BRB No. 11-0164 BLA

JIMMY MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SILVER EAGLE MINING COMPANY, INCORPORATED	)	DATE ISSUED: 12/01/2011
	)	
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 Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2008-BLA-05556) of Administrative Law Judge Christine L. Kirby, rendered on a subsequent claim filed on April 27, 2007,[1] pursuant to the provisions of the Black Lung Benefits Act, 30

[1] Claimant filed an initial claim for benefits on February 20, 1990, which was denied by Administrative Law Judge Peter McC. Giesey on February 28, 1992, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a claim on November 8, 2004, but later requested that it be

U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). In a Decision and Order dated October 26, 2010, the administrative law judge credited claimant with 15.4 years of underground coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant was entitled to invoke the rebuttable presumption of total disability due to pneumoconiosis, pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found 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 determining the length of claimant's coal mine employment and in not finding that employer established rebuttal of the presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board. Employer has also filed a reply brief, reiterating its arguments.

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

Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30

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withdrawn. Director's Exhibit 2. Claimant took no further action until he filed his current subsequent claim. Director's Exhibit 4.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.SC. §921(c)(4)).

I. LENGTH OF COAL MINE EMPLOYMENT

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

The administrative law judge noted that in a February 28, 1992 Decision and Order, issued with respect to claimant's prior claim, Administrative Law Judge Peter McC. Giesey credited claimant with eighteen and one-half years of coal mine employment. Decision and Order at 5; Director's Exhibit 1. With respect to the current subsequent claim, the administrative law judge noted that the district director determined, in a Proposed Decision and Order dated January 16, 2008, that claimant worked for thirteen years in coal mine employment "from at least 1973 to December 5, 1988." Decision and Order at 5 *quoting* Director's Exhibit 20. The administrative law judge further noted that the district director credited claimant with 13.35 years of coal mine employment, in a *Summary of Medical And Employment Evidence*, but provided no explanation as to how that number was reached. Decision and Order at 5. The administrative law judge indicated that on Forms CM-911a and CM-913, and during his hearing testimony, claimant alleged that he began coal mine work in 1969 and stopped in 1988, but that he "did not indicate specific dates as to when he started and stopped mining coal or indicate whether his employment was continuous." *Id*.; Director's Exhibits 4, 6; Hearing Transcript at 20.

In calculating claimant's coal mine employment, the administrative law judge considered claimant's Social Security Administration (SSA) records for the period of 1969-1988. Decision and Order at 5. For each year, she divided claimant's yearly earnings by the average yearly wage base reported for coal mine workers by the Bureau of Labor Statistics (BLS). The administrative law judge relied on the yearly wage base from "Exhibit 609 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual, Wage Base History*," which the administrative law judge accessed from a website maintained by the Department of Labor (DOL). *Id*. The administrative law judge credited claimant with partial years of coal mine employment from 1969-1973,

with one full year of coal mine employment for each year from 1974-1980, and with partial years of coal mine employment from 1982-1988. *Id*. at 5-7. The administrative law judge concluded that claimant established 15.4 years of coal mine employment. *Id*. at 7.

Employer argues that the administrative law judge improperly "devised a method" for determining claimant's coal mine employment and that she should have "count[ed] the number of quarters of coal mine employment as outlined in the SSA records." Employer's Brief in Support of Petition for Review at 10. Based on this method, employer asserts that "at best, the documentary evidence shows 33 quarters of coal mine employment from 1969 to 1979, and an additional six years from 1980 to 1986, totaling 14.75 years of coal mine employment." *Id*. Additionally, employer contends that the administrative law judge erred in relying on "non-record" materials to reach her determination, without following the proper procedures for taking judicial notice of a material fact,[3] and that her failure to do so has violated employer's "due process right to know the evidence in the record and respond to it with proof." *Id*. at 11. Employer requests that the case be remanded for a proper calculation of claimant's length of coal mine employment.

Contrary to employer's contention, the administrative law judge was not required to count the quarterly hours in the SSA record in determining claimant's length of coal mine employment.[4] The administrative law judge properly followed the method set forth at 20 C.F.R. §725.101(a)(32)(iii), which states:

[3] The Federal Rules of Evidence provide that a judicially noticed fact must be one that is not subject to reasonable dispute, in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* Fed. R. Evid. 201(b). The administrative law judge may therefore take administrative judicial notice of facts if it is done in the proper manner. In so doing, the administrative law judge must provide the parties with "the opportunity to contradict the noticed facts" with evidence to the contrary. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

[4] Although employer asserts that claimant has only 14.75 years of coal mine employment, based on the quarterly hours reflected in the Social Security Administration [SSA] records, employer does not account for claimant's SSA earnings for coal mine work from 1986 to 1988, which the administrative law judge calculated as 1.1 years of coal mine employment.

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(iii).

With regard to employer's argument that the BLS table constitutes "non-record" evidence, we disagree that the administrative law judge was required to follow the procedures for taking judicial notice of a material fact, prior to relying on the BLS table, as the regulation at 20 C.F.R. §725.101(a)(32)(iii) does not impose such a requirement. Furthermore, although the administrative law judge did not adhere to the requirement of 20 C.F.R. §725.101(a)(32)(iii), that she make "[a] copy of the BLS table . . . part of the record," we consider this error, if any, to be harmless, as she informed the parties in her Decision and Order that the BLS table was available for review on DOL's website.[5] S*ee Larioni v. Director, OWCP*, 12 BLR 1-1276 (1989); Decision and Order at 5 n. 7.

Employer does not dispute that the method applied by the administrative law judge establishes 15.4 years of coal mine employment. Therefore, because the administrative law judge permissibly calculated claimant's coal mine employment, based on her review of the earnings reported in the SSA records and the method set forth at 20 C.F.R 725.101(a)(32)(iii), we affirm her finding that claimant established 15.4 years of coal mine employment, as it is supported by substantial evidence. *See Dawson v. Old Ben Coal Co*., 11 BLR 1-58, 1-60 (1988); *Brumley v Clay Coal Corp*., 6 BLR 1-956, 1-959 (1984).

[5] Even assuming that judicial notice was required, employer's argument in this case fails. An administrative law judge may take judicial notice of a fact, by reference in the administrative law judge's decision, *see* 29 C.F.R. §18.45, if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary. *See Maddaleni*, 14 BLR at 1-139. Although employer contends that the administrative law judge erred in relying on wage-based information that does not take into consideration the location of the miner's job, the number of days or hours worked, or the type of job performed, because the Department of Labor specifically directs an administrative law judge to use the Bureau of Labor Statistics table, employer has not shown substantial prejudice under the facts of this case.

Additionally, because claimant established fifteen years of underground coal mine employment and employer does not challenge the administrative law judge's determination that claimant has a totally disabling respiratory or pulmonary impairment, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), we affirm the administrative law judge's finding that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that he satisfied the requirements for invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4).

II. REBUTTAL OF THE PRESUMPTION

In considering whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge required employer to prove 1) that claimant does not have either clinical or legal pneumoconiosis or 2) that claimant's disabling respiratory or pulmonary impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 15. The administrative law judge noted that employer relied upon the opinions of Drs. Dahhan and Castle to satisfy its burden of proof. Dr. Dahhan examined claimant on November 7, 2007, and diagnosed that claimant has totally disabling chronic obstructive pulmonary disease (COPD) due entirely to smoking. Director's Exhibit 14. Dr. Castle examined claimant on September 25, 2008, and diagnosed that claimant has chronic bronchitis, which he also attributed to smoking and not to coal dust exposure. Employer's Exhibit 1.

The administrative law judge found that, while claimant had negative x-ray evidence for clinical pneumoconiosis,[6] employer failed to rebut the presumption by disproving the existence of legal pneumoconiosis,[7] as Drs. Dahhan and Castle did not adequately explain why coal dust exposure is not a causative factor for claimant's

[6] "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, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

[7] "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).

disabling COPD. Decision and Order at 17, 26, Because the administrative law judge rejected the opinions of Drs. Dahhan and Castle on the issue of legal pneumoconiosis, she also found that their opinions were insufficient to establish that claimant's disability did not arise out of, or in connection with, his coal mine employment. *Id*. at 26. Thus, the administrative law judge found that employer failed to establish rebuttal of the presumption. *Id*.

Employer argues that the administrative law judge erred in concluding that Drs. Dahhan and Castle did not rule out coal dust exposure as a causative factor for claimant's disabling COPD. Employer contends that the administrative law judge erred in discrediting expert testimony, based on the preamble to the regulations, and that she gave claimant the benefit of an erroneous presumption that his COPD is latent and progressive. Employer also contends that the administrative law judge's standard of proof has converted amended Section 411(c)(4) into an irrebuttable presumption. Employer's Brief in Support of Petition for Review at 12-15. Employer's arguments are rejected as without merit.

On the issue of the existence of legal pneumoconiosis, the administrative law judge properly considered the rationale underlying the opinions of Drs. Dahhan and Castle to determine whether their opinions were sufficiently reasoned to rebut the amended Section 411(c)(4) presumption. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); Decision and Order at 23-26. The administrative law judge correctly noted that "one of the bases for Dr. Dahhan's opinion regarding the lack of legal pneumoconiosis is that claimant 'did not have an obstructive ventilatory impairment [until] twelve years after his termination of exposure to coal dust.'" Decision and Order at 23, *quoting* Director's Exhibit 4. Similarly, the administrative law judge found that Dr. Castle eliminated coal dust exposure as a cause for claimant's chronic bronchitis because claimant had normal pulmonary function studies two years after leaving the mines but he continued to smoke cigarettes. Decision and Order at 25; Employer's Exhibit 5. The administrative law judge, however, considered the opinions of Drs. Dahhan and Castle to be unpersuasive, based on the view of the DOL that "pneumoconiosis is a latent and progressive condition which may first become detectable only after the cessation of coal mine dust exposure." Decision and Order at 23, *citing* 65 Fed. Reg. 79,971 (Dec. 20, 2000).

Contrary to employer's contention, the administrative law judge permissibly relied on the preamble to the regulations as an authoritative statement of medical principles accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment, which may first become detectable only after the cessation of coal mine dust exposure. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.*

[*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Moreover, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990). Thus, we conclude that the administrative law judge acted within her discretion in finding that Drs. Dahhan and Castle failed to adequately explain why claimant's COPD was not a latent and progressive disease caused by coal dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (*en banc*).

With regard to Dr. Dahhan, the administrative law judge found that he also relies on the improvement in claimant's pulmonary function results, after the administration of a bronchodilator, as support for his opinion that claimant's impairment is partially reversible and therefore unrelated to coal dust exposure. Decision and Order at 24. The administrative law judge correctly observed, however, that claimant's pulmonary function tests were still qualifying for total disability, even after bronchodilators were administered. *Id*. The administrative law judge also properly observed that partial obstructive impairment reversibility "does not signify that coal dust played *no* role in [claimant's] respiratory impairment." *Id*. at 23-24 (emphasis added), *citing Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).[8] We affirm the administrative law judge's decision to give less weight to Dr. Dahhan's opinion since he did not explain why coal dust exposure would not be a contributing factor in claimant's irreversible respiratory impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 24.

The administrative law judge further found that Dr. Dahhan ruled out coal dust exposure as a causative factor for claimant's COPD because he did not believe that an obstructive lung disease with a marked loss in the FEV1 is associated with exposure to

[8] Employer asserts that the administrative law judge's reliance on *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. May 11, 2004) (unpub.) is "prohibited" by Local Rule 32.1 of the Rules of the Fourth Circuit, as the court has indicated that "reliance on unpublished [decisions] is generally disfavored," in briefs and oral arguments filed before it or the district courts. Employer's Brief in Support of Petition for Review at 18, *quoting NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 197 n. 4 (4th Cir. 1984). The rule, however, does not prohibit an administrative law judge from citing an unpublished decision in reaching his decision. Furthermore, while unpublished decisions are not considered binding precedent in the Fourth Circuit, our holding is not based exclusively upon the Fourth Circuit's holding in *Swiger*, but is based upon a review of the administrative law judge's specific findings in this case.

coal dust. Decision and Order at 24; Director's Exhibit 14. The administrative law judge permissibly concluded that Dr. Dahhan's opinion is inconsistent with the position of the DOL that "even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airway obstruction and chronic bronchitis. The risk is additive with cigarette smoking." Decision and Order at 24, *quoting* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *see also Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04; *Obush*, 24 BLR at 125-26.

With regard to Dr. Castle's opinion, the administrative law judge noted that he cited to the purely obstructive nature of claimant's respiratory impairment in ruling out coal dust exposure as a potential cause of claimant's condition. Decision and Order at 25-26. However, because a purely obstructive respiratory condition may satisfy the definition of legal pneumoconiosis at 20 C.F.R. §718.201, if it arises out of coal mine employment, the administrative law judge permissibly determined that Dr. Castle's opinion was less credible. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Moreover, although Dr. Castle cited to negative x-ray evidence to support his opinion that claimant does not have coal workers' pneumoconiosis, the administrative law judge observed correctly that negative x-rays do not "preclude a finding of legal pneumoconiosis." Decision and Order at 25; *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990).

Because the administrative law judge has broad discretion in assessing the credibility of the medical experts, we affirm the administrative law judge's credibility findings with respect to Drs. Dahhan and Castle. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to meet its burden to rebut the presumption at amended Section 411(c)(4) by proving that claimant does not have pneumoconiosis or that his disabling respiratory impairment did not arise out of, or in connection with, employment in a coal mine.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge