BRB No. 12-0344 BLA

| | | |
|---|---|---|
| KENNETH MINNIX | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| MINNIX MINING MACHINERY REPAIR | ) | DATE ISSUED: 04/30/2013 |
| | ) | |
| and | ) | |
| | ) | |
| WEST VIRGINIA CWP FUND | ) | |
| | ) | |
| 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 Living Miner's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Anne B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits (2010-BLA-5116) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a subsequent claim filed pursuant to the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] The administrative law judge credited claimant with twenty-seven years of coal mine employment, of which at least twenty-five years were spent underground, and adjudicated this claim, filed on October 30, 2008, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. 30 U.S.C. §921(c)(4),[2] and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence was insufficient to establish rebuttal of the amended Section 411(c)(4) presumption, arguing that the administrative law judge selectively analyzed the evidence and failed to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C.

[1] Claimant's previous claim, filed on December 24, 2003, was denied by the district director on January 17, 2004 for failure to establish any element of entitlement, and was not further pursued. Director's Exhibit 1 at 4-6, 99. Where, as here, a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

[2] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. Subsequent to the issuance of the administrative law judge's Decision and Order and employer's appeal, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427819 (June 28, 2012). Therefore, employer's request that proceedings in this case be held in abeyance pending resolution of the constitutional challenges to the PPACA is moot.

§919(d) and 5 U.S.C. §554(c)(2).[3] Claimant has filed no response to the appeal. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[4]

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.[5] 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).

Employer asserts that the opinions of Drs. Fino[6] and Repsher[7] are well-reasoned

[3] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of coal mine employment and his findings that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R §725.309(d), and invocation of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 18-19.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

[6] Dr. Fino diagnosed chronic obstructive pulmonary disease (COPD) due to smoking. He opined that claimant does not suffer from pneumoconiosis, and that his primary respiratory abnormality is emphysema unrelated to coal dust exposure. He stated that smoking caused claimant's disability, and ruled out pneumoconiosis as a contributing cause. Decision and Order at 11-14, 29; Director's Exhibit 26 at 15; Employer's Exhibit 10 at 10-14, 20, 24-26.

[7] Dr. Repsher diagnosed centrilobular emphysema from smoking. He opined that claimant does not have pneumoconiosis, but allowed that coal dust exposure "may have contributed to a very, very *de minimis* extent" to claimant's disability. Decision and Order at 16-17; Employer's Exhibits 7 at 4, 9 at 9, 14-15.

and sufficient to establish rebuttal of the amended Section 411(c)(4) presumption,[8] and argues that the administrative law judge provided no valid reason for discounting these opinions, while crediting the contrary opinion of Dr. Rasmussen.[9] Employer's arguments lack merit. In finding that employer failed to establish rebuttal with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory impairment did not arise out of, or in connection with, coal mine employment, the administrative law judge determined that the opinions of Drs. Fino and Repsher, unlike that of Dr. Rasmussen, are based on beliefs that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science underlying the current regulations, as determined by the Department of Labor (DOL) and set forth in the preamble to the revised regulations. Decision and Order at 30-32; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1025, 24 BLR 2-297, 2-315 (10th Cir. 2010). In so finding, the administrative law judge determined that Drs. Fino and Repsher based their opinions, that claimant's disabling chronic obstructive pulmonary disease (COPD) is due solely to smoking, in part upon their belief that the average loss of $FEV_1$ in miners is small and not clinically significant, and that claimant's $FEV_1$ values are disproportionately low.[10] Decision and Order at 15. As the opinions of Drs. Fino and

[8] Employer maintains that Drs. Fino and Repsher sufficiently acknowledged that pneumoconiosis: can be latent and progressive, can be totally disabling even absent x-ray evidence of pneumoconiosis, and can produce an obstructive and/or restrictive defect. Employer also asserts that Drs. Fino and Repsher identified objective evidence supporting their determination that the onset of claimant's pulmonary impairment was too rapid to be attributable to pneumoconiosis. Employer's Brief at 13-16, 20-21.

[9] Dr. Rasmussen diagnosed pneumoconiosis, and opined that both smoking and pneumoconiosis were contributing causes of claimant's totally disabling respiratory impairment. Decision and Order at 9-11, 31; Director's Exhibit 15; Claimant's Exhibit 5.

[10] Dr. Repsher stated that the contribution of coal mine dust to the loss of $FEV_1$ is *de minimis*, and that the vast majority of miners would have none or only a clinically insignificant loss of $FEV_1$. In connection with the $FEV_1$/FVC ratio, Dr. Repsher stated that claimant's spirometry shows a "markedly disproportionate" decrease in $FEV_1$ as compared with his decrease in FVC, which he states is characteristic of smoking-induced COPD and is not seen with pneumoconiosis. He concluded that "even assuming that coal mine dust contributed to [claimant's] severe COPD," the contribution due to the inhalation of coal mine dust would not be clinically significant, compared to the effects of cigarette smoking and the normal aging process. Employer's Exhibit 7 at 4-5; *see* Decision and Order at 15.

Repsher were premised on their view that coal dust-related lung disease does not cause a clinically significant pulmonary impairment, contrary to the view endorsed by DOL in the preamble, the administrative law judge permissibly found that the opinions were entitled to little weight.[11] Decision and Order at 30-31; *see* 65 Fed. Reg. 79,938-40 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Further, as DOL recognized in the preamble that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms," and that centrilobular emphysema is "significantly more common" among coal workers, the administrative law judge rationally discounted Dr. Repsher's opinion, that claimant's centrilobular emphysema is caused by smoking and not by coal dust exposure.[12] Decision and Order at 28-29, *citing* 65 Fed. Reg. at 79,943 (Dec. 20, 2000); Employer's Exhibits 2 at 9, 14, 10 at 29. The administrative law judge also determined that Dr. Fino relied on negative x-ray evidence as "an indicator that claimant's lungs do not have a significant amount of coal dust," explaining that he used the negative x-ray "to try to

---

Dr. Fino agreed that the average loss of $FEV_1$ is "small and not clinically significant," and stated:

> the [$FEV_1$] reduction is not clinically significant in the average miner. However, it could be clinically significant if there was moderate or profuse pneumoconiosis present because the amount of pneumoconiosis correlates quite well with the amount of emphysema present. Therefore, it is very helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal mine dust inhalation.

Director's Exhibit 26 at 11, 13-14; *see also* Employer's Exhibit 10 at 20-21, 24-25; Decision and Order at 12.

[11] In this connection, the administrative law judge properly considered that neither Dr. Fino nor Dr. Repsher explained why claimant could not be one of the rare miners in whom coal dust exposure produces clinically significant obstructive lung disease. Decision and Order at 30-31; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

[12] The administrative law judge was also not persuaded by Dr. Fino's testimony, that he can distinguish between the effects caused by coal dust and those caused by smoking, in view of Dr. Fino's acknowledgement that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and his agreement with Dr. Rasmussen that abnormalities caused by smoking and coal mine dust are identical. Decision and Order at 28-29; Employer's Exhibit 10; *see* 65 Fed. Reg. 79,939, 41-43 (Dec. 20, 2000).

quantitate the amount of obstruction that could be accounted for by the inhalation of coal mine dust," and opined that claimant's disabling obstruction was secondary to smoking-related emphysema.[13] Decision and Order at 29; Employer's Exhibit 10 at 15-16, 18-19, 28. The administrative law judge properly concluded that Dr. Fino's reasoning is contrary to DOL's recognition that coal dust-related emphysema may develop independently of clinical pneumoconiosis. Decision and Order at 29-30; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000).

The administrative law judge additionally discounted Dr. Repsher's reliance on the fact that claimant ceased working in the mines in 1994, but continued smoking, to support his conclusion that claimant suffers from smoking-induced lung disease, finding that this does not "constitute a persuasive basis for concluding that his obstructive lung disease stems from smoking," in view of the latent and progressive nature of pneumoconiosis. Decision and Order at 31; *see* 20 C.F.R. §718.201(c); *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *see also* 65 Fed. Reg. at 79,937-79,945, 79,968-79,977; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(Decision and Order on Recon. en banc). The administrative law judge also determined that Dr. Fino ruled out coal dust exposure as a contributing factor in claimant's COPD, based on his view that "[w]hen coal dust progresses, it progresses slowly….[t]his is a very rapid worsening, but it's probably a reversible worsening, and coal dust is not a reversible disease."[14] Employer's Exhibit 10 at 14; Decision and Order at 13, 31. The administrative law judge permissibly rejected this rationale as "too speculative and not sufficiently reasoned." Decision and Order at 31; *see United States Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). Lastly, the administrative law judge acted within his discretion in finding that the opinions of Drs. Fino and Repsher were not well-reasoned, as they did not adequately explain why claimant's history of twenty-seven years of coal dust exposure was not a contributing cause of his disabling COPD. Decision and Order at 31; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). As substantial evidence supports the administrative law judge's determination to discount the opinions of Drs. Fino and Repsher, we affirm his finding

[13] Dr. Fino stated: "Emphysema due to coal mine dust is directly related to the amount of coal mine dust you've inhaled" and "my assertion is that there is a relationship between the amount of impairment in COPD patients based on the clinical pneumoconiosis that is seen." Employer's Exhibit 10 at 20, 28.

[14] The administrative law judge found that the failure of Drs. Repsher and Fino to adequately address the etiology of the residual disabling impairment, as demonstrated on claimant's pulmonary function studies, further detracted from the reliability of their opinions. Decision and Order at 31.

that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4).[15] 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *see also Rose v. Clinchfield Coal Co*., 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order Awarding Living Miner's Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[15] Because employer failed to affirmatively establish that claimant does not have legal pneumoconiosis, we need not address employer's challenge to the administrative law judge's weighing of the evidence on the issue of clinical pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *see also Rose v. Clinchfield Coal Co*., 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).