BRB No. 12-0585 BLA

JACOB PATRICK JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING & PROCESSING	)	DATE ISSUED: 08/21/2013
	)	
and	)	
	)	
TRAVELLERS INSURANCE 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 Awarding Benefits of John P. Sellers, III, 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.

Richard A. Seid (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5116) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with eighteen years of coal mine employment, and accepted employer's stipulations that sixteen of those years were spent underground, and that claimant had a totally disabling respiratory impairment, as supported by the record. The administrative law judge adjudicated this claim, filed on July 18, 2008, pursuant to 20 C.F.R. Part 718, and found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption and, accordingly, awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Employer argues that the administrative law judge improperly utilized the preamble to the amended regulations, and selectively analyzed the medical opinion evidence, in violation of the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).[2] Claimant has responded in support of the award of benefits, and employer has filed a reply. The Director, Office of Workers' Compensation Programs

[1] 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, the amendments revive Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

[2] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

(the Director), has filed a limited response,[3] but has declined to respond with regard to employer's challenges to the administrative law judge's disposition of the conflicting medical evidence on rebuttal.[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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the administrative law judge's references to the preamble in evaluating the medical opinions of Drs. Jarboe[6] and Habre.[7] In particular, employer

[3] Employer also contended that the retroactive application of amended Section 411(c)(4) is unconstitutional, and asserted that the administrative law judge imposed an improper burden of proof on rebuttal. The Director, Office of Workers' Compensation Programs, responded in opposition to the foregoing arguments. However, in its reply brief, employer withdrew its constitutional challenges, and its burden of proof argument, based on the holdings of the United States Court of Appeals for the Sixth Circuit in *Vision Processing, LLC v. Groves*, 705 F.3d 551, BLR (6th Cir. 2013), and *Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011). *See* Employer's Reply Brief at 2.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of coal mine employment and his finding that claimant was entitled to invocation of the amended Section 411(c)(4) presumption based on employer's stipulation to total respiratory disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. Decision and Order at 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 3, 12 at 28.

[6] Dr. Jarboe diagnosed pulmonary emphysema and asthmatic bronchitis, and concluded that claimant's totally disabling impairment was caused primarily by smoking, but that his asthma contributed as well. Dr. Jarboe opined that claimant does not have clinical or legal pneumoconiosis, and that claimant's impairment is completely unrelated to his coal dust exposure. Decision and Order at 11-12, 17; Employer's Exhibits 1 at 4-5, 2 at 4, 3, 16 at 7, 20 at 4-5.

[7] Dr. Habre diagnosed hypertension and chronic obstructive pulmonary disease [COPD], and identified emphysematous changes and airway obstruction. He opined that

argues that the administrative law judge improperly imposed a presumption that coal dust caused claimant's condition, and assumed that the effects of smoking and coal dust exposure are additive, although the "preamble was not subject to publication, notice and comment…" Employer's Reply Brief at 5; Employer's Brief at 23-24. Employer maintains that Drs. Jarboe and Habre provided well-reasoned opinions establishing rebuttal of the amended Section 411(c)(4) presumption, and that their opinions were improperly discounted in favor of the contrary opinions of Drs. Baker[8] and Agarwal.[9] Employer's arguments lack merit.

The United States Court of Appeals for the Sixth Circuit has held that the preamble to the amended regulations sets forth the resolution, by the Department of Labor (DOL), of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *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). Further, the court has held that the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond; therefore, an administrative law judge may evaluate expert opinions in conjunction with DOL's discussion of sound medical science as set forth in the preamble. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12. Thus, employer's assertions to the contrary are meritless.

The administrative law judge correctly found that, once claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer to affirmatively establish either that claimant does not have pneumoconiosis[10] or that his disabling respiratory or pulmonary impairment did not arise

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claimant's impairment was due to smoking and not coal dust exposure, although claimant's coal mine dust exposure had a "minimal contribution, both to his underlying diagnosis and disability." Decision and Order at 15, 20, 26; Employer's Exhibit 4 at 4.

[8] Dr. Baker diagnosed clinical and legal pneumoconiosis, COPD with severe obstructive defect, and chronic bronchitis, all due to coal dust exposure. Claimant's Exhibit 2 at 3-4; Decision and Order at 16-17.

[9] Dr. Agarwal found emphysema, very severe obstruction and legal pneumoconiosis, and concluded that claimant's disabling impairment is due to coal dust exposure. Director's Exhibit 12 at 31; Decision and Order at 9-10.

[10] 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

out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). While the administrative law judge determined that employer successfully rebutted the presumption that claimant has clinical pneumoconiosis, he found that the opinions of Drs. Jarboe and Habre are based on beliefs that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science underlying the current regulations, as set forth in the preamble. Decision and Order at 22-28. First, the administrative law judge found that Dr. Jarboe's conclusion, that claimant's condition is not compatible with a coal dust-induced lung disease, but is due primarily to smoking, relied in part on the supposition that coal dust exposure causes a parallel or symmetrical reduction in FEV_1/FVC ratio, while claimant's FEV_1 and FVC values are disproportionately reduced.[11] *Id*. at 22. The administrative law judge concluded that this view is inconsistent with the scientific studies approved by DOL in the preamble, recognizing that "coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV_1/FVC ratio." Decision and Order at 22-23; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000). Further, the administrative law judge considered Dr. Jarboe's position to be inconsistent with DOL's view that coal dust exposure and smoking "work in combination and pose an additive risk of significant lung disease." Decision and Order at 23; *see* 20 C.F.R. §718.201(a)(2); *Obush*, 24 BLR at 1-117; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-292 n.7 (7th Cir. 2001). Additionally, Dr. Jarboe's reliance on negative x-ray evidence to rule out coal dust exposure as a cause of claimant's emphysema[12] was deemed "problematic," as it contravenes DOL's

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reaction of the lung 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).

[11] Dr. Jarboe stated that the claimant's testing shows a "relative preservation of the forced vital capacity compared to the FEV_1. The inhalation of coal mine dust tends to cause a parallel reduction of FVC and FEV_1. A disproportionate reduction of FEV_1 compared to FVC is the hallmark of the functional abnormality seen in cigarette smoking and/or asthma and not coal dust inhalation." *See* Employer's Exhibits 1 at 4-5, 2 at 5-6, 3 at 21-22; *see also* Employer's Exhibits 16 at 6, 20 at 3-4.

[12] Dr. Jarboe stated that when miners develop pulmonary emphysema, they do so "in proportion to the degree of dust deposition and the associated fibrosis . . . there is evidence of some dust retention in the lungs, that is, there is a demonstrable fibrotic reaction to dust." He continued: "Neither [claimant's] chest radiographs nor especially his CT scan show any evidence of a fibrotic reaction to coal dust. Based on this observation, I feel that it is reasonable to conclude that the cigarette smoking has been the

recognition that coal dust-related emphysema may develop independently of clinical pneumoconiosis. Decision and Order at 24, 29-30; Employer's Exhibits 1 at 5, 2 at 6, 20 at 4; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Obush*, 24 BLR at 1-125-26.[13] The administrative law judge also found that Dr. Jarboe's opinion, that claimant's reduced diffusing capacity is typical of emphysema but is not consistent with impairment due to coal dust, because pneumoconiosis causes only a "mild reduction of diffusion or none at all," was not persuasive as a basis for ruling out coal dust exposure as a cause of claimant's obstructive impairment. The administrative law judge had already found that Dr. Jarboe's reason for excluding coal dust exposure as a cause of claimant's emphysema was inconsistent with the preamble. He further noted that Dr. Jarboe failed to explain why the fact that all of claimant's reduced diffusing capacity could not be attributed to coal dust exposure necessarily ruled out that exposure as a contributing cause of impairment. Decision and Order at 25-26; Employer's Exhibits 1 at 5, 3 at 23-24, 20 at 4; *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Summers*, 272 F.3d at 483 n.7; 22 BLR at 2-281 n.7. Finally, while Dr. Jarboe opined that the reversibility shown on claimant's pulmonary function testing was inconsistent with pneumoconiosis, the administrative law judge found that Dr. Jarboe failed to adequately explain why partial reversibility necessarily ruled out coal dust exposure as a cause of the fixed, irreversible component of claimant's disabling obstructive impairment, further undercutting the reliability of his opinion. Decision and Order at 25, 27; Employer's Exhibit 1 at 5-6, 2 at 6; *see Barrett*, 478 F.3d at 350, 23 BLR at 2-472; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-495 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Considering the foregoing, the administrative law judge permissibly concluded that Dr. Jarboe's opinion regarding the cause of claimant's emphysema and his disabling obstructive impairment was insufficient to affirmatively establish the absence of legal pneumoconiosis, or that claimant's impairment did not arise out of, or in connection with, his coal mine employment. *See Morrison*, 644 F.3d at 479-80, 25 BLR

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primary cause of his emphysema with its associated severe airflow obstruction." Decision and Order at 23-24; *see* Employer's Exhibits 1 at 6, 2 at 6, 3 at 24-25, 20 at 3-5.

[13] Although a fibrotic reaction of lung tissue caused by coal dust exposure is generally associated with the existence of clinical pneumoconiosis, x-ray evidence of fibrosis is not required for a finding of legal pneumoconiosis under 20 C.F.R. §718.201(a)(2). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000). Therefore, a medical opinion that imposes a need for x-ray evidence of nodulation or dust retention cannot be reconciled with either the definition of legal pneumoconiosis or the terms of 20 C.F.R. §718.202(a)(4), which provide that "[a] determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, *notwithstanding a negative X-ray*, finds that the miner suffers or suffered from pneumoconiosis *as defined in* [*20 C.F.R.*] *§718.201*." 20 C.F.R. §718.202(a)(4)(emphasis added).

at 2-8-9; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000).

Similarly, the administrative law judge determined that Dr. Habre relied on x-rays consistent with emphysema but negative for clinical pneumoconiosis to support his conclusion, that claimant's disabling chronic obstructive pulmonary disease was attributable to smoking, with minimal, if any, contribution from coal dust exposure. The administrative law judge thus found that Dr. Habre's opinion was inconsistent with DOL's position in the preamble, that coal dust exposure can cause emphysema independent of the presence of clinical pneumoconiosis. Further, the administrative law judge found that Dr. Habre failed to adequately explain why the partial reversibility shown on claimant's pulmonary function studies necessarily ruled out coal dust exposure as a contributing cause of the non-reversible, fixed component of claimant's impairment. In addition, while Dr. Habre indicated that only clinical pneumoconiosis can progress after coal dust exposure ceases,[14] the administrative law judge noted that emphysema is also a progressive, irreversible disease, and that Dr. Habre failed to expressly acknowledge that coal dust exposure can cause or contribute to emphysema, contrary to scientific evidence credited by DOL, and DOL's acknowledgment in the preamble that the effects of coal dust exposure and smoking are additive. Decision and Order at 26-27; Employer's Exhibit 4 at 3-4. The administrative law judge concluded that Dr. Habre's opinion was "infirm in many of the same respects as Dr. Jarboe's [opinion]" and, thus, properly exercised his discretion as fact-finder in deeming the opinion inadequately reasoned and unpersuasive. Decision and Order at 26-28; *see Obush*, 24 BLR at 1-125; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Barrett*, 478 F.3d at 350, 23 BLR at 2-472.

We conclude that the administrative law judge rationally identified factors detracting from the reliability of the medical opinions of Drs. Jarboe and Habre, and explained his findings, in compliance with the APA. As the administrative law judge permissibly discredited all of the medical opinions supportive of employer's burden on rebuttal, and substantial evidence supports his credibility determinations, we affirm his finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4). *See Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9. Consequently, we affirm the administrative law judge's finding that claimant is entitled to benefits.

[14] Dr. Habre stated: "[T]he lack of any x-ray finding of opacity or signs of coal workers' pneumoconiosis makes the possibility of progression post exposure not applicable." Employer's Exhibit 4 at 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge