

U.S. Department of Labor

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



BRB No. 16-0146 BLA

RACHEL S. RIGGSBY)	
(Widow of ZANE B. RIGGSBY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
HARMAN MINING CORPORATION)	DATE ISSUED: 02/02/2017
)	
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 Granting Request for Modification and Awarding Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

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

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

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Request for Modification and Awarding Benefits (2012-BLA-05828) of Administrative Law Judge Paul R. Almanza, rendered on a survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In a Decision and Order issued on November 7, 2011, Administrative Law Judge Pamela J. Lakes credited the miner with at least fifteen years of underground coal mine employment, based on the stipulation of the parties, and determined that the evidence was sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Based on those determinations and the filing date of the survivor's claim, Judge Lakes found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).² Judge Lakes also determined, however, that employer successfully rebutted the presumption and benefits were denied.

Claimant filed a timely request for modification on December 8, 2011, and the case was assigned to Judge Almanza (the administrative law judge). Director's Exhibit 76. In his Decision and Order Granting Request for Modification and Awarding Benefits, issued on November 25, 2015, the administrative law judge initially determined that granting claimant's modification request would render justice under the Act. The administrative law judge found that there was no mistake in a determination of fact regarding whether claimant invoked the Section 411(c)(4) presumption. In considering whether employer rebutted the presumption, the administrative law judge noted that employer agreed at the hearing that the autopsy evidence established the existence of simple, clinical pneumoconiosis. The administrative law judge further found, however, that Judge Lakes erred in finding that employer established that no part of the miner's death was due to pneumoconiosis. Thus, the administrative law judge concluded that claimant established modification, based on a mistake in a determination of fact under 20 C.F.R. §725.310, and he awarded benefits accordingly.

¹ Claimant is the widow of the miner, Zane B. Riggsby, who died on January 30, 2005. Director's Exhibit 7. The miner filed two claims for federal black lung benefits during his lifetime, both of which were finally denied. Director's Exhibit 1. Claimant filed her survivor's claim on June 15, 2006. Director's Exhibit 2.

² Relevant to this survivor's claim, Section 411(c)(4) provides a presumption that the miner's death was due to pneumoconiosis if the miner had at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

On appeal, employer contends that the administrative law judge's decision does not comply with the Administrative Procedure Act (APA),³ and that he applied an incorrect rebuttal standard, mischaracterized the evidence, and did not rationally explain his credibility determinations. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. 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 must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior denial of benefits. 20 C.F.R. §725.310; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In addressing modification based on a mistake in a determination of fact, the fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). When a request for modification is filed, "any mistake may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

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

Because claimant invoked the presumption that the miner's death was due to

³ The Administrative Procedure Act, 5 U.S.C. §500 et seq., 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 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

⁴ As the record reflects that the miner's last coal mine employment was in Virginia, the Board will apply the law 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); Director's Exhibit 3.

pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,⁵ or that “no part of the miner’s death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(2); *see W.Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 154-56 (2015) (Boggs, J., concurring and dissenting). Noting that employer conceded that the miner had simple, clinical pneumoconiosis, the administrative law judge found that there was no mistake in a determination of fact with regard to Judge Lakes’s determination that employer was unable to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis under 20 C.F.R. §718.305(d)(2)(i).⁶ 2015 Decision and Order at 10. We affirm the administrative law judge’s finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i), as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

With regard to whether employer disproved the presumed fact of death causation under 20 C.F.R. §718.305(d)(2)(ii), the administrative law judge stated:

If the employer cannot rebut the presumption that a totally disabled miner has legal and clinical pneumoconiosis, it faces a more substantial hurdle in trying to rebut the presumption that pneumoconiosis contributed to the miner’s death. To rebut the presumed link between a miner’s pneumoconiosis and death, the employer must “establish that *no part* of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis. . .” [20 C.F.R.] §718.305(d)(2)(ii) (emphasis added). . . . After considering the discussion in the preamble to the current version of [20 C.F.R.] §718.305, I find that the “no part” language means that in order for an employer to rebut the presumption that a miner’s death was due to

⁵ “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).

⁶ The administrative law judge did not make a finding as to whether employer disproved the existence of legal pneumoconiosis.

pneumoconiosis, an employer must establish by a preponderance of the evidence that pneumoconiosis played no role in the miner's death.

2015 Decision and Order at 10.

Turning to the medical opinion evidence, the administrative law judge considered the opinions of Drs. Castle, Crouch, Tomashefski, and Perper, which were previously submitted before Judge Lakes, and Dr. Fino's opinion, which was submitted on modification.⁷ The administrative law judge noted that Judge Lakes found Dr. Castle's opinion sufficient to establish rebuttal of the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(ii). The administrative law judge observed that, in rendering his opinion that pneumoconiosis played no role in the miner's death, Dr. Castle relied, in part, on the autopsy reports of Drs. Crouch⁸ and Tomashefski⁹ pertaining to the degree of

⁷ The administrative law judge summarized the death certificate and autopsy report, which do not aid employer in establishing rebuttal of the presumed fact of death causation. 2015 Decision and Order at 5-6. Dr. Patel treated the miner during his final hospitalization and prepared the death certificate, which listed the cause of the miner's death as cardiopulmonary arrest due to arrhythmia due to myocardial infarction. Director's Exhibits 7, 12. He indicated that other significant conditions contributing to death were congestive heart failure and "probable CWP [coal workers' pneumoconiosis]." Director's Exhibit 7. In the autopsy report dated January 31, 2005, Dr. Abrenio indicated that the miner's death was caused by acute myocardial infarction, with coronary artery disease, bronchopneumonia, granulomata, and simple coal worker's pneumoconiosis listed as contributing to the miner's death. Director's Exhibit 63.

⁸ In her autopsy report dated December 8, 2006, based on her review of the miner's autopsy slides, Dr. Crouch described moderately severe simple pneumoconiosis, granulomatous inflammation, pneumonia, parenchymal and pleural fibrosis, mild centriacinar emphysema, and non-small cell carcinoma. Director's Exhibit 14. She also noted cardiac findings. *Id.* Dr. Crouch attributed the miner's emphysema to his smoking history and concluded that "the dust related changes [were] too mild to have caused any clinically significant degree of respiratory impairment or disability and could not have caused, contributed to or otherwise hastened [the miner's] death." *Id.* She indicated that the miner's death "could most reasonably be" attributed to heart disease and pneumonia. *Id.*

⁹ Dr. Tomashefski reviewed the miner's autopsy slides and certain medical records. Director's Exhibit 66. Dr. Tomashefski indicated that the amount of black pigment in the lungs was minimal and that only "a small number of pigment deposits

pneumoconiosis found in the miner's lungs. Because he determined that the opinions of Drs. Crouch and Tomashefski were "not well supported by the record," the administrative law judge found that Dr. Castle's opinion was not credible to rebut the Section 411(c)(4) presumption. 2015 Decision and Order at 11. The administrative law judge explained:

Dr. Crouch concluded that the miner's pneumoconiosis was too mild to have caused, contributed to, or hastened the miner's death. Dr. Crouch, however, *did not discuss or note the results of pulmonary function studies* which [Judge] Lakes found established total disability. That finding by [Judge] Lakes is supported by the newly submitted pulmonary function study dated two years before the miner's death, in which the miner demonstrated qualifying values both before and after the use of a bronchodilator. As Dr. Crouch's opinion as to the severity of the miner's pneumoconiosis is not well supported by the record, Dr. Castle's opinion, to the extent it is based on that of Dr. Crouch, is weakened.

Similarly, Dr. Tomashefski concluded the coal workers' pneumoconiosis was minimal based on the lack of respiratory symptoms or impairment prior to death and so he concluded pneumoconiosis was not the cause of[,] or a contributing factor in[,] the miner's death. Dr. Tomashefski's opinion is not well supported in this conclusion because it is contradicted by the pulmonary function studies which support a finding of total disability

Id. (emphasis added).

After concluding that Judge Lakes made a mistake in a determination of fact in crediting Dr. Castle's opinion, the administrative law judge also determined that Dr. Fino's opinion was not "persuasive" to rule out pneumoconiosis as a cause of the miner's death. 2015 Decision and Order at 11. In contrast, the administrative law judge found that Dr. Perper gave a "more detailed discussion and conclusion that the miner's coal workers' pneumoconiosis was significant and contributed to his death." *Id.* at 12. Accordingly, the administrative law judge found that employer failed to satisfy its burden to establish rebuttal under 20 C.F.R. §718.305(d)(2)(ii), by establishing that no part of the miner's death was due to pneumoconiosis. *Id.*

qualify for coal macules." *Id.* He also stated that the miner's "minimal pneumoconiosis would have caused no respiratory symptoms or impairment, and was not a cause or contributory factor in his death. Director's Exhibit 67.

Employer argues that the administrative law judge erred in rejecting Dr. Crouch's opinion for failing to consider the qualifying pulmonary function studies, which employer states are "an irrelevant factor in establishing rebuttal" of the presumed fact of death causation. Employer's Brief in Support of Petition for Review at 17. We disagree.

Although employer is correct that autopsy evidence is recognized as the most reliable diagnostic tool for determining the presence or absence of clinical pneumoconiosis, *see Terlip v. Director, OWCP*, 8 BLR 1-363 (1985), that is not to say that pulmonary function studies have no probative value in considering whether a miner's death was due to pneumoconiosis. *See generally Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014) ("The relationship between severe pulmonary impairment and cardiac functioning is well known. The body is an integrated organism. A part can drag down the whole."); *Morgan v. Bethlehem Steel Corp.*, 7 BLR 1-226 (1984) (pulmonary function studies are probative evidence of the existence of a respiratory condition that may arise out of coal mine employment).

In this case, Dr. Crouch's report does not indicate whether, in rendering her opinion, she was aware that the miner had a totally disabling respiratory or pulmonary impairment prior to his death.¹⁰ We therefore see no error in the administrative law judge's finding that Dr. Crouch's failure to discuss the miner's qualifying pulmonary function studies undercut the credibility of her conclusion that the miner's pneumoconiosis was too mild to have caused any respiratory disability or to have contributed to the miner's death. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Because we affirm the administrative law judge's determination that Dr. Crouch's opinion is not credible, we affirm the administrative law judge's finding that Dr. Castle's opinion is not persuasive on the cause of the miner's death, to the extent he relied on Dr. Crouch's opinion.¹¹ Accordingly, we affirm the administrative law judge's finding that

¹⁰ Dr. Crouch reviewed six autopsy slides, the autopsy report by Dr. Patel, the death certificate, and "miscellaneous medical records" which she did not specify. Director's Exhibit 14.

¹¹ Because we affirm the administrative law judge's finding that Dr. Castle's opinion is less credible for relying on Dr. Crouch's finding of minimal pneumoconiosis, it is not necessary that we address employer's assertion that the administrative law judge mischaracterized Dr. Tomashefski's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Dr. Castle's opinion "is not sufficient to establish that the miner's pneumoconiosis played no role in the miner's death" pursuant to 20 C.F.R. §718.305(d)(2)(ii). Decision and Order on Remand at 12.

We also reject employer's argument that the administrative law judge erred in discrediting Dr. Fino's opinion on the cause of the miner's death, based on Dr. Fino's discussion of the pulmonary function studies.¹² As noted by the administrative law judge, Dr. Fino opined that the miner's death was due to chronic obstructive pulmonary disease (COPD), but he excluded coal dust exposure as a causative factor for the miner's COPD and death, in part because the pulmonary function studies showed reversibility in the miner's obstructive respiratory impairment after use of a bronchodilator. 2015 Decision and Order at 11; Employer's Exhibit 2. Contrary to employer's argument, we see no error in the administrative law judge's finding that Dr. Fino's opinion was not persuasive as "Dr. Fino did not discuss the fact that even if [the pulmonary function studies] were reversible, the results of the September 2003 study were qualifying both before and after the use of bronchodilators." 2015 Decision and Order at 11. The administrative law judge rationally found that Dr. Fino "has not excluded coal mine dust exposure as one potential causative agent of the non-reversible qualifying portion of the pulmonary function study, even if he has excluded it out [sic] as a causative agent of those portions of the study which were reversible." *Id.*; see *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); see also *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Because the administrative law judge permissibly rejected Dr. Fino's opinion on the etiology of the miner's COPD, we affirm the administrative law judge's finding that Dr. Fino's opinion is not persuasive on the cause of the miner's death and is insufficient to establish that

¹² Dr. Fino prepared a report dated May 13, 2013. Employer's Exhibit 2. Dr. Fino indicated that he had previously examined the miner in 2003, and had been asked by employer to review evidence in the survivor's claim consisting, *inter alia*, of the miner's autopsy report, hospital records, the pathology reports based on a review of the autopsy slides, and Dr. Castle's report. *Id.* Dr. Fino opined that the miner's death was due to pneumonia, secondary to chronic obstructive pulmonary disease (COPD)/centrilobular emphysema. *Id.* Dr. Fino excluded coal dust exposure as a contributing factor in the miner's COPD, based on the "reversibility [of his impairment], the low FEV1/FVC ratio and the improvement following bronchodilators [that] point to a smoking related underlying COPD." *Id.* Dr. Fino opined that the miner "died due to non-occupational lung diseases" and that his disability and death "would have occurred as they did . . . had he never been exposed to coal mine dust." *Id.*

pneumoconiosis played no part in the miner's death at 20 C.F.R. §718.305(d)(2)(ii).¹³ See *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Because the administrative law judge explained the bases for his credibility findings in accordance with the APA, and acted within his discretion in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, we affirm the administrative law judge's finding that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and that she is entitled to benefits on her survivor's claim. See *Bender*, 782 F.3d at 137, 25 BLR at 2-699; *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the Decision and Order Granting Request for Modification and Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

¹³ The administrative law judge also permissibly assigned Dr. Fino's opinion less weight because Dr. Fino "did not discuss the miner's cardiac condition, which all other physicians identified as a serious and substantial factor in [the miner's] death." Decision and Order on Modification at 12; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).