BRB No. 13-0337 BLA

CY EDWARD SMITH (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 04/24/2014
	)	
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 on Remand and Decision and Order on Reconsideration of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.[1]

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

[1] The Board issued an order on November 18, 2011, acknowledging notice from the miner's widow that the miner had died. The Board stated that it would "proceed with its consideration of this case as a miner's claim." *Smith v. Big Elk Creek Coal Co.*, BRB No. 11-0295 BLA (Nov. 18, 2011) (Order). Claimant is the miner's widow, who is pursuing the miner's claim.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand and Decision and Order on Reconsideration (2008-BLA-05022) 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 (2012) (the Act).[2] This claim, filed on December 29, 2006, is before the Board for the third time.[3] Director's Exhibit 2.

[2] 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 that if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] The full procedural history of this case is set forth in the Board's prior decisions. *See Smith v. Big Elk Creek Coal Co.*, BRB No. 11-0295 BLA (Jan. 20, 2012) (unpub.); *C.S.* [*Smith*] *v. Big Elk Creek Coal Co.*, BRB No. 09-0185 BLA (Sept. 17, 2009)(unpub.). Relevant to the instant appeal, in a previous decision, the Board affirmed Administrative Law Judge Janice K. Bullard's finding of twenty-five years of coal mine employment based on the parties' stipulation, and her finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2). *Smith*, BRB No. 09-0185 BLA, slip op. at 3 n.4.

In the most recent appeal, the Board vacated Judge Bullard's finding that claimant established fifteen years of qualifying coal mine employment and, therefore, vacated Judge Bullard's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), 30 U.S.C. §921(c)(4). The Board instructed Judge Bullard, on remand, to determine whether claimant established the fifteen years of qualifying coal mine employment necessary to invoke the presumption, and, if so, to determine whether employer has rebutted the presumption. *Smith v. Big Elk Creek Coal Co.*, BRB No. 11-0295 BLA, slip op. at 5 (Jan. 20, 2012) (unpub.).

On remand, due to the unavailability of Judge Bullard, the case was reassigned, without objection, to Administrative Law Judge Lystra A. Harris (the administrative law judge). In her Decision and Order on Remand, issued December 19, 2012, the administrative law judge credited the miner with at least fifteen years of qualifying coal mine employment. The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits. Employer moved for reconsideration, and in a decision dated April 4, 2013, the administrative law judge reweighed the medical evidence and again concluded that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting the miner with fifteen years of qualifying coal mine employment and, therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in her analysis of the medical opinion evidence when she found that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. Claimant has filed a response brief, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited response brief, asserting that employer has not established grounds for reversal of the award; rather, if the Board finds error, a remand is warranted. Employer has filed a reply brief, reiterating its arguments on appeal.[4]

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *See* 30 U.S.C. §921(c)(4); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 15; Decision and Order on Reconsideration at 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption. Employer specifically asserts that the Act and its implementing regulations "do not provide a standard for assessing comparability" between the miner's surface coal mine employment and conditions in an underground mine and that, therefore, any determination by the administrative law judge on that issue was arbitrary. Employer's Brief at 13-14. Employer's contentions lack merit.

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). Subsequent to the issuance of the administrative law judge's Decision and Order, the Department of Labor promulgated regulations implementing amended Section 411(c)(4). 78 Fed. Reg. 59,102 (Sept 25, 2013). Those regulations provide 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."[6] 78 Fed. Reg. at 59,114 (to be

[5] The miner's coal mine employment was in Kentucky. Director's Exhibit 14. 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).

[6] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines

codified at 20 C.F.R. §718.305(b)(2)); *see also Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

The administrative law judge found that the miner had a total of twenty-five years of coal mine employment, as stipulated by the parties, including five years spent in underground mining and twenty years spent in surface mining. Decision and Order on Remand at 2, 4. In determining whether dust conditions in the miner's surface mine employment were "substantially similar' to conditions in underground mining, the administrative law judge considered whether claimant established "sufficient evidence of coal dust exposure" in the miner's surface mine employment. Decision and Order on Remand at 4. The administrative law judge credited the miner's testimony that he worked as an oiler, near the drill, during the entirety of his surface mine employment; that he experienced significant dust exposure, especially when blowing out air filters, which left him covered in coal dust, and with coal dust in his mouth; and that those conditions were the dustiest of his career, including his underground coal mine employment. Decision and Order on Remand at 5; Hearing Tr. at 23, 26, 30. Contrary to employer's argument, the miner's uncontradicted testimony regarding his working conditions, having been credited by the administrative law judge, is sufficient under *Leachman*, and under the regulations, to satisfy the "substantially similar" requirement of Section 411(c)(4). 78 Fed. Reg. at 59,114 (to be codified at 20 C.F.R. §718.305(b)(2)); *Leachman*, 855 F.2d at 512-13. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the miner had at least fifteen years of employment in surface mining with dust conditions substantially similar to those found in underground mines. 20 C.F.R. §718.305(b)(2).

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

> whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995) The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order on Remand at 11-15; Decision and Order on Reconsideration at 3-4.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[7] In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Rasmussen, Rosenberg, and Vuskovich.[8] Drs. Rosenberg and Vuskovich opined that the miner did not suffer from legal pneumoconiosis, but suffers from severe obstructive pulmonary disease due to cigarette smoking. Employer's Exhibits 1, 13, 14. In contrast, Dr. Rasmussen diagnosed the miner with chronic obstructive pulmonary disease (COPD) and emphysema caused by a combination of cigarette smoking and coal mine dust exposure.

The administrative law judge discredited the opinion of Dr. Vuskovich because she found it to be inadequately explained. Decision and Order on Remand at 12-13; Decision and Order on Reconsideration at 3. The administrative law judge found that the remaining opinions of Dr. Rosenberg, attributing the miner's disabling obstructive respiratory impairment to smoking alone, and Dr. Rasmussen, attributing the miner's respiratory impairment to both coal mine dust exposure dust and smoking, were in equipoise. Decision and Order on Reconsideration at 4. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer initially contends that the administrative law judge failed to provide valid reasons for finding that the opinion of Vuskovich did not disprove the existence of

[7] "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) (2013).

[8] The administrative law judge also considered, and discounted, the opinions of Drs. Baker and Sandlin. However, as both physicians diagnosed legal pneumoconiosis, their opinions do not assist employer in meeting its burden to disprove the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Claimant's Exhibits 2, 3.

legal pneumoconiosis. Employer's Brief at 5. We disagree. The administrative law judge noted that Dr. Vuskovich stated that he had considered whether the miner had legal pneumoconiosis, but that "the other forces that drove [the miner's] abnormal pulmonary function studies results, the air trapping from the harmful effects of acute exposure to cigarette smoke, and the bronchorestrictor effects of the beta blocker" led him to conclude "that [the miner] did not have legal pneumoconiosis." Employer's Exhibit 14 at 12. Contrary to employer's argument, the administrative law judge permissibly discounted Dr. Vuskovich's opinion, in part, because he failed to adequately explain why the miner's twenty-five years of coal mine dust exposure could not have contributed to his pulmonary impairment, along with his cigarette smoking and other medical conditions. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Crockett Colleries, 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); Decision and Order on Remand at 13; Decision and Order on Reconsideration at 3.

Next, employer argues that the administrative law judge failed to explain her decision to accord equal weight to the opinions of Drs. Rasmussen and Rosenberg regarding the existence of legal pneumoconiosis. Employer's Brief at 11-13. Employer contends that the administrative law judge's assessment of the two opinions was "cursory," and does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer's Brief at 11-12. Employer argues further that, compared to Dr. Rasmussen's opinion, Dr. Rosenberg's opinion was based on a more thorough analysis of the record and relevant medical literature, and a more accurate history of the miner's smoking and coal mine employment. *Id*. at 12-13. These arguments lack merit.

The administrative law judge fully considered the opinions of Drs. Rasmussen and Rosenberg, noting that, in diagnosing legal pneumoconiosis, Dr. Rasmussen had considered that the miner had thirty-five years of coal mine dust exposure and a forty-two pack-year smoking history. Director's Exhibit 11 at 24, 27; Decision and Order on Remand at 8. The administrative law judge further noted that Dr. Rasmussen had based his diagnosis on the results of his physical examination and objective testing, and had supported his conclusions with references to medical studies that he stated demonstrated that emphysema caused by smoking is identical to emphysema caused by coal mine dust exposure; that smoking and coal mine dust exposure have additive effects on ventilatory function; and that coal mine dust exposure causes chronic lung diseases "even absent radiographic changes of pneumoconiosis." Director's Exhibit 11 at 24, 27; Decision and Order on Remand at 7-8. Similarly, the administrative law judge noted that Dr. Rosenberg had considered a thirty-five year coal mine employment history and an extensive smoking history, and had discussed the results of his physical examination of the miner and reviewed the relevant medical literature. Employer's Exhibit 13 at 4-7;

Decision and Order on Remand at 8-9. The administrative law judge further noted that, in attributing the miner's disabling obstructive lung disease to smoking, based on the his reduced FEV1/FVC ratio, Dr. Rosenberg cited studies that, in his view, demonstrated that the ratio is reduced when COPD is due to smoking, but preserved when COPD is due to coal mine dust exposure. Employer's Exhibit 13 at 3-5; Decision and Order on Remand at 9; *but see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000)(recognizing that coal mine dust can cause significant obstructive disease, as shown by a reduced FEV1/FVC ratio).

In analyzing the weight to be accorded to each physician's opinion, the administrative law judge found that Drs. Rasmussen and Rosenberg are both well-qualified,[9] that they both considered the miner's coal dust exposure and smoking history, and that they both offered "opinions that are well-reasoned, well-documented, unequivocal and that clearly explain the bases for their conclusions." Decision and Order on Remand at 13; Decision and Order on Reconsideration at 4. The administrative law judge noted that while she had initially given "slightly more weight" to Dr. Rasmussen's opinion, as more consistent with the scientific studies cited in the preamble to the 2000 regulatory revisions, upon employer's motion for reconsideration, she had reviewed Dr. Rosenberg's opinion and concluded that it, too, was consistent with preamble's scientific studies.[10] Decision and Order on Remand at 13-14; Decision and Order on Reconsideration at 2, 4; Employer's Exhibit 13 at 5. Therefore, the administrative law judge "decline[d] to afford less weight to Dr. Rosenberg's opinion based on inconsistency with the medical science relied upon by the Department of Labor," and concluded that the opinions of Drs. Rasmussen and Rosenberg were in equipoise. Decision and Order on Reconsideration at 4. Accordingly, the administrative law judge concluded that employer failed to disprove that the miner had legal pneumoconiosis. *Id*.

The task of determining whether medical opinions are adequately reasoned is committed to the discretion of the administrative law judge. *Rowe*, 710 F.2d at 255, 5

[9] The administrative law judge noted that Dr. Rasmussen is Board-certified in internal medicine, works in the division of pulmonary medicine, and is a B reader, and that Dr. Rosenberg is Board-certified in Internal Medicine and Pulmonary Disease and is a B reader. Decision and Order on Remand at 13.

[10] Specifically, the administrative law judge initially cited, as contrary to the findings in the preamble, Dr. Rosenberg's apparent view that coal mine dust exposure does not cause centrilobular emphysema. Decision and Order on Remand at 14 n.7. On reconsideration of Dr. Rosenberg's opinion, however, the administrative law judge recognized that Dr. Rosenberg did, in fact, acknowledge that coal mine dust exposure can cause centrilobular emphysema. Decision and Order on Reconsideration at 2, 4; Employer's Exhibit 13 at 5.

BLR at 2-103. In this case, the administrative law judge explained her findings, and substantial evidence supports her permissible determination that both Drs. Rasmussen and Rosenberg provided well-reasoned and well-documented opinions regarding the presence of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Moreover, in asserting that Dr. Rosenberg's opinion is entitled to greater weight, employer is asking for a reweighing of the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, as the administrative law judge considered and weighed all of the relevant evidence, and explained the bases for her findings and credibility determinations, consistent with the APA, we reject employer's allegations of error, and affirm the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. 5 U.S.C. §557(c)(3)(A); *see Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1022-26, 24 BLR 2-297, 2-310-18 (10th Cir. 2010). We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge