BRB Nos. 13-0563 BLA
and 13-0563 BLA-A

ALBERT F. MINK	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
CATENARY COAL COMPANY	)	
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	DATE ISSUED: 08/22/2014
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Lexington, Kentucky, 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order on Remand (2010-BLA-5821) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a request for modification of a subsequent claim,[1] and is before the Board for the second time.[2]

In his initial decision, the administrative law judge applied amended Section 411(c)(4).[3] 30 U.S.C. §921(c)(4). The administrative law judge credited claimant with at least forty-four years of coal mine employment,[4] twenty-six years of which constituted qualifying coal mine employment. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, based on employer's concessions that claimant has clinical pneumoconiosis and a total respiratory disability. The administrative law judge further found that claimant established a change in conditions and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

Considering the merits of the claim, the administrative law judge found that while the evidence did not establish the existence of legal pneumoconiosis pursuant to 20

[1] Claimant's previous claim, filed on July 28, 1999, was finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed his current claim on May 1, 2006.

[2] The complete procedural history of this case is set forth in the Board's prior decision. *Mink v. Catenary Coal Co.*, BRB No. 12-0017 BLA (Oct. 18, 2012) (unpub.).

[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 underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 3, 4, 11.

C.F.R. §718.202(a)(4), the evidence established the existence of clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203(b). Further, the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore determined that claimant invoked the rebuttable presumption that his total disability is due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). However, in considering rebuttal of the presumption, the administrative law judge determined that the evidence failed to establish that pneumoconiosis is a "substantially contributing cause" of claimant's totally disabling impairment. Accordingly, the administrative law judge denied benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on his unchallenged finding that claimant established at least twenty-six years of qualifying coal mine employment and employer's concession that claimant has a total respiratory disability.[5] *Mink v. Catenary Coal Co.*, BRB No. 12-0017 BLA (Oct. 18, 2012) (unpub.). Regarding the administrative law judge's rebuttal findings, based on the administrative law judge's determination, and employer's concession, that the evidence established the existence of clinical pneumoconiosis, the Board held that rebuttal of the amended Section 411(c)(4) presumption by showing the absence of pneumoconiosis is precluded as a matter of law. The Board further held, however, that the administrative law judge applied an incorrect burden of persuasion under amended Section 411(c)(4) with regard to the issue of disability causation, in requiring clamant to establish that his total disability is due to pneumoconiosis, rather than requiring employer to affirmatively rule out any connection between claimant's disabling respiratory impairment and his pneumoconiosis. Thus, the Board vacated the administrative law judge's finding that rebuttal of the amended Section 411(c)(4) presumption was established on this basis, and remanded the case for further consideration of the evidence.

On remand, the administrative law judge found that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

[5] The Board further affirmed the administrative law judge's unchallenged findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and established a change in conditions and a mistake in a determination of fact at 20 C.F.R. §725.310. *Mink v. Catenary Coal Co.*, BRB No. 12-0017 BLA (Oct. 18, 2012) (unpub.).

On appeal, employer asserts that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Employer further asserts that the administrative law judge applied an improper rebuttal standard, and erred in his evaluation of the medical opinion evidence, relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. Claimant also filed a cross-appeal, contending that, if the Board remands this case, it must instruct the administrative law judge to reconsider the degree to which clinical pneumoconiosis contributed to claimant's disability. In its responses to claimant's cross-appeal and response brief, employer urges the Board to reject claimant's arguments on cross-appeal, and reiterates its contentions on appeal. The Director, Office of Workers' Compensation Programs, has filed a limited combined response to employer's appeal and claimant's cross-appeal, arguing that the administrative law judge properly applied Section 411(c)(4) to this case.

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).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his 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). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either clinical or legal pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), or by establishing 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). The administrative law judge found that employer failed to establish rebuttal by either method.

[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).

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's Brief at 16-22; Employer's Reply Brief at 12-21. Employer's contention is substantially similar to the one that 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 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision.[7]

Employer also asserts, with respect to the first method of rebuttal, that the administrative law judge applied an improper standard by requiring employer to rule out the existence of legal pneumoconiosis. Employer's Brief at 30-31. However, as the Board noted in the prior appeal, because employer conceded in this case that the evidence establishes the existence of clinical pneumoconiosis, rebuttal of the Section 411(c)(4) presumption by showing the absence of pneumoconiosis is precluded as a matter of law. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Mink v. Catenary Coal Co.*, BRB No. 12-0017 BLA (Oct. 18, 2012) (unpub.), slip op. at 2. Therefore, any error by the administrative law judge in stating that employer had "not ruled out legal pneumoconiosis" is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986); Decision and Order on Remand at 4.

With respect to the second method of rebuttal, employer again asserts that the administrative law judge applied an incorrect standard by requiring employer to rule out coal mine dust exposure as a cause of claimant's totally disabling respiratory impairment. Contrary to employer's argument, because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge correctly shifted the burden of proof to employer to rebut the presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 2, 5. Moreover, the United States Court of Appeals for the Fourth Circuit has explicitly stated that, in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by dust exposure in coal mine employment. *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.

Employer also asserts, with respect to the second method of rebuttal, that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Castle, in evaluating whether employer established that no part of claimant's disabling respiratory

[7] The regulations also make clear that the rebuttal provisions apply to responsible operators. 20 C.F.R. §718.305(d)(1).

impairment was caused by pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1); *Barber*, 43 F.3d at 901, 19 BLR at 2-67; Employer's Brief at 9-16.

With respect to Dr. Zaldivar's opinion, employer specifically contends that the administrative law judge should not have reconsidered his prior finding that Dr. Zaldivar's opinion as to the cause of claimant's disabling impairment was credible. Employer further contends that the administrative law judge did not provide an adequate explanation for discrediting Dr. Zaldivar's opinion on remand.

To the extent that employer contends that the administrative law judge erred in reconsidering whether Dr. Zaldivar's disability causation opinion was reasoned and documented, we reject this contention. When the Board vacates an administrative law judge's decision, the effect is to return the parties to the status quo ante, with all of the rights, benefits and/or obligations that they had prior to the issuance of the decision. *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985). The administrative law judge was permitted, therefore, to revisit the medical opinion evidence on the issue of disability causation and render new findings. *Id*.

Nor is there merit to employer's contention that the administrative law judge erred in discrediting Dr. Zaldivar's opinion, that claimant's disabling emphysema is due entirely to smoking. In his most recent report, Dr. Zaldivar opined that "[t]here is evidence in this case to justify a diagnosis of radiographic coal workers' pneumoconiosis because of the positive [computerized tomography] scan findings" but that ["t]here is no evidence in this case to justify a diagnosis of legal or clinical coal workers' pneumoconiosis." Employer's Exhibit 6 at 5. He diagnosed claimant with emphysema and explained that "[t]he reason that there is not enough evidence is that there is plenty of good evidence regarding [claimant's] continued smoking habit to fully justify the emphysematous disease from which [claimant] suffers." Employer's Exhibit 6 at 5-6. Dr. Zaldivar therefore attributed claimant's pulmonary impairment and emphysema to smoking. Director's Exhibit 49 at 4; Employer's Exhibit 6 at 6. In his deposition, Dr. Zaldivar testified that he could exclude coal mine dust as a cause of claimant's impairment because coal mine dust and smoking do not affect the lungs in the same way, Employer's Exhibit 12 at 26-28, because "[t]he biochemistry is different." Employer's Exhibit 12 at 45. Contrary to employer's argument, the administrative law judge permissibly discredited Dr. Zaldivar's opinion, in part, because he found the physician's reasoning to be inconsistent with the studies that recognize that coal mine dust-induced

[8] The administrative law judge also considered, and discredited, the opinion of Dr. Hippensteel, that claimant's pulmonary impairment is not due to pneumoconiosis. Decision and Order on Remand at 4. As employer raises no challenge to this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and smoke-induced emphysema occur through similar mechanisms, that coal mine dust exposure is associated with clinically significant obstructive lung disease, and that coal miners who smoke have an additive risk of developing significant obstruction. *See* 65 Fed. Reg. 79,920, 79,940, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264 (4th Cir. 2013)(Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); Decision and Order on Remand at 3-4. Moreover, the fact that Dr. Zaldivar cited recent literature, addressing the various effects of smoking on the lungs, did not require the administrative law judge to conclude that advancements in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs, that was endorsed by the Department of Labor in the preamble. *See Cochran*, 718 F.3d at 324, 25 BLR at 2-265 (observing that neither of the employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the Preamble"). We therefore affirm the administrative law judge's finding that Dr. Zaldivar's opinion is not sufficiently credible to rule out a connection between claimant's disabling respiratory impairment and his coal mine employment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Employer also contends that the administrative law judge erred in according little weight to Dr. Castle's opinion, that claimant's disabling pulmonary impairment is due to cigarette smoking, and is unrelated to pneumoconiosis or coal mine dust exposure, because the physician did not diagnose clinical pneumoconiosis. Employer's Brief at 15. Employer asserts that because the administrative law judge stated that the evidence ruled out clinical pneumoconiosis as a cause of claimant's disabling impairment, whether Dr. Castle diagnosed clinical pneumoconiosis is not relevant to the credibility of his disability causation opinion. Employer's Brief at 15-16. Contrary to employer's argument, the administrative law judge permissibly discredited Dr. Castle's opinion because he did not review the most recent 2009 computerized tomography scan diagnosing clinical pneumoconiosis, and because his conclusion, that claimant's disabling impairment was also due, in part, to obesity and sleep apnea, was not supported by the weight of the evidence of record. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984); Decision and Order on Remand at 4, referencing 2011 Decision and Order at 30.

Moreover, we reject employer's contention that clinical pneumoconiosis was ruled out as a cause of claimant's disability. The administrative law judge did not identify any evidence that affirmatively establishes that no part of claimant's disabling respiratory impairment is due to clinical pneumoconiosis. Further, while the administrative law judge stated that "clinical pneumoconiosis ha[d] been ruled out as a cause of any

significance," employer is required to show that pneumoconiosis played "no part" in claimant's disability. 20 C.F.R. §718.305(d)(1)(ii). Finally, as claimant accurately states, the administrative law judge ultimately concluded that "employer [did] not establish[] [that] the miner's total respiratory disability is not due to clinical or legal pneumoconiosis." Decision and Order on Remand at 5.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Castle, the only opinions supportive of a finding that no part of claimant's disabling impairment is due to pneumoconiosis, 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, coal mine employment. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43. Consequently, we affirm the administrative law judge's finding that employer did not satisfy its burden to establish rebuttal. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

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's award of benefits is affirmed. Consequently, we need not address claimant's contentions of error raised in his cross-appeal challenging the administrative law judge's findings regarding the contribution by clinical pneumoconiosis to claimant's disabling respiratory impairment. *See Larioni*, 6 BLR at 1278.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge