BRB No. 13-0358 BLA

FRANK E. SNIDER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 04/28/2014
	)	
Employer-Petitioner	)	
	)	
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-Awarding Benefits of Administrative Law Judge Michael P. Lesniak, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (2010-BLA-5309) of Administrative Law Judge Michael P. Lesniak on a claim filed on January 8, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In its prior Decision and Order, the Board affirmed the administrative law judge's findings of thirty-five years of underground coal mine employment, the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4). *Snider v. Consolidation Coal Co.*, BRB No. 11-0727 BLA, slip op. at 3-4 (July 30, 2012)(unpub.). The Board vacated, however, the administrative law judge's finding that employer failed to rebut the presumption by establishing the absence of pneumoconiosis, or that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with coal mine employment. *Id.* at 7. The Board remanded the case to the administrative law judge with instructions to reconsider whether the opinions of Drs. Castle and Bellotte are sufficient to establish rebuttal. After reconsidering the evidence on remand, the administrative law judge again determined that employer failed to rebut the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge did not apply the appropriate standard and failed to follow the Board's remand instructions in rendering his findings on rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited brief, asserting that the Board should reject employer's contentions. Employer has filed a reply brief reiterating its contentions on appeal.

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.[1] 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).

Employer initially contends that the rebuttal methods set forth in amended Section 411(c)(4) apply only to the Secretary of Labor. This argument is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550, BLR (4th Cir. 2013) (Niemeyer, J., concurring).[2]

[1] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Employer's related request that this case be held in abeyance pending a decision on appeal from *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), is

We, therefore, reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Moreover, the Department of Labor (DOL) has promulgated regulations implementing amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), that make clear that the rebuttal provisions apply to responsible operators. *See* 78 Fed. Reg. 59,102, 59,115 (to be codified at 20 C.F.R. §718.305(d)).

Employer also argues that the administrative law judge erred in applying the "rule out" standard on rebuttal when addressing whether employer established that claimant is not totally disabled due to pneumoconiosis. Employer maintains that operators "must be able to rebut the presumption with proof [that] pneumoconiosis was not a significantly or materially contributing cause of pulmonary disability. . . ." Employer's Brief at 12. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption that his total disability is due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by establishing that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order on Remand at 4, 9; *see* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). In addition, the United States Court of Appeals for the Fourth Circuit has held that an employer must "effectively . . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure in order to meet its rebuttal burden. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The DOL has also expressed its acceptance of the "rule out" standard and rejected the argument that administrative law judges should apply a "substantially contributing cause" standard on rebuttal. 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013). We conclude, therefore, that the administrative law judge applied the correct rebuttal standard in this case.

Alternatively, employer argues that the administrative law judge failed to follow the Board's remand instructions in determining whether the opinions of Drs. Castle and Bellotte were sufficient to rebut the amended Section 411(c)(4) presumption. Employer maintains that the administrative law judge did not weigh the totality of the physicians' opinions and did not consider the documentation underlying their judgments or the sophistication of, and bases for, their diagnoses. Employer's allegations of error are without merit.

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moot. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013) (Niemeyer, J. concurring).

The administrative law judge acknowledged that the Board held that he failed to provide a rationale for discounting the opinion of Dr. Castle, that claimant's respiratory impairment is due entirely to smoking, and mischaracterized Dr. Bellotte's opinion, that claimant's bullous emphysema is unrelated to coal dust exposure because his chest x-rays showed a low dust burden. Decision and Order on Remand at 4. The administrative law judge reexamined Dr. Castle's medical report, taking particular note of his statement that:

> The ventilatory studies which were valid demonstrated a mild to moderate degree of airway obstruction associated with gas trapping and a mild reduction in the diffusing capacity. These findings are *typical* of tobacco smoke induced bullous emphysema. When coal workers' pneumoconiosis causes impairment, it *generally* does so by causing a mixed, irreversible obstructive and restrictive ventilatory defect. Those were not the findings in this case.

Id., quoting Employer's Exhibit 4 at 6. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Castle's opinion was entitled to "little weight to the extent that it relies on gross generalities, rather than the specifics of [claimant's] condition."[3] Decision and Order on Remand at 4; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). With respect to Dr. Bellotte's opinion, the administrative law judge referred to the Board's summary of the physician's conclusions and rationally found that "Dr. Bellotte'[s] comments, as characterized by the Board, are inconsistent with the [r]egulations, which establish that the presence of legal pneumoconiosis bears no necessary relationship to the degree of dust retention in the lungs."[4] Decision and Order

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[3] The administrative law judge also noted, "where Dr. Castle discusses the kind of impairment that [coal workers' pneumoconiosis] usually causes, it is unclear whether he is referring to the clinical or legal definition of the disease." Decision and Order on Remand at 4 n.3. Contrary to employer's argument, the administrative law judge's finding is supported by substantial evidence, as Dr. Castle stated that pneumoconiosis generally causes "a mixed … obstructive *and* restrictive defect," while the regulatory definition of legal pneumoconiosis "includes, but is not limited to, any chronic restrictive *or* obstructive pulmonary disease arising out of coal mine employment." Employer's Exhibit 4 at 6; 20 C.F.R. §718.201(a)(2) (emphasis added).

[4] Dr. Bellotte stated in his medical report:

> This patient does not have a heavy coal dust burden. I characterized his chest x-ray as 0/0. Patients who have progressive massive fibrosis, or perhaps a higher category of simple pneumoconiosis, could have bullous

on Remand at 5; *see* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000) (DOL rejected the position that there is no scientific support that clinically significant emphysema exists in coal miners without progressive massive fibrosis); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). We affirm, therefore, the administrative law judge's determination that the opinions of Drs. Castle and Bellotte were insufficient to establish that claimant does not have legal pneumoconiosis. *Id*.

Regarding the issue of total disability causation on rebuttal, the administrative law judge determined that Dr. Castle's opinion was insufficient to carry employer's burden, as he did not find that claimant was totally disabled. Decision and Order on Remand at 6. The administrative law judge discredited Dr. Bellotte's opinion on this issue for the same reason he discredited the physician's opinion on the issue of legal pneumoconiosis. *Id*. Contrary to employer's allegations, the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment is supported by substantial evidence. Because we have affirmed the administrative law judge's determination, in the context of legal pneumoconiosis, that neither Dr. Castle nor Dr. Bellotte credibly disproved the existence of a causal connection between coal dust exposure and claimant's disabling pulmonary impairment, we also affirm his conclusion that employer failed to prove that claimant's total disability did not arise out, or in connection with, his mine employment.[5] 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). We affirm, therefore, the award of benefits.

> emphysema which would be visible on the chest x-ray, but it would be distinctly unusual for a patient with a low ILO category, 0 or 1 chest x-ray, to have bullous emphysema related to coal dust.

Employer's Exhibit 2 at 8-9. Dr. Bellotte added, "[n]owhere in my review of the literature could I find bullous emphysema, radiographically diagnosed, to be related to coal dust exposure, except for patients who have progressive massive fibrosis." *Id.*

[5] Because employer bears the burden of proof on rebuttal, and we have held that the administrative law judge permissibly discredited the opinions of its experts, we need not reach employer's arguments that the administrative law judge erred in affording some weight to the opinions of Drs. Rasmussen and Saludes. *See Defore v. Alabama By-Products*, 12 BLR 1-27 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge