BRB No. 13-0100 BLA

CLARENCE CLUTTER Claimant-Respondent v. ROBLEE COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/27/2013 DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-5331) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on March 11, 2010.[1]

After crediting claimant with 27.63 years of underground coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2010 claim on the merits. Because the administrative law judge credited claimant with over fifteen years of qualifying coal mine employment, and found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

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[1] Claimant initially filed a claim for benefits on March 14, 2003. Director's Exhibit 1. In a Proposed Decision and Order dated December 14, 2004, the district director found that the evidence established the existence of pneumoconiosis. *Id.* However, the district director found that the evidence did not establish the existence of a totally disabling pulmonary impairment. *Id.* Accordingly, the district director denied benefits. *Id.* Claimant took no further action until he filed the current subsequent claim.

[2] Claimant's most recent coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[3] 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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Employer also alleges that the administrative law judge applied an improper Section 411(c)(4) rebuttal standard. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that the administrative law judge applied an improper rebuttal standard.[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. 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 objects to the application of amended Section 411(c)(4) to this claim brought against a responsible operator, as the language of this section only addresses claims filed against the Secretary of Labor. Employer's arguments are substantially similar to those rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *aff'd on other grounds*, F.3d , 2013 WL 3929081 (4th Cir. July 31, 2013) (No. 11-2418) (Niemeyer, J., concurring), and we reject them for the reasons set forth in that decision. *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).

Employer also 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 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 claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 13; 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the United States Court of Appeals for the Fourth Circuit has stated, explicitly, that in order to meet its rebuttal

[4] Because employer does not challenge the administrative law judge's findings of 27.63 years of qualifying coal mine employment, that the evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309(d), and that claimant invoked the Section 411(c)(4) presumption, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

In evaluating whether employer disproved the existence of legal pneumoconiosis,[5] the administrative law judge considered the opinions of Drs. Zaldivar and Castle. Dr. Zaldivar opined that claimant suffers from chronic obstructive pulmonary disease (COPD) due to smoking and asthma. Employer's Exhibit 2. Dr. Castle opined that claimant suffers from asthma, and from tobacco smoke-induced airway obstruction. Employer's Exhibit 5. Drs. Zaldivar and Castle concluded that claimant does not suffer from any lung disease caused by his coal mine dust exposure. Employer's Exhibits 10 at 27, 11 at 50-51.

The administrative law judge accorded less weight to Dr. Zaldivar's opinion, because he found that the doctor did not adequately explain why claimant's coal mine dust exposure did not contribute, along with his other conditions, to his obstructive pulmonary impairment. Decision and Order at 15. The administrative law judge accorded less weight to Dr. Castle's opinion, because he found that the doctor failed to adequately explain why claimant's coal mine dust exposure did not exacerbate his obstructive pulmonary impairment. *Id.* at 16. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Zaldivar and Castle. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Zaldivar and Castle regarding the cause of claimant's obstructive pulmonary impairment because neither doctor adequately explained how he eliminated claimant's coal dust exposure as a source of claimant's obstructive impairment. *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 15-16. Specifically, the administrative law judge permissibly found that Drs. Zaldivar and Castle did not adequately explain why claimant's 27.63 years of coal dust exposure did not contribute, along with claimant's other conditions, to his obstructive pulmonary 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). As the administrative law judge's basis for discrediting the opinions of Drs. Zaldivar and Castle

[5] "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).

is rational and supported by substantial evidence, this finding is affirmed.[6] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Because the opinions of Drs. Zaldivar and Castle are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding 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.

The administrative law judge also found that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge rationally determined that the same reasons that he provided for discrediting the opinions of Drs. Zaldivar and Castle, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 17. Therefore, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits. 30 U.S.C. §921(c)(4).

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[6] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Zaldivar and Castle, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge