**U.S. Department of Labor**

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

BRB Nos. 15-0357 BLA
and 15-0380 BLA

| | | |
|---|---|---|
| CAROLYN J. GAMBLE<br>(Widow of and o/b/o DAVID E. GAMBLE)<br><br>Claimant-Respondent<br><br>v.<br><br>CHAROLAIS CORPORATION<br><br>and<br><br>KENTUCKY CENTRAL INSURANCE COMPANY c/o AMERICAN RESOURCES INSURANCE COMPANY<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 04/26/2016<br><br>DECISION and ORDER |

Appeal of the Decisions and Orders of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas E. Springer III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

Anthony K. Finaldi and Tighe A. Estes (Fogle Keller Purdy, PLLC) Lexington, Kentucky, 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: BOGGS, BUZZARD, and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decisions and Orders (2008-BLA-05420, 2011-BLA-06087) of Administrative Law Judge Peter B. Silvain, Jr., awarding benefits on claims filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim[1] filed on January 25, 2007, and a survivor's claim[2] filed on April 11, 2011.

Considering the miner's claim pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4),[3] the administrative law judge credited the miner with 19.25 years of surface coal mine employment,[4] and found that all of the miner's surface coal mine employment

[1] The miner's first claim for benefits, filed on April 11, 2002, was denied by the district director on July 29, 2003, because the miner did not establish total disability. Director's Exhibit 1 at 5-6. The miner filed his current claim on January 25, 2007. Director's Exhibit 3 at 1. It was pending when he died on September 2, 2010. Director's Exhibit 51 at 1.

[2] Claimant filed her claim for survivor's benefits on April 11, 2011, and is also pursuing the miner's claim on his behalf. Director's Exhibit 44 at 1, 2. The claims were consolidated and sent to the Office of Administrative Law judges for a hearing, which was conducted on May 23, 2013. Subsequently, the administrative law judge issued separate decisions in the miner's claim and the survivor's claim. Miner's Claim Decision and Order at 3; Survivor's Claim Decision and Order at 2.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b).

[4] The miner's most recent coal mine employment was in Kentucky. Director's Exhibit 4 at 3-4. Accordingly, the Board will apply the law of the United States Court of

took place in conditions substantially similar to those in an underground mine. The administrative law judge further found that the new evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). The administrative law judge then found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

In a separate decision, the administrative law judge considered claimant's survivor's claim. The administrative law judge noted that Section 932(*l*), 30 U.S.C. §932(*l*), provides that a survivor of a miner who is determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption in the miner's claim. Specifically, employer argues that the administrative law judge erred in finding that the miner's surface coal mine employment was substantially similar to underground coal mine employment. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Therefore, employer asserts, the administrative law judge erred in awarding benefits in the miner's claim and, consequently, improperly awarded benefits in the survivor's claim based on the automatic entitlement provision set forth in Section 932(*l*). Claimant responds in support of the administrative law judge's award of benefits in both the miner's and survivor's claims. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that, in the miner's claim, the administrative law judge applied an improper standard on rebuttal.[5]

---

Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that the miner had 19.25 years of coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's finding that total disability was established in the miner's claim pursuant to 20 C.F.R. §718.204(b)(2), and that, therefore, claimant established a

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Invocation of the Section 411(c)(4) Presumption in the Miner's Claim**

Employer argues that the administrative law judge erred in finding that the miner invoked the Section 411(c)(4) presumption. Employer specifically challenges the administrative law judge's finding that the miner's 19.25 years of coal mine employment occurred in conditions substantially similar to those in an underground mine. Section 411(c)(4) requires a claimant to establish at least fifteen years of employment either in "underground coal mines," or in "a coal mine other than an underground mine" in conditions that are "substantially similar" to those in an underground mine. 30 U.S.C. §921(c)(4). Section 411(c)(4) does not define the term "substantially similar." However, the Department of Labor's implementing regulation, 20 C.F.R. §718.305(b)(2), provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Employer asserts that the administrative law judge failed to consider whether all of the miner's employment, including his work as a coal hauler from 1960 to the 1970's and his work as a strip miner from the 1970's to 1984, was performed in conditions that were substantially similar to those in an underground coal mine. Employer's Brief at 10-11. We disagree.

Contrary to employer's contention, the administrative law judge considered claimant's testimony regarding the dusty conditions the miner experienced both as a coal hauler and in his strip mine employment. Miner's Claim Decision and Order at 5, 36. As summarized by the administrative law judge, claimant testified that the miner hauled coal from 1960 until the 1970's when he went to work at the strip mine, where he worked until 1984. Miner's Claim Decision and Order at 5; Hearing Tr. at 13. The administrative law judge further noted claimant's testimony that the miner was around coal and coal mine dust from 1960 to 1984, and considered her description of the miner's working conditions during that time period:

---

change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 759, 25 BLR 2-221, 2-228 (6th Cir. 2013); *Skrack*, 6 BLR at 1-711.

> Regarding the nature of the [m]iner's coal mine employment, the [c]laimant testified that the [m]iner would return home from work "[c]overed from head to toe [in coal dust], black in his ears, his nose, everywhere. A lot of times he would take his – strip down to his underwear when he come into the door and I'd put his clothes in the washer and he would get in the shower." (Tr. at 13-14). [Claimant] explained that this occurred "just about every day . . . [b]ecause when he wasn't hauling coal he was working at the strip mines." (Tr. at 14).

Miner's Claim Decision and Order at 5, 36.

Based on claimant's credible testimony that the miner was covered from head to toe in coal dust "just about every day" whether he was "hauling coal [or] working at the strip mines," the administrative law judge found that claimant demonstrated that the miner's 19.25 years of coal mine employment occurred "in conditions 'substantially similar' to an underground coal mine." Miner's Claim Decision and Order at 36-37. As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established 19.25 years of qualifying coal mine employment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664-65, BLR (6th Cir. 2015); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27-28 (2011).

In light of our affirmance of the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment, and his uncontested finding that the miner suffered from a totally disabling respiratory impairment, we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

**Rebuttal of the Section 411(c)(4) Presumption in the Miner's Claim**

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[6] 20

[6] "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).

C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Selby and Broudy. Dr. Selby opined that the miner did not have legal pneumoconiosis, but suffered from chronic obstructive pulmonary disease (COPD), in the form of emphysema, chronic bronchitis, and bronchial asthma due to smoking and not coal mine dust exposure. Employer's Exhibits 1 at 17-19; 2 at 13-14, 16-18; 5 at 28. Dr. Broudy also opined that the miner did not have legal pneumoconiosis, but had COPD, in the form of emphysema and chronic bronchitis due to smoking and not coal mine dust exposure. Employer's Exhibits 3 at 5; 4 at 7-10, 19; 6 at 3-4. The administrative law judge discredited the opinions of Drs. Selby and Broudy because he found that neither was well reasoned. Miner's Claim Decision and Order at 42-45. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id*. at 45.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Selby and Broudy. Employer's Brief at 11-13. Employer's argument lacks merit. The administrative law judge permissibly questioned the opinions of Drs. Selby and Broudy because, while both Drs. Selby and Broudy acknowledged that the miner's ten to twenty-four years of coal mine dust exposure could constitute "significant" exposure, the administrative law judge permissibly found that neither physician adequately explained why he believes that the miner's years of coal mine dust exposure did not cause, contribute to, or exacerbate, the miner's COPD. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Miner's Claim Decision and Order at 42-45; Employer's Exhibits 2 at 9; 4 at 10-11.

Specifically, the administrative law judge noted that, in concluding that coal mine dust did not contribute to the miner's impairment, Dr. Selby relied, in part, on the fact that the miner was treated for asthma, which Dr. Selby stated was genetic and not caused by coal mine dust exposure. Employer's Exhibit 1 at 17. The administrative law judge permissibly determined that Dr. Selby did not adequately explain why the miner's history of asthma necessarily established that the miner did not also suffer from legal pneumoconiosis. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Miner's Claim Decision and Order at 42-43.

The administrative law judge also considered Dr. Selby's opinion that he could exclude coal mine dust as a cause of the miner's impairment because it is "very unusual" for the coal mine dust inhaled in the geographical area where the miner worked to cause COPD. Employer's Exhibit 5 at 28. The administrative law judge permissibly discredited Dr. Selby's opinion, in part, because he found that Dr. Selby relied on generalized anecdotal evidence and did not offer any documentation to substantiate this statement. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Miner's Claim Decision and Order at 43.

The administrative law judge similarly discredited Dr. Broudy's opinion, that the miner's obstructive impairment was not due to coal mine dust exposure because coal mine dust "usually" causes a restrictive impairment, as based on generalities, rather than on the specifics of the miner's case. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Knizner*, 8 BLR at 1-7; Miner's Claim Decision and Order at 44-45; Employer's Exhibits 3 at 5; 6 at 4. The administrative law judge further permissibly found Dr. Broudy's reasoning, that it would be "unusual" for the miner to have developed a coal mine dust-related impairment twenty years after the cessation of dust exposure, to be both based on generalities and inconsistent with the regulations, which recognize that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 737-40, 25 BLR 2-675, 685-87 (6th Cir. 2014); *Knizner*, 8 BLR at 1-7 (1985); Miner's Claim Decision and Order at 44-45; Employer's Exhibit 4 at 18.

As the administrative law judge's bases for discrediting the opinions of Drs. Selby and Broudy are rational and supported by substantial evidence, these findings are affirmed. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283. Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Selby and Broudy, the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis, we further 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.[7] Employer's failure to disprove the existence of legal pneumoconiosis

[7] Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Selby and Broudy. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

precludes a rebuttal finding that the miner did not have pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1); *Kennard*, 790 F.3d at 668.

Employer next contends that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of disability causation. Employer's Brief at 7-10. Initially, we reject employer's assertion that the administrative law judge erred in requiring it to "rule out" pneumoconiosis as a cause of the miner's disability. *Id*. Contrary to employer's argument, the pertinent regulations specifically require the party opposing entitlement to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201" and, as the Director asserts, the United States Court of Appeals for the Sixth Circuit has explicitly upheld application of the "rule out" standard. 20 C.F.R. §718.305(d)(1)(ii); *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070-71, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *see also W.Va. CWP Fund v. Bender*, 782 F.3d 129, 137-43, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-156 (2015) (Boggs, J., concurring & dissenting).

We further reject employer's contention that the administrative law judge failed to adequately analyze the medical opinions in determining whether employer rebutted the presumption. The administrative law judge reasonably found that the same reasons he provided for discrediting the opinions of Drs. Selby and Broudy, that the miner did not suffer from legal pneumoconiosis, also undercut their opinions that the miner's disabling impairment was unrelated to pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Ogle*, 737 F.3d at 1074; *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Miner's Claim Decision and Order at 46. As the administrative law judge observed, the failure of Drs. Selby and Broudy to credibly disprove legal pneumoconiosis necessarily rendered their opinions inadequate to establish that no part of the miner's disability was due to pneumoconiosis. Miner's Claim Decision and Order at 46. Thus, under the facts of this case, there was no need for the administrative law judge to analyze these opinions a second time. *Kennard*, 790 F.3d at 668; *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1346 n. 20, 25 BLR 2-549, 2-579 n.20 (10th Cir. 2014). We, therefore, affirm the administrative law judge's finding that employer failed to establish

[8] Employer argues that the administrative law judge erred in crediting Dr. Simpao's diagnosis of legal pneumoconiosis. Employer's Brief at 11-13; *see* Director's Exhibits 12, 14. We decline to address employer's allegations of error, as employer bears the burden of proof on rebuttal and the opinion of Dr. Simpao does not aid employer in satisfying that burden. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Further, the administrative law judge did not rely on Dr. Simpao's opinion in finding that employer failed to establish rebuttal. Rather, he found the opinions of Drs. Selby and Broudy insufficient to rebut the presumption. Miner's Claim Decision and Order at 45.

that no part of the miner's respiratory disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant established invocation of the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits in the miner's claim.

**The Survivor's Claim**

Having awarded benefits in the miner's claim, in a separate decision the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Survivor's Claim Decision and Order at 3-4. As the administrative law judge's findings are supported by substantial evidence, we affirm his determination that claimant is derivatively entitled to receive survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932(*l*); *Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decisions and Orders awarding miner's and survivor's benefits are affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge