

BRB No. 12-0472 BLA

JAMES A. DAUGHERTY )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 CHISHOLM COAL COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 ) DATE ISSUED: 04/26/2013  
 PIKEVILLE COAL COMPANY )  
 )  
 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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5721) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp.

2011) (the Act). This case involves a miner's claim filed on July 16, 2009. The district director awarded benefits and employer requested a hearing, which was held on June 14, 2011. Director's Exhibits 47, 48.

The administrative law judge credited claimant with twenty-nine years of underground coal mine employment,<sup>1</sup> and found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>2</sup> The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.<sup>3</sup>

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

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

<sup>2</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

<sup>3</sup> Employer does not challenge the administrative law judge's findings of twenty-nine years of underground coal mine employment, that claimant established he is totally disabled under 20 C.F.R. §718.204(b)(2), and that he invoked the Section 411(c)(4) presumption. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant’s pulmonary or respiratory impairment “did not arise out of, or in connection with,” coal mine employment. 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). The administrative law judge found that employer did not establish rebuttal under either method. Decision and Order at 12-18.

In determining whether employer disproved the existence of legal pneumoconiosis,<sup>4</sup> the administrative law judge considered the opinion of Dr. Rosenberg.<sup>5</sup> Dr. Rosenberg stated that because claimant does not have obstruction on his pulmonary function study, and because his lung function improved over time, the doctor was able to determine that claimant does not have legal pneumoconiosis.<sup>6</sup> Director’s Exhibit 17; Employer’s Exhibits 6, 8.

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<sup>4</sup> 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

<sup>5</sup> The administrative law judge also considered the opinion of Dr. Baker, who diagnosed claimant with legal pneumoconiosis, in the form of chronic obstructive pulmonary disease, with hypoxemia and chronic bronchitis, all of which are due to both smoking and coal mine dust exposure. Director’s Exhibit 12; Claimant’s Exhibit 3.

<sup>6</sup> Dr. Rosenberg examined claimant and reviewed the results of Dr. Baker’s August 15, 2009 examination. In rendering his opinion that claimant does not have legal pneumoconiosis, Dr. Rosenberg compared the results of Dr. Baker’s August 15, 2009 pulmonary function study with the pulmonary function study results that Dr. Rosenberg obtained on March 2, 2010, and January 18, 2011. Based on that comparison, Dr. Rosenberg concluded that claimant does not have an obstructive impairment, but has a non-disabling restrictive impairment, that is due to elevated hemidiaphragms. Director’s Exhibit 17; Employer’s Exhibits 6, 8.

The administrative law judge discounted Dr. Rosenberg's opinion, in part, because Dr. Rosenberg did not address the most recent pulmonary function study, administered by Dr. Baker on April 30, 2011, which was qualifying<sup>7</sup> for total disability, and which Dr. Baker interpreted as revealing a "moderate obstructive ventilatory defect."<sup>8</sup> Claimant's Exhibit 3 at 3; Decision and Order at 10-11, 16. Further, the administrative law judge declined to credit Dr. Rosenberg's opinion, because she found that he did not adequately explain his basis for determining that claimant's twenty-nine years of coal mine employment had not contributed to his pulmonary impairment. Decision and Order at 17. The administrative law judge therefore found that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. Decision and Order at 17.

Employer contends that the administrative law judge erred in her consideration of Dr. Rosenberg's opinion. We disagree. The administrative law judge permissibly found that Dr. Rosenberg did not adequately explain his basis for concluding that claimant's twenty-nine years of coal mine dust exposure had not contributed to his pulmonary impairment. See *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Further, the administrative law judge reasonably discounted Dr. Rosenberg's opinion, that claimant does not have legal pneumoconiosis, which the doctor supported by reference to evidence claimant does not have an obstructive impairment and his lung function improved. The administrative law judge observed that Dr. Rosenberg did not address the most recent pulmonary function study, which was qualifying and which was interpreted as revealing a moderate obstructive impairment. See *Martin v. Ligon*

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<sup>7</sup> A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values contained in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. See 20 C.F.R. §718.204(b)(2)(i).

<sup>8</sup> In finding that claimant established total disability, the administrative law judge determined that the pulmonary function study evidence, including the most recent study administered on April 30, 2011, better supported Dr. Baker's opinion that claimant is totally disabled by an obstructive impairment, than Dr. Rosenberg's contrary opinion. Decision and Order at 10-11. The administrative law judge found that Dr. Rosenberg's opinion was "deficient for lack of review of the most recent pulmonary function test, a test that, if reviewed, may have altered his opinion, especially considering that Dr. Rosenberg initially considered the [c]laimant totally disabled." Decision and Order at 11. As noted above, employer has not challenged the administrative law judge's total disability determination. See n.3, *supra*.

*Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-287 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 11, 16-17. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that Dr. Rosenberg's opinion was not sufficiently reasoned to meet employer's burden to disprove the existence of pneumoconiosis.<sup>9</sup> See *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

The administrative law judge next found that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 17-18. In so finding, the administrative law judge permissibly concluded that the same reasons for which she discredited Dr. Rosenberg's opinion on the issue of legal pneumoconiosis, also undercut his opinion that claimant's impairment is unrelated to his coal mine employment. See *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Martin*, 400 F.3d at 307, 23 BLR at 2-287; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. That finding is therefore affirmed.

Substantial evidence supports the administrative law judge's findings that employer did not disprove the existence of pneumoconiosis, or establish that claimant's impairment did not arise out of, or in connection with, coal mine employment. Therefore, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits. 30 U.S.C. §921(c)(4); see *Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

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<sup>9</sup> Because employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis, we need not address employer's contention that the administrative law judge erred in finding that employer did not disprove the existence 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); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); Employer's Brief at 9-10; Employer's Reply Brief at 2-3.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge