**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0652 BLA

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| GEORGE E. SMITH (deceased) | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| RIDGETOP MINING, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN RESOURCES INSURANCE COMPANY | ) | DATE ISSUED: 08/30/2017 |
| | ) | |
| | ) | |
| 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 of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

H. Brett Stonecipher and Tighe Estes (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (12-BLA-5735) of Administrative Law Judge Peter B. Silvain, Jr. 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 claim filed on January 24, 2011.

Initially, the administrative law judge credited claimant with 21.56 years of coal mine employment.[1] Addressing the merits of entitlement, the administrative law judge found that claimant's 21.56 years of surface coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge also found that the evidence established that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.[2] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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[1] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act 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 coal mine 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) (2012); *see* 20 C.F.R. §718.305.

[3] Claimant died on March 1, 2017, while employer's appeal was pending before the Board. Claimant's widow is pursuing the claim.

[4] Because employer does not challenge the administrative law judge's finding that the evidence established that claimant suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

**Invocation of the Section 411(c)(4) Presumption**

Employer argues that the administrative law judge erred in determining that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. To invoke the presumption, claimant must establish that he had at least fifteen years of employment "in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

In addressing whether claimant's 21.56 years of surface coal mine employment occurred in conditions that were "substantially similar" to those in an underground mine,[5] the administrative law judge summarized claimant's hearing testimony regarding the nature of his surface coal mine employment:

> [T]he Claimant testified that he did not have air conditioning on equipment until he began working for . . . [e]mployer. He described the dust as "completely cover[ing] everything," and that his skin was black from coal dust at the end of the day. Claimant described the dust conditions at D. Mar Coal Company as particularly bad; however, the dust conditions while working for the Employer were "a lot better at that time," as the equipment had air conditioning and an enclosed cab. He explained that the "dust was there," but "not as bad," as "it didn't get inside like a lot of it did." The Claimant described his clothing while working for the Employer as "about half as bad as when we first started on them other jobs." Nevertheless, he testified that he was still exposed to "all kinds" of coal dust that covered his face until it was black. He added that he was exposed to this type of dust

[5] Although employer notes that it stipulated to only fourteen years of coal mine employment, Employer's Brief at 9, employer does not allege any error in regard to the administrative law judge's determination that claimant established 21.56 years of coal mine employment. Decision and Order at 4-8. This finding is, therefore, affirmed. *Skrack*, 6 BLR at 1-711.

> every day while working, and would spit or cough up dust when he went home in the evenings.

Decision and Order at 21 (Hearing Transcript citations omitted).

In this case, the administrative law judge credited claimant's testimony that, even under the best circumstances, he was regularly exposed to the substantial levels of coal dust. Decision and Order at 21. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant's surface coal mine employment took place in conditions substantially similar to those in an underground mine. Decision and Order at 21; *see Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1344, 25 BLR 2-549, 2-566 (10th Cir. 2014). Consequently, we affirm the administrative law judge's finding that claimant established 21.56 years of qualifying coal mine employment.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical 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 [20 C.F.R.] §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] "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). "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).

The administrative law judge found that employer established that claimant does not suffer from clinical pneumoconiosis. Decision and Order at 30. However, employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Westerfield and Broudy that claimant did not suffer from the disease. Director's Exhibit 13; Employer's Exhibits 1, 4, 5. Dr. Westerfield opined that claimant's chronic obstructive pulmonary disease (COPD)/emphysema was due to cigarette smoking. Employer's Exhibit 4 at 29. Although Dr. Westerfield could not eliminate claimant's coal mine dust exposure as a "less significant cause" of his pulmonary impairment, Dr. Westerfield opined that it was not a substantially contributing cause. *Id.* at 29-30. Dr. Broudy opined that claimant suffered from emphysema due to cigarette smoking, not coal mine dust exposure. Employer's Exhibit 5 at 19. The administrative law judge discredited their opinions because he found that the doctors failed to adequately explain how they eliminated claimant's 21.56 years of coal mine dust exposure as a contributor to claimant's disabling pulmonary impairment. Decision and Order at 26-30.

We reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Westerfield and Broudy. The administrative law judge permissibly did not credit their opinions because he found that they failed to adequately explain how they eliminated claimant's coal mine dust exposure as a source of his disabling pulmonary impairment.[7] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 20-21. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i).

[7] The administrative law judge found that Dr. Westerfield did not offer any credible explanation as to why he excluded coal dust as a contributing factor to claimant's pulmonary condition. Decision and Order at 26. The administrative law judge found that Dr. Broudy also failed to offer any credible explanation for why claimant's coal mine dust exposure did not contribute to his emphysema. *Id.* at 28.

[8] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Westerfield and Broudy, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Westerfield and Broudy that claimant's pulmonary impairment was not caused by pneumoconiosis because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 30. We therefore affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked 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.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge