



BRB No. 20-0278 BLA

EDWARD G. PIPER (deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EIGHTY FOUR MINING COMPANY)	DATE ISSUED: 04/28/2021
)	
and)	
)	
CONSOL ENERGY, INCORPORATED)	
)	
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 Awarding Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawloski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Deanna Lyn Istik (SutterWilliams, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits on Remand (2017-BLA-05821) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed March 5, 2015,¹ and is before the Benefits Review Board for the second time.²

The Board previously affirmed, as unchallenged, the administrative law judge's finding that Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).³ However, the Board held that in considering whether Employer rebutted the presumption, the administrative law judge erred in placing the burden on the Miner to disprove clinical pneumoconiosis, failing to address legal pneumoconiosis, and applying the wrong legal standard in weighing the evidence on disability causation. *Piper v. Eighty Four Mining, Co.*, BRB No. 18-0173 BLA (Mar. 12, 2019) (unpub.). Thus, the Board vacated the administrative law judge's determination that Employer did not rebut the presumption and remanded the case for further consideration. *Id.*

On remand, the administrative law judge again found Employer did not rebut the Section 411(c)(4) presumption and awarded benefits.

On appeal, Employer contends the administrative law judge erred in finding the Section 411(c)(4) presumption un rebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

¹ The Miner died on October 18, 2017. His widow, Randa L. Piper (Claimant), is pursuing the Miner's claim on her husband's behalf. Hearing Transcript at 10-11.

² We incorporate the procedural history of the case as set forth in *Piper v. Eighty Four Mining, Co.*, BRB No. 18-0173 BLA (Mar. 12, 2019) (unpub.).

³ Section 411(c)(4) provides a rebuttable presumption that the Miner was totally disabled due to pneumoconiosis if Claimant establishes he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish the Miner had neither legal nor clinical pneumoconiosis,⁵ or "no part of [his] 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)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.⁶

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish the Miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

Employer relies on the opinions of Drs. Basheda and Rosenberg,⁷ along with the Miner's treatment records. Employer's Exhibits 3-12. Drs. Basheda and Rosenberg found

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the Miner's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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 found Employer disproved clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); Decision and Order on Remand at 12.

⁷ The administrative law judge also considered the opinions of Drs. Ranavaya and Cohen. Decision and Order on Remand at 12, 14. He accorded no weight to Dr.

no evidence of an obstructive respiratory impairment. They each opined the Miner suffered from a moderate restrictive impairment caused by his documented history of treatment for lung cancer, obesity, and rheumatoid arthritis. Employer's Exhibits 3, 4, 11, 12. Employer contends the administrative law judge erred in finding their opinions, and the treatment records, insufficient to satisfy its burden of proof. Employer's Brief at 10-12. We disagree.

Dr. Basheda examined the Miner and reviewed his treatment records. Employer's Exhibit 3. He opined that the Miner had "significant pulmonary restriction based on the manifestations of Stage IV nonsmall cell lung cancer and rheumatoid arthritis" and "significant pleuro-parenchymal changes on chest CT scanning consistent with the aforementioned processes." *Id.* He stated "[t]here was no evidence of coal worker's pneumoconiosis to define restrictive lung disease." *Id.* He also noted there was no evidence of an obstructive respiratory impairment. *Id.* Although Dr. Basheda acknowledged the Miner's coal dust exposure placed him "at risk for coal dust induced pulmonary disease, if he was a susceptible coal worker," he concluded, with no specific explanation, there was no evidence of legal pneumoconiosis. *Id.* At his deposition, Dr. Basheda reiterated his opinion that the Miner did not have legal pneumoconiosis, noting only the Miner's treatment for lung cancer and rheumatoid arthritis, and his history of obesity. Employer's Exhibit 11 at 15.

Contrary to Employer's contention, the administrative law judge permissibly found Dr. Basheda's summary statements excluding legal pneumoconiosis not well-reasoned because he failed to explain why the Miner's 27.63 years of coal mine dust exposure was not also a substantial contributing factor for his restrictive respiratory impairment, along with his lung cancer, rheumatoid arthritis, and obesity. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986); Decision and Order on Remand at 13-14.

In rejecting Dr. Rosenberg's opinion, the administrative law judge accurately found he excluded a diagnosis of legal pneumoconiosis, in part, because the Miner did not have "advanced parenchymal changes related to past coal mine dust exposure." Employer's Exhibit 4; *see* Decision and Order on Remand at 14. During his deposition, Dr. Rosenberg discussed the Miner's risk factors, including his coal dust exposure, and stated he does not have "a medical condition that represents legal [pneumoconiosis]." Employer's Exhibit 12 at 12-14. He testified that coal dust cannot cause a restrictive lung disease without evidence of clinical coal workers' pneumoconiosis. *Id.* at 22-25. He specifically stated "you have to have clinical coal workers' pneumoconiosis that is advanced and [the Miner did] not

Ranavaya's opinion because it did not address the issue of legal pneumoconiosis; he accorded the "most weight" to Dr. Cohen's opinion that the Miner had legal pneumoconiosis. *Id.*; Director's Exhibits 10, 15; Claimant's Exhibit 1.

have any, even minimum.” Decision and Order on Remand at 14, *referencing* Employer’s Exhibit 12 at 22-25.

The administrative law judge correctly observed that clinical pneumoconiosis and legal pneumoconiosis are distinct diseases and, therefore, the absence of clinical pneumoconiosis does not preclude the existence of legal pneumoconiosis. 20 C.F.R. §718.201(a)(1), (2); Decision and Order on Remand at 14. The administrative law judge therefore permissibly found Dr. Rosenberg’s rationale inconsistent with the regulations and that the physician did not adequately explain why the Miner did not have legal pneumoconiosis “apart from relying on the absence of clinical pneumoconiosis” on the Miner’s x-rays. Decision and Order on Remand at 14, *citing Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487 (6th Cir. 2012) (a miner can have legal pneumoconiosis, even in the absence of clinical pneumoconiosis); *Balsavage*, 295 F.3d at 396; *Kertesz*, 788 F.2d at 63.

Lastly, Employer asserts the Miner’s treatment records support rebuttal because his treating physicians did not diagnose legal pneumoconiosis and one physician “relate[d] his restrictive disease to pleural effusions caused by rheumatoid arthritis, lung cancer and/or obesity.”⁸ Employer’s Brief at 10 (emphasis deleted); *see* Employer’s Exhibit 5. However, Employer does not challenge the administrative law judge’s finding that although the Miner’s treatment records contain several CT scan and chest x-ray readings identifying various diagnoses, none were “interpreted specifically to determine the presence or absence of pneumoconiosis.” Decision and Order on Remand at 17; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, while these records may lend support to Employer’s argument that rheumatoid arthritis, cancer, and obesity are causative factors in the Miner’s impairment, the administrative law judge permissibly found they do not satisfy Employer’s burden to affirmatively disprove legal pneumoconiosis by establishing the Miner’s coal dust exposure was not also a significant contributor. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (administrative law judge may find an x-ray that is silent on the existence of pneumoconiosis inconclusive on the presence or absence of the disease); Decision and Order on Remand at 17.

Employer’s arguments on legal pneumoconiosis are a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp*

⁸ While Employer suggests that more than one physician may have related the Miner’s restrictive impairment to these conditions, it identifies only Dr. Patti’s treatment records to support its assertion. Employer’s Brief at 8-10. Employer summarizes additional treatment records as diagnosing rheumatoid arthritis and cancer but does not indicate the physicians identified them as causes of the Miner’s restriction. *Id.*

Coal of Utah, Inc., 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Employer did not disprove legal pneumoconiosis.⁹ See 20 C.F.R. §718.305(d)(2)(i)(A); *Balsavage*, 295 F.3d at 396; Decision and Order on Remand at 17. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Disability Causation

The administrative law judge next considered whether Employer established "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). Contrary to Employer's contention, he permissibly discredited the opinions of Drs. Basheda and Rosenberg regarding the cause of the Miner's total respiratory disability because they failed to diagnose legal pneumoconiosis.¹⁰ See *Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); see also *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Therefore, we affirm the administrative law judge's finding that Employer failed to establish no part of the Miner's respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

⁹ Since Employer bears the burden of proof on rebuttal and the administrative law judge provided valid reasons for rejecting its evidence, we need not address Employer's contentions of error regarding the administrative law judge's crediting of Dr. Cohen's diagnosis of legal pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 11-12. The administrative law judge correctly found Dr. Ranavaya did not address whether the Miner had legal pneumoconiosis and thus his opinion does not aid Employer in rebutting the presumption.

¹⁰ Neither physician offered an explanation with respect to whether legal pneumoconiosis caused the Miner's total respiratory disability independent of his incorrect conclusion that the Miner did not have the disease.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge