Remand at 5; s*ee Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Finally, contrary to employer's contention, the administrative law judge was not required to accord greater weight to Dr. Renn's opinion on the basis of his allegedly superior qualifications, but permissibly gave his opinion less weight after considering the documentation underlying his opinion in evaluating its reliability.[5] *See Clark*, 12 BLR at 1-154. Accordingly, we reject employer's argument that the administrative law judge did not consider Dr. Renn's credentials and affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F. R. §718.204(b)(2)(iv).

Furthermore, because the administrative law judge considered all of the relevant evidence under 20 C.F.R. §718.204(b)(2)(i)-(iv) and rationally credited the opinions of Dr. Malhotra, Oesterling, Hou and Heggere, over the opinion of Dr. Renn, we reject employer's argument that the administrative law judge failed to weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc). We affirm, therefore, the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

III. Rebuttal of the Amended Section 411(c)(4) Presumption

[5] The administrative law judge adopted Judge's Lesniak's determination that Dr. Renn is Board-certified in internal medicine, pulmonary diseases, forensic medicine and is a forensic medicine examiner. Decision and Order on Remand at 2.

Because the Board affirmed Judge's Lesniak determination that employer failed to disprove the existence of pneumoconiosis, the administrative law judge determined that employer could rebut the amended Section 411(c)(4) presumption only by proving that the miner's death did not arise out of, or in connection with, dust exposure in his coal mine employment. Decision and Order on Remand at 6. The administrative law judge considered the opinions of Drs. Malhotra, Renn and Oesterling on this issue and determined that employer failed to satisfy its burden, as the opinions in which Drs. Renn and Oesterling ruled out coal dust exposure as a contributing cause of the miner's death were entitled to little weight. *Id*. at 7-9.

Employer asserts that, by conceding that it could not establish rebuttal by disproving the existence of clinical pneumoconiosis,[6] it did not concede that the miner had legal pneumoconiosis.[7] Employer also argues that, contrary to the administrative law judge's finding, Dr. Renn rationally premised his opinion on the minimal number of coal macules in the miner's lungs, and also explicitly stated that emphysema did not contribute to the miner's death. Employer further maintains that the administrative law judge erred in finding that Dr. Oesterling's opinion was insufficient to rebut the presumed fact that the miner's death was due to pneumoconiosis. Finally, employer contends that the administrative law judge erred in omitting from consideration Dr. Begley's opinion that the miner's CWP played no role in his death.

Employer's arguments are without merit. The administrative law judge correctly observed that the Board had affirmed, as unchallenged on appeal, Judge Lesniak's findings that all of the physicians of record diagnosed CWP, and that Drs. Renn and Oesterling could not rule out a causal connection between the miner's emphysema and his coal dust exposure. *See Skala*, BRB No. 12-0257 BLA, slip op. at 10 n.13; Decision and Order on Remand at 6. Contrary to employer's suggestion, therefore, the administrative law judge reasonably concluded that employer did not disprove the presumed existence of clinical and legal pneumoconiosis, and that the only method of rebuttal available to employer was to prove that neither clinical, nor legal, pneumoconiosis played a role in his death. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(2); *see Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th

[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 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).

Cir. 1995); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

In weighing the medical opinions, the administrative law judge rationally determined that Dr. Renn's opinion based, in part, on the "percent involvement of [the] miner's coal macules . . . is relevant in addressing the impact of [the] miner's *clinical* pneumoconiosis" on his death, but "does not preclude a finding that [the] miner's emphysema (which employer cannot establish is unrelated to coal dust exposure) hastened his death."[8] Decision and Order on Remand at 8; *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002). The administrative law judge also acted within his discretion in finding that Dr. Renn's observation, that he did not believe that emphysema was a significant contributing cause of the miner's death, "is conclusory and inadequately reasoned." Decision and Order on Remand at 8; *see Balsavage v. Director*, OWCP, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002). Similarly, the administrative law judge permissibly determined that Dr. Oesterling's opinion was entitled to little weight, as he opined that clinical pneumoconiosis was not a factor in the miner's death, but did not "address whether [the] miner's emphysema could have hastened his death, considering its severity."[9] Decision and Order on Remand at 8; *see Soubik*, 366 F.3d at 2-234, 23 BLR at 2-99; *Kramer*, 305 F.3d at 210, 22 BLR at 2-480.

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[8] Dr. Renn diagnosed centrilobular emphysema related, at least in part, to coal dust exposure, and panlobular and bullous emphysema caused by smoking. Employer's Exhibit 15 at 27. When asked if emphysema contributed to the miner's death, he testified: "No, I don't believe that the emphysema was." *Id*. When asked on cross-examination whether emphysema contributed to the miner's death, Dr. Renn stated: "No." *Id*. at 42. Regarding the severity of the miner's emphysema, he opined:

> The pathologists who did the autopsy . . . found [bullous] emphysema and mentioned another type of emphysema. I guess that they had to – they either related the centrilobular emphysema to the macules that they found or not. I just don't know. But they did not say anything about the severity of the emphysema.

Id. at 43. Dr. Renn did not comment on the diagnoses of "simple coal workers' pneumoconiosis *associated* with pulmonary emphysema . . . *severe*," made by the autopsy prosectors, Drs. Hou and Heggere. Director's Exhibit 11 (emphasis added).

[9] Dr. Oesterling opined that the miner's panlobular and bullous emphysema could not be associated with coal workers' pneumoconiosis. Employer's Exhibit 1 at 4. Dr.

Lastly, contrary to employer's contention, the administrative law judge weighed the entirety of Dr. Begley's opinion, that the miner's CWP was not a significant contributing or hastening factor in the miner's death. The administrative law judge, however, rationally found that Dr. Begley provided no basis for his opinion and did not address the impact, if any, the miner's emphysema may have had on his death. *See Soubik*, 366 F.3d at 2-234, 23 BLR at 2-99; *Kramer*, 305 F.3d at 210, 22 BLR at 2-480; Decision and Order on Remand at 9 n.23; Employer's Exhibit 12. We affirm, therefore, the administrative law judge's finding that the evidence, as a whole, was insufficient to establish that the miner's death did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(2)(ii); *see Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

Oesterling also diagnosed nodule-related focal emphysema, but did not determine whether it played a role in the miner's death. *Id*.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge