BRB No. 13-0410 BLA

CARL J. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COUNTRY BOY MINING, INCORPORATED	)	
	)	
and	)	
	)	
VIRGINIA PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION	)	DATE ISSUED: 04/22/2014
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Sarah M. Hurley (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/carrier (employer) appeals the Decision and Order (2011-BLA-5933) of Administrative Law Judge Linda S. Chapman rendered 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 March 12, 2010.[1] Director's Exhibit 3.

Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with thirty years of underground coal mine employment,[3] and found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and demonstrated a change in the applicable

[1] Claimant filed a prior claim on June 16, 1997, which was ultimately denied on August 12, 2004, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1.

[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 of total disability 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. *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 record reflects that claimant's coal mine employment was in Virginia. Director's Exhibits 4, 7. 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).

condition of entitlement pursuant to 20 C.F.R. §725.309.[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 employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, asserting that the administrative law judge applied the proper legal standard in determining whether employer established rebuttal of the Section 411(c)(4) presumption. Employer filed a reply brief, reiterating its contentions on appeal.[5]

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).

Employer challenges the administrative law judge's determination that it did not rebut the Section 411(c)(4) presumption. Employer initially asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 5-7. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption that the miner's total disability was 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[6] and legal[7] pneumoconiosis, or by

[4] The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

[5] Employer does not challenge the administrative law judge's findings that claimant established thirty years of underground coal mine employment and the existence of a totally disabling respiratory impairment and, therefore, invoked the Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. 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

establishing that the miner's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 15-16; *see* 30 U.S.C. §921(c)(4); *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). Furthermore, 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.[8] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case. Decision and Order at 14.

The administrative law judge found that employer failed to disprove the existence of clinical pneumoconiosis, a finding that precludes a rebuttal on the ground that claimant does not have pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 15. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Therefore, there is no merit to employer's contention that the administrative law judge erred in failing to specifically address whether employer disproved the existence of legal pneumoconiosis.[9] Employer's Brief at 4-5.

---

reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[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). 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).

[8] Similarly, the implementing regulation that was promulgated after the administrative law judge's 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 § 718.201." 20 C.F.R. §718.305(d)(1)(ii); 78 Fed Reg. at 59,115; *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (holding that there is no meaningful difference between the "play[ed] no part" standard and the "rule-out" standard).

[9] To the extent employer asserts that claimant bears the burden to affirmatively establish the existence of pneumoconiosis, employer's contention is misplaced. Employer's Brief at 4-5. As the Director, Office of Workers' Compensation Programs,

In evaluating whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, the administrative law judge considered the opinions of Drs. Rosenberg and Fino.[10] Dr. Rosenberg opined that claimant's disabling chronic obstructive airways disease is due to cigarette smoking, and is unrelated to coal mine dust exposure. Employer's Exhibit 1. Dr. Fino opined that, assuming that claimant has a smoking history, claimant's disabling airflow obstruction is "quite consistent" with smoking-related disease. Dr. Fino further opined, however, that if claimant does not have a smoking history, then he could not rule out coal mine dust exposure as a cause of claimant's disabling impairment. Director's Exhibit 37.

The administrative law judge discounted the opinion of Dr. Rosenberg as inadequately explained, and inconsistent with the scientific views endorsed by the Department of Labor in the preamble to the 2000 regulatory revisions.[11] Decision and

---

asserts, because claimant has successfully invoked the Section 411(c)(4) presumption, it is employer's burden to affirmatively establish that claimant does not have pneumoconiosis. *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); Decision and Order at 16.

[10] The administrative law judge also considered the opinions of Drs. Gallai, Habre, and Klayton, that claimant's disabling respiratory impairment was due to a combination of cigarette smoking and coal mine dust exposure, with coal mine dust exposure being a significant contributing factor. Decision and Order at 15-16. The administrative law judge properly found that these physicians' opinions do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66.

[11] Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's disabling obstructive pulmonary impairment, in part, because claimant's pulmonary function study revealed a markedly reduced FEV1/FVC ratio, which Dr. Rosenberg opined was uncharacteristic of a coal mine dust-induced lung disease, but classic for smoking related disease. Employer's Exhibit 1. The administrative law judge permissibly discounted Dr. Rosenberg's opinion, noting that medical science endorsed by the Department of Labor recognizes that coal mine dust can cause clinically significant obstructive disease, as 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); Decision and Order at 17, *referencing* 65 Fed. Reg. 79,943 (Dec. 20, 2000). Because employer does not challenge the administrative law judge's basis for

Order at 16-18. The administrative law judge found that Dr. Fino's opinion was insufficient to establish rebuttal because the doctor failed to effectively rule out coal mine employment as a cause of claimant's total disability. Decision and Order at 18. The administrative law judge therefore found that employer failed to prove that claimant's pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 18-20.

Employer argues that the administrative law judge erred in his consideration of Dr. Fino's opinion. We disagree. Dr. Fino examined claimant in 2000, in connection with his prior claim, and examined him again in December 2010, in connection with his current claim. Following his 2010 examination, Dr. Fino diagnosed severe pulmonary emphysema and discussed the possible causes of claimant's disabling impairment:

> When I saw this man 10 years ago, he had a disabling pulmonary emphysema condition, and I thought that there may be some asthma. There was a history of cigarette smoking. Re-examining him in 2010, I note that he has had some worsening of his pulmonary function. He definitely has an oxygen transfer impairment. He told me that he does not smoke. However, the Department of Labor examining physician from June of 2010 obtained a history of ½-1 package of cigarettes per day between 1958 and 1983.
>
> This man has a severe obstructive ventilatory abnormality, and he is totally disabled from returning to his last mining job or a job requiring similar effort. If he indeed was a cigarette smoker – as the histories on a couple of occasions say – then his respiratory disease is quite consistent with cigarette smoking.
>
> Without a smoking history, I could not rule out coal mine dust as a cause of his disability.

Director's Exhibit 37 at 11.

Noting that claimant clearly was a smoker in the past, the administrative law judge permissibly found that, in simply stating that claimant's impairment is "quite consistent" with cigarette smoking, Dr. Fino did not adequately explain why claimant's thirty years

---

according less weight to the opinion of Dr. Rosenberg, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

of coal mine dust exposure did not also contribute, along with claimant's past smoking habit, to his disabling respiratory impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 18. Thus, contrary to employer's contention, the administrative law judge rationally determined that Dr. Fino's opinion failed to effectively rule out coal mine employment as a cause of claimant's total respiratory disability. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 18; Employer's Brief at 12. As the administrative law judge's basis for discrediting Dr. Fino's opinion is rational and supported by substantial evidence, it is affirmed. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). Because employer raises no further challenges to the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that employer failed to establish that claimant's disabling impairment is unrelated to his coal mine employment. 30 U.S.C. §921(c)(4). Therefore, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal.[12] *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge properly awarded benefits. 30 U.S.C. §921(c)(4).

[12] Thus, we need not address employer's argument that the administrative law judge erred in failing to make a specific determination regarding the length of claimant's smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge