BRB No. 13-0580 BLA

WALTER R. JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SQUIRES CREEK COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 08/27/2014
	)	
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 on Remand Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Edensburg, Pennsylvania, for claimant.

Ashley M. Harmon and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jonathan 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 the Decision and Order on Remand Awarding Benefits (2009-BLA-5398) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim filed on May 14, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the second time. In the last appeal, the Board rejected employer's evidentiary challenges and affirmed, as unchallenged on appeal, Administrative Law Judge Michael P. Lesniak's findings that claimant had at least fifteen years of underground coal mine employment; that new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309; that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4);[1] and that employer failed to establish rebuttal of the presumption with affirmative proof that claimant does not have clinical pneumoconiosis. However, the Board vacated Judge Lesniak's determination that rebuttal was not established with proof that coal dust exposure was not a contributing cause of claimant's totally disabling respiratory impairment. While the Board rejected employer's challenges to Judge Lesniak's weighing of Dr. Perper's opinion, the Board agreed with employer's argument that Judge Lesniak failed to adequately consider the biopsy report of Dr. Oesterling and the medical reports of Drs. Spagnolo and Bellotte. Accordingly, the Board affirmed in part, and vacated in part, Judge Lesniak's Decision and Order, and remanded the case for further consideration. *Johnson v. Squires Creek Coal Co.*, BRB No. 12-0370 BLA (Mar. 28, 2013) (unpub.).

On remand, due to the retirement of Judge Lesniak, the case was reassigned to Administrative Law Judge Richard A. Morgan (the administrative law judge), who found that, although the weight of the evidence established that claimant's clinical

[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, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary 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(a), 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 did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

pneumoconiosis was too minimal to cause an impairment, employer failed to rebut the presumption of legal pneumoconiosis and to rule out a causal connection between claimant's disability and his coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, arguing that he applied an incorrect rebuttal standard and erred in weighing the evidence relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4). Employer has filed a combined reply brief in support of 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.[2] 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).

Initially, we address employer's contention that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4), contrary to the unambiguous statutory language and the United States Supreme Court's decision in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer's Brief at 30-37. Recognizing that this argument has previously been rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), employer asserts that the United States Court of Appeals for the Fourth Circuit did not resolve this issue. Further, employer argues that the recently promulgated regulation implementing amended Section 411(c)(4), specifically 20 C.F.R. §718.305(d), conflicts with the holding in *Usery* and is invalid. Employer's Brief at 34-37. Employer's arguments lack merit. The Fourth Circuit court has not disturbed the Board's holding in *Owens*, *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013), and employer has not provided a compelling reason for the Board to revisit this issue. Additionally, employer has not shown that it was, in fact, restricted in the evidence it offered in rebuttal. Lastly, we agree with the Director's position that 20 C.F.R. §718.305(d), as amended, does not conflict with the holding in *Usery*. Consequently, we reject employer's arguments to the contrary.

[2] 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, 1-202 (1989) (en banc).

Employer next contends that the administrative law judge erred in finding that employer failed to prove that claimant does not have legal pneumoconiosis and that his disabling impairment did not arise out of, or in connection with, coal mine employment. Specifically, employer argues that the administrative law judge provided invalid reasons for discrediting the opinions of Drs. Oesterling, Spagnolo and Bellotte.[3] Employer's Brief at 7-26. We disagree.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge determined that a preponderance of the pathological evidence established the presence of emphysema, as he found that the best-qualified pathologists,[4] Drs. Perper and Crouch, diagnosed this condition. Decision and Order on Remand at 5, 8; *see Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As Dr. Oesterling did not identify areas of emphysema in his pathology report, nor did he address the issue of legal pneumoconiosis, the administrative law judge properly found that his opinion was insufficient to rebut the presumed fact of legal pneumoconiosis. Decision and Order on Remand at 6, 8. Similarly, while Dr. Spagnolo opined that none of claimant's "symptoms, complaints, or

[3] Employer additionally argues that the administrative law judge "failed to acknowledge and consider Dr. Crouch's opinion regarding disability causation, resulting in an incomplete weighing of the medical evidence." Employer's Brief at 19. We note that a reassessment of Dr. Crouch's opinion was outside the scope of the Board's remand instructions. Further, contrary to employer's argument, the administrative law judge credited Dr. Crouch's opinion that the severity of claimant's clinical pneumoconiosis was too slight to have caused impairment. Decision and Order on Remand at 5; Employer's Exhibit 12. However, as Dr. Crouch identified areas of focal emphysema in her pathological findings, but failed to address the cause of the emphysema or the severity of that condition, the administrative law judge permissibly found that her opinion was insufficient to establish rebuttal of the amended Section 411(c)(4) presumption. Decision and Order on Remand at 6; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2010); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

[4] The administrative law judge determined that Drs. Perper and Crouch possessed superior pathological qualifications, based upon their professorships, work experience and publications in addition to their Board-certifications in anatomical and forensic pathology for Dr. Perper and in anatomic pathology for Dr. Crouch. Decision and Order on Remand at 5; Claimant's Exhibit 1; Employer's Exhibit 14.

medical conditions is related to his coal dust exposure," the administrative law judge permissibly found that the opinion was insufficient to rebut the presumed fact of legal pneumoconiosis, as Dr. Spagnolo did not address the cause of claimant's emphysema, and his statement, that claimant's "respiratory condition appears to be a combination of smoker's bronchiolitis and diastolic heart failure," was equivocal. Decision and Order on Remand at 7 n.16, 8; Employer's Exhibit 18; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

In evaluating Dr. Bellotte's "somewhat equivocal" statement, that he "attributed [claimant's] chronic obstructive pulmonary disease with emphysema and chronic bronchitis to his over 100 pack-year smoking history. . . . [because smoking was] much more likely to be the etiology," Employer's Exhibit 20 at 3, the administrative law judge rationally found that various factors detracted from its probative value. Decision and Order on Remand at 7; *see Justice*, 11 BLR at 1-94. The administrative law judge noted that the Board previously agreed that, to the extent that Dr. Bellotte relied on the relative harmfulness of smoking as compared to coal dust exposure,[5] his opinion contravened the scientific view cited by the Department of Labor in the preamble to the amended regulations, that medical literature "support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." 65 Fed. Reg. 79,943 (Dec. 21, 2000); Decision and Order on Remand at 7, *citing Johnson*, slip op. at 9 n.9; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117 (2009). Additionally, the administrative law judge determined that Dr. Bellotte's observation, that "p]atients who develop lung cancer have high incidence association with chronic obstructive pulmonary disease with emphysema and chronic bronchitis related to their history of tobacco abuse," Employer's Exhibit 20 at 6, was based on generalities, rather than findings specific to claimant. Decision and Order on Remand at 7; *see Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); *accord Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). In view of the foregoing, the administrative law judge acted within his discretion in finding that Dr. Bellotte's opinion was insufficient to affirmatively rebut the presumed fact that claimant has legal pneumoconiosis. Decision and Order on Remand at 7; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2010).

On the issue of disability causation, the administrative law judge followed the Board's remand instruction to address Dr. Oesterling's statement that any respiratory impairment "is not attributable to coal dust but much to a failing left ventricle and as well

[5] Dr. Bellotte attributed claimant's obstructive impairment to smoking because "in the federal registry [sic] it states that cigarette smoking is [three] times more harmful than being exposed to coal dust." Employer's Exhibit 20 at 2.

the areas of infiltrating tumor," Employer's Exhibit 10 at 6. The administrative law judge credited Dr. Oesterling's opinion, that claimant's moderately severe clinical pneumoconiosis "does not appear sufficient to alter structure to a point that would result in respiratory symptomatology," *id.*, but permissibly found the opinion insufficient to rebut the presumed fact that claimant's disability was caused by legal pneumoconiosis because the physician failed to acknowledge the presence of claimant's emphysema. Decision and Order on Remand at 8. Similarly, the administrative law judge credited the opinions of Drs. Spagnolo and Bellotte, that claimant's disability was unrelated to clinical pneumoconiosis, but properly found that neither opinion was sufficient to rebut the presumed fact of disability causation because each was premised on the belief that claimant does not have legal pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order on Remand at 9-10; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 2-306 (4th Cir. 1994); *see also Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013).

As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have occupational 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); 20 C.F.R. §718.305(d); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Thus, we affirm the administrative law judge's award of benefits.

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