BRB No. 14-0193 BLA

CORTLAND J. MORGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BARNES & TUCKER COMPANY	)	DATE ISSUED: 08/20/2014
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

James C. Munro, II (Spence, Custer, Saylor, Wolfe, & Rose), Johnstown, Pennsylvania, for employer.

Emily Goldberg-Kraft (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 appeals the Decision and Order Awarding Benefits (2012-BLA-6164) of Administrative Law Judge Drew A. Swank rendered 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the parties' stipulation that claimant worked for 21.75 years in coal mine employment. The administrative law judge found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and was entitled to invocation of the 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 establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the opinions of Drs. Pickerill and Fino were insufficient to establish rebuttal of the presumption under amended Section 411(c)(4). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's rebuttal findings.[2]

[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. 30 U.S.C. §921(c)(4).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established 21.75 years of coal mine employment, the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), total respiratory disability at 20 C.F.R. §718.204(b), and invocation of 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). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 7-13. Likewise, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), with proof that claimant does not have pneumoconiosis, as unchallenged on appeal. *See Skrack*, 7 BLR at 711; Decision and Order at 15.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Pickerill and Fino were insufficient to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant's totally disabling respiratory impairment is unrelated to coal dust exposure. Specifically, employer maintains that, despite the regulatory provision that the presumption "must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin," 20 C.F.R. §718.305(d)(3), the Board has held that, while an employer is required to rule out a causal connection between coal dust exposure and a claimant's disability, employer need not establish the specific etiology of a claimant's totally disabling respiratory impairment. Employer's Brief at 4-5, citing *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987), and *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Employer asserts that, because Drs. Pickerill and Fino unequivocally attributed claimant's disability to idiopathic pulmonary fibrosis that is not known to be caused by coal dust, their opinions are sufficient to establish rebuttal. Employer's Brief at 2-8.

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. After reviewing the underlying bases for the physicians' conclusions, the administrative law judge acted within his discretion in finding that the medical opinions supportive of employer's burden were insufficient to establish that no part of claimant's disabling respiratory impairment was caused by pneumoconiosis. Decision and Order at 15-18. In so finding, the administrative law judge determined that Dr. Pickerill diagnosed totally disabling idiopathic pulmonary fibrosis, based upon the appearance of the x-ray and CT scan abnormalities, and concluded that this condition "very likely . . . is not due to previous coal dust exposure." Decision and Order at 15; Director's Exhibit 13 at 6. Dr. Pickerill admitted that it can be difficult to differentiate between idiopathic pulmonary fibrosis and coal workers' pneumoconiosis on x-rays, but stated that a lung biopsy would confirm the diagnosis of idiopathic pulmonary fibrosis. Decision and Order at 15-16; Director's Exhibit 13 at 6;

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

Employer's Exhibit 8 at 14. Dr. Pickerill further indicated that, although coal dust exposure can cause pulmonary fibrosis, it was "probably not" a contributing factor to claimant's disabling idiopathic pulmonary fibrosis. Decision and Order at 16; Employer's Exhibit 8 at 21. In view of the foregoing, the administrative law judge rationally concluded that Dr. Pickerill's opinion was too equivocal to establish rebuttal. Decision and Order at 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).

Similarly, the administrative law judge determined that Dr. Fino diagnosed disabling idiopathic pulmonary fibrosis which has not been shown to be associated with coal dust exposure, based upon the appearance of the abnormalities on claimant's x-ray and pulmonary function studies. Decision and Order at 16-17; Director's Exhibit 12; Employer's Exhibit 7 at 10-13. Dr. Fino stated that "there may be an association" between coal dust exposure and idiopathic pulmonary fibrosis if there is evidence of pneumoconiosis on x-ray or if a biopsy were present and it showed pigmentation in the pulmonary fibrosis. Decision and Order at 16; Director's Exhibit 12 at 13; Employer's Exhibit 7 at 21. However, in this case, Dr. Fino found no radiographic evidence of pneumoconiosis, and noted that there was no pathological evidence. *Id*. Dr. Fino also admitted that he had seen the abnormalities shown on claimant's pulmonary function studies in individuals with x-ray evidence of simple or complicated pneumoconiosis, so "[claimant's] restrictive defect with a reduction in diffusion and very bad blood gases could be due to coal mine dust . . .[but t]he key is that we have a chest x-ray that absolutely is not what one would expect in a coal dust related condition." Decision and Order at 17; Employer's Exhibit 7 at 14. As Dr. Fino, like Dr. Pickerill, opined that claimant's disabling pulmonary impairment was caused by a disease of unknown origin, and both physicians indicated that a lung biopsy would confirm whether or not coal dust exposure was a contributing cause of claimant's condition, the administrative law judge acted within his discretion in concluding that neither opinion was definitive, persuasive or sufficient to affirmatively establish rebuttal. Decision and Order at 18; *see* 20 C.F.R. §718.305(d)(3); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

Because substantial evidence supports the administrative law judge's credibility determinations, and the standard he applied on rebuttal is consistent with the statute and regulations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant's 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. Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge