BRB No. 14-0120 BLA

TERRY L. SHIPLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	DATE ISSUED: 08/13/2014
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Jeffrey R. Soukup (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:

Claimant appeals the Decision and Order (2012-BLA-6048) of Administrative Law Judge Drew A. Swank denying benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on August 4, 2011.

The administrative law judge credited claimant with 40.22 years of coal mine employment,[1] and the parties stipulated that claimant suffers from a totally disabling pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] However, the administrative law judge determined that the evidence failed to establish that pneumoconiosis was a "substantially contributing cause" of claimant's totally disabling impairment, and therefore found that employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge used the wrong legal standard in determining that the Section 411(c)(4) presumption was rebutted. Claimant also contends that the administrative law judge erred in his weighing of the medical opinion evidence. Employer/carrier (employer) responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, arguing that the administrative law judge used the wrong rebuttal standard, and urging the Board to remand the case for application of the proper standard.

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).

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[1] Because claimant's most recent coal mine employment occurred in West Virginia, 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); Decision and Order at 5; Hearing Transcript at 21.

[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 that a miner is totally disabled due to pneumoconiosis in cases where the miner has fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012).

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,[3] 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 did not consider whether employer could disprove the existence of pneumoconiosis,[4] but determined that the medical opinion evidence established that claimant's impairment did not arise from his coal mine employment, and that employer had therefore rebutted the Section 411(c)(4) presumption. Decision and Order at 14-19. Claimant and the Director contend that the administrative law judge erred by using the wrong rebuttal standard. Claimant's Brief at 2-6; Director's Brief at 2-3. We agree.

In considering the cause of claimant's impairment, the administrative law judge considered the medical opinions of Drs. Bellotte, Basheda, Jaworski, Schaaf, and Begley. The administrative law judge found the opinions of Drs. Bellotte and Basheda "extremely persuasive," and noted that "[b]oth demonstrate how the various diagnostic tests indicate that [c]laimant's pulmonary/respiratory impairments are not caused by coal mine dust, but [are] rather attributable to his smoking and asthma." Decision and Order at 19. Conversely, the administrative law judge discounted the opinions of Drs. Jaworski, Schaaf, and Begley, that claimant's coal mine employment contributed to his impairment. Decision and Order at 15-19. The administrative law judge concluded:

[3] "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).

[4] Earlier in his decision, the administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis by x-ray or biopsy evidence, pursuant to 20 C.F.R. §718.202(a)(1), (2). Decision and Order at 7-10. The administrative law judge made no findings regarding the existence of legal pneumoconiosis.

> The question in this case therefore becomes whether [e]mployer's experts' medical opinions overcome the presumption as established by 20 C.F.R. §718.305 that the miner's coal workers' pneumoconiosis is a "substantially contributing cause" to the miner's pulmonary or respiratory disability. Based upon the thoroughness of Drs. Bellotte's and Basheda's reports, with their detailed explanations linking diagnostic testing results to support their conclusions, [I find] that the presumption established by 20 C.F.R. §718.305 is rebutted, and [c]laimant has not proven that his . . . coal workers' pneumoconiosis was a "substantially contributing cause" of the miner's total disability.

Decision and Order at 19.

As an initial matter, we agree with claimant and the Director that the administrative law judge erred to the extent that he placed the burden of proving that claimant's disability was due to pneumoconiosis on claimant. Once the administrative law judge found that claimant had invoked the Section 411(c)(4) presumption, claimant was entitled to a presumption that his disabling impairment is due to pneumoconiosis, and employer bore the burden of rebutting it. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d); *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *see also Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345 (10th Cir. 2014); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069 (6th Cir. 2013).

We also agree with claimant and the Director that the administrative law judge applied an incorrect rebuttal standard. The administrative law judge considered whether pneumoconiosis is a "substantially contributing cause" of claimant's totally disabling impairment. Decision and Order at 19. As the administrative law judge noted, a miner seeking to affirmatively establish total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), must show that pneumoconiosis is a "substantially contributing cause" of his or her impairment. Decision and Order at 12. The regulations, however, impose a different standard on an employer seeking to rebut the presumption of disability causation, requiring the employer to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis . . . ." 20 C.F.R. §718.305(d)(1)(ii). In revising the regulations to implement amended Section 411(c)(4), the Department of Labor made clear that the "no part" standard of 20 C.F.R. §718.305(d)(1)(ii) is different, and more favorable to claimants, than the "substantially contributing cause" standard for disability causation at 20 C.F.R. §718.204(c). 78 Fed. Reg. 59,102, 59,106-07 (Sept. 25, 2013); *see also Rose*, 614 F.2d at 939, 2 BLR at 2-43-44 (requiring employer to "rule out the possibility" of a connection between miner's disabling impairment and his pneumoconiosis or coal mine employment). Therefore, we conclude that the administrative law judge applied an incorrect rebuttal standard, and we vacate his finding that employer rebutted the Section 411(c)(4) presumption.

On remand, the administrative law judge must consider whether the opinions of Drs. Bellotte, Basheda, Jaworski, Schaaf, and Begley are reasoned and documented, and affirmatively establish that claimant does not have either clinical or legal pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 80, 25 BLR 2-1, 2-9 (6th Cir. 2011). Because employer bears the burden of proof on rebuttal, the administrative law judge must determine whether the opinions of Drs. Bellotte and Basheda[5] are credible, regardless of the weight that he assigns to the opinions of Drs. Jaworski, Schaaf, and Begley. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Morrison*, 644 F.3d at 80, 25 BLR at 2-9. The administrative law judge must evaluate the credibility of the medical opinions in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

[5] Claimant contends that the administrative law judge erred in finding the opinions of Drs. Bellotte and Basheda to be credible. Claimant's Brief at 6-9. Claimant argues that both doctors based their conclusions, excluding coal mine dust as a cause of claimant's impairment, on their view that an obstructive impairment due to coal mine dust typically produces symmetrical decreases in FEV1 and FVC, and that an obstructive impairment due to smoking produces a greater decrease in FEV1 and a reduced FEV1/FVC ratio. *Id*.; Employer's Exhibit 14 at 14-17; Employer's Exhibit 9 at 20-25. Claimant therefore contends that the opinions of Drs. Bellotte and Basheda are contrary to the science accepted by the Deparment of Labor, which recognizes that coal mine dust-induced obstructive disease can be shown by a reduced FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *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). We leave these arguments for the administrative law judge to consider on remand.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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