BRB No. 14-0142 BLA

KEITH A. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINE RIDGE COAL COMPANY	)	DATE ISSUED: 08/26/2014
	)	
Employer-Petitioner	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (The Law Office of Roger D. Forman, L.C.), Buckeye, West Virginia, for claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5962) of Administrative Law Judge Richard A. Morgan, rendered on a claim filed on January 13, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant worked for at least twenty-four years in coal mine employment, with more than fifteen years in underground coal mines, and determined that claimant has a totally disabling respiratory impairment. Based on these determinations, and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, pursuant to amended Section

411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to rebut that presumption through the medical opinions of Drs. Zaldivar and Rosenberg. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge did not rationally weigh Dr. Zaldivar's opinion.[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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.[3] 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).

When claimant invokes the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), employer may rebut that presumption by (i) establishing both that the miner does not, or did not have, clinical and legal pneumoconiosis;[4] or (ii)

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[1] Under amended Section 411(c)(4), a miner is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the amended Section 411(c)(4) presumption and that Dr. Rosenberg's opinion is insufficient to rebut that presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] As claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] The regulation at 20 C.F.R. §718.201(a) provides:

> "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis,

establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis[.]" 20 C.F.R. §718.305(d). On the issue of clinical pneumoconiosis, the administrative law judge noted that all of the x-rays of record are negative. Decision and Order at 16. In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge weighed the opinions of Drs. Zaldivar and Rosenberg and found that they did not credibly explain their bases for excluding coal dust exposure as a cause of claimant's disabling obstructive respiratory condition in the form of asthma and emphysema. *Id*. at 19-21. Thus, the administrative law judge determined that employer failed to satisfy its burden to affirmatively establish that claimant does not have legal pneumoconiosis. *Id*. Additionally, because neither Dr. Zaldivar, nor Dr. Rosenberg, diagnosed legal pneumoconiosis, the administrative law judge determined that their opinions were insufficient to establish that no part of claimant's respiratory disability was due to pneumoconiosis. *Id*. at 28-29. Thus, the administrative law judge concluded that employer failed to rebut the amended Section 411(c)(4) presumption. *Id*.

Employer argues that the administrative law judge mischaracterized Dr. Zaldivar's opinion in finding that it is inconsistent with the preamble to the amended regulations. Specifically, employer contends that the administrative law judge erred in stating that Dr. Zaldivar "believe[s] coal dust does not cause asthma." Decision and Order at 19; *see* Employer's Brief in Support of Petition for Review at 5-8. Employer's argument has no merit.

Dr. Zaldivar opined that claimant's obstructive impairment is "entirely the result of his past smoking habit, which has caused a combination of emphysema in an individual who has a tendency to have asthma[.]" Director's Exhibit 26. He referenced studies indicating that "[s]moking is known to produce both asthma and emphysema[.]" *Id*. Throughout his deposition, Dr. Zaldivar was asked how he was able to exclude coal dust exposure as a cause of claimant's obstructive impairment. Employer's Exhibit 3. Dr. Zaldivar cited the fact that claimant has been "wheezing for six or seven years," and explained that wheezing is "not a manifestation of coal mining. It is a manifestation of

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> anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of 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. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

asthma and bronchospasm." *Id*. at 45. Therefore, we reject employer's assertion that the administrative law judge mischaracterized Dr. Zaldivar's opinion.

Moreover, we see no error in the administrative law judge's determination that Dr. Zaldivar's reasoning is inconsistent with the preamble to the amended regulations. The administrative law judge noted correctly that the Department of Labor (DOL) has recognized that the "term 'chronic obstructive pulmonary disease' includes three disease processes characterized by airways dysfunction: chronic bronchitis, emphysema, and asthma," and that "[c]linical studies, pathological findings, and scientific evidence regarding cellular mechanisms of lung injury link, in a substantial way, coal mine dust exposure to pulmonary impairment and chronic obstructive lung disease." Decision and Order at 19 n. 30, *quoting* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). The DOL has stated also that "the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease." 65 Fed. Reg. at 79,994. Therefore, we affirm the administrative law judge's rational finding that Dr. Zaldivar's explanation for excluding coal dust exposure is not persuasive. *See 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, 315-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *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, 21 BLR 2-269 (4th Cir. 1997).

Furthermore, the administrative law judge noted correctly that Dr. Zaldivar focused on "Dr. Rasmussen's 2011 [pulmonary function study] showing a partial reversibility to exclude a dust etiology, [but] gloss[ed] over Dr. Zaldivar's more recent (2012) [pulmonary function study] showing no reversibility." Decision and Order at 20. The administrative law judge rationally found that Dr. Zaldivar did not address the significance of his own testing, which indicates that claimant has an irreversible respiratory impairment. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. May 11, 2004) (unpub.); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); Decision and Order at 20. We therefore affirm the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

Lastly, we reject employer's contention that the administrative law judge erred in finding that it did not rebut the presumed fact of disability causation. The administrative law judge properly found that Dr. Zaldivar's opinion is not credible to establish that claimant's disability did not arise out of, or in connection with, his coal mine

employment, as Dr. Zaldivar did not diagnose legal pneumoconiosis.[5] Decision and Order at 28-29; *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); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Looney*, 678 F.3d at 305, 25 BLR at 2-115. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to prove that claimant's respiratory disability did not arise out of, or in connection with, his coal mine employment. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[5] Employer argues that Dr. Zaldivar's opinion should be credited on the issue of disability causation because he identified symptoms consistent with legal pneumoconiosis, although he did not diagnose the disease. We disagree. Dr. Zaldivar explained that claimant's symptoms were entirely related to smoking and asthma and specifically explained that coal dust exposure does not cause wheezing. *See* Director's Exhibit 26; Employer's Exhibit 3.

Accordingly, the administrative law judge's Decision and Order 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