BRB No. 13-0392 BLA

BOBBY R. SHEPARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RESOURCES CORPORATION	)	DATE ISSUED: 04/30/2014
	)	
and	)	
	)	
CHARTIS INSURANCE	)	
	)	
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 Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Tennessee, for employer/carrier.

Jonathan P. Rolfe (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-05329) of Administrative Law Judge Stephen R. Henley 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). This case involves a subsequent claim filed on January 28, 2010.[1] Director's Exhibit 5.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with thirty-three years of qualifying coal mine employment,[3] based on the parties' stipulation. The administrative law judge further found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge,

[1] Claimant's initial claim for benefits, filed on April 7, 2004, was finally denied by the district director on November 9, 2004, by reason of abandonment. Director's Exhibit 1a. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[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 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) (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. 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 may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 6-8. 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 (1989) (en banc); Director's Exhibits 6-8.

[4] The administrative law judge did not make a finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because claimant did not establish any element of entitlement in his previous claim, 20 C.F.R. §725.409(c), the administrative law judge's finding that claimant established total disability with new evidence constitutes a determination of a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption.[5] Claimant has not submitted a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments that the administrative law judge erred in his analysis of claimant's medical treatment records, and applied an improper rebuttal standard. Employer has filed a reply brief, reiterating its position.

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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 both clinical and legal pneumoconiosis,[6] 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 Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that employer failed to establish rebuttal by either method.

[5] Employer does not challenge the administrative law judge's findings that claimant had thirty-three years of qualifying coal mine employment, that he established total disability pursuant to 20 C.F.R. §§718.204(b)(2), 725.309, 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).

[6] "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). "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).

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Fino and Rosenberg,[7] and considered claimant's medical treatment records. Drs. Fino and Rosenberg opined that claimant has severe airflow obstruction that is due to asthma and unrelated to coal mine dust exposure.[8] Director's Exhibit 14; Employer's Exhibit 1. Employer also submitted medical treatment records from 1979 to 2012, which contain diagnoses of chronic obstructive pulmonary disease (COPD) and asthma, and which document claimant's treatment for these and other conditions. Employer's Exhibits 4-135.

The administrative law judge discounted the opinions of Drs. Fino and Rosenberg because he found that they were not well-reasoned, as they were inconsistent with scientific views endorsed by the Department of Labor (DOL) in the 2000 preamble to the regulatory revisions. Decision and Order at 14-15. Regarding the treatment records, the administrative law judge noted that claimant's treating physicians diagnosed COPD and asthma, but "none . . . offered opinions as to the cause." Decision and Order at 13. Thus, the administrative law judge found that "the treatment records [were] non-probative" on the issue of legal pneumoconiosis. *Id*. The administrative law judge therefore determined that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge "ignored the physicians' reasoning" when he found that the opinions of Drs. Fino and Rosenberg did not disprove the existence of legal pneumoconiosis. Employer's Brief at 6. Employer's argument lacks merit. The administrative law judge examined the reasoning employed by Drs. Fino and Rosenberg to eliminate coal mine dust exposure as a cause of claimant's COPD, and found that it was not credible. Specifically, the administrative law judge noted Dr. Fino's opinion that, although coal mine dust exposure can cause obstruction, in the majority of cases, the obstruction caused by coal mine dust inhalation is not clinically significant. Decision and Order 14; Director's Exhibit 14 at 14-15. Further, the administrative law judge accurately noted that Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's COPD, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC value which, in Dr. Rosenberg's view, is characteristic of asthma, but not of lung disease caused by coal mine dust exposure. Decision and Order at 14; Employer's Exhibit 1 at 5-6.

[7] The record also contains the medical opinion of Dr. DeFore, who diagnosed claimant with legal pneumoconiosis, in the form of obstructive lung disease due to coal mine dust exposure. Director's Exhibit 17.

[8] The physicians of record agree that claimant never smoked. Director's Exhibits 14, 17; Employer's Exhibit 1.

The administrative law judge permissibly found that the reasoning Drs. Fino and Rosenberg used to eliminate coal mine dust exposure as a source of claimant's COPD was inconsistent with the medical science accepted by DOL, recognizing that coal mine dust can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013)(Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 14-15 and n.28. We therefore affirm the administrative law judge's determination that the opinions of Drs. Fino and Rosenberg were not sufficiently credible to disprove the existence of legal pneumoconiosis.

Employer argues further that the administrative law judge failed to analyze claimant's medical treatment records when he found that they were not probative on the issue of legal pneumoconiosis. Employer contends that, contrary to the administrative law judge's determination, it was "highly relevant" that claimant's physicians diagnosed him with asthma, but did not link the disease to coal mine dust exposure. Employer's Brief at 6. Employer's allegation of error lacks merit. Employer must affirmatively establish that claimant does not have legal pneumoconiosis. *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66. The administrative law judge accurately noted that the treatment records listed diagnoses of COPD and asthma, but did not address the etiology of those lung conditions. Decision and Order at 13; Employer's Exhibits 4-135. Thus, the administrative law judge reasonably found that the treatment records did not support employer's burden to disprove the existence of legal pneumoconiosis. *See Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66. Employer's argument to the contrary effectively asks the Board to reweigh the evidence, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's finding that the medical treatment records did not assist employer in disproving the existence of legal pneumoconiosis.

Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Fino and Rosenberg, and did not err in his analysis of claimant's medical treatment records, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.[9]

[9] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir. 1995). Therefore, 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. Employer's Brief at 4.

The administrative law judge next considered whether employer could establish that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. The administrative law judge discounted the disability causation opinions of Drs. Fino and Rosenberg because the physicians did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. Decision and Order at 15. Further, the administrative law judge considered Dr. Fino's statement that, even assuming claimant has legal pneumoconiosis, it was not a "substantial cause of his disability," because "coal mine dust has not played a substantial contributing role in his impairment. . . ." Director's Exhibit 14 at 15. The administrative law judge found that, because Dr. Fino "d[id] not rule out pneumoconiosis as a contributing factor" to claimant's disabling impairment, his opinion did not meet employer's rebuttal burden. Decision and Order at 16.

As an initial matter, we note that employer does not challenge the administrative law judge's determination to discount the disability causation opinions of Drs. Fino and Rosenberg because the physicians did not diagnose claimant with legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 15. The administrative law judge's decision to discount the physicians' opinions on that basis is, therefore, affirmed.[10] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer challenges the administrative law judge's analysis of Dr. Fino's alternative statement that, even if present, legal pneumoconiosis is not a "substantial cause" of claimant's disability. Employer argues that the administrative law judge applied an improper standard in finding Dr. Fino's opinion insufficient because it did not rule out pneumoconiosis as a cause of claimant's disability. Employer's Brief at 7-9. Contrary to employer's contention, the United States Court of Appeals for the Fourth Circuit has held that, to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's disabling impairment by pneumoconiosis.[11] *Rose*, 614

[10] Therefore, we need not address employer's argument that the administrative law judge erred in also finding that Dr. Rosenberg's disability causation opinion was not well-reasoned. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 9-11.

[11] Similarly, the implementing regulation that was promulgated after the administrative law judge issued his decision requires the party opposing entitlement in a miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)); Director's Brief at 3.

F.2d at 939, 2 BLR at 2-43-44. Thus, the administrative law judge did not err in finding that Dr. Fino's "substantial cause" opinion failed to meet employer's burden. Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's disabling impairment did not arise out of, or in connection with, his coal mine employment.

Claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption. Therefore, we affirm the award of benefits. 30 U.S.C. §921(c)(4).

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