BRB No. 11-0225 BLA

DENNY R. MIDDLETON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B R & D ENTERPRISES, INCORPORATED	)	DATE ISSUED: 12/15/2011
	)	
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 Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Barry H. Joyner (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05846) of Administrative Law Judge Robert B. Rae, with respect to a subsequent claim filed on August 17, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 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). After crediting claimant with twenty-six years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in

20 C.F.R. Part 718. The administrative law judge initially found that employer is the properly designated responsible operator. On the merits, the administrative law judge stated that, although the claim before him was technically a subsequent claim under 20 C.F.R. §725.309(d), he would treat it as an initial claim for benefits, as claimant's previous claim was denied by reason of abandonment and none of the elements of entitlement were actually adjudicated against him.[1] Weighing the evidence submitted with the present claim, the administrative law judge determined that the evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv). Relying on amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis.[2] The administrative law judge found that employer did not rebut the presumption by establishing that claimant does not have pneumoconiosis, as he determined that the preponderance of the x-ray evidence was positive for pneumoconiosis under 20 C.F.R. §718.202(a)(1). The administrative law judge further found that employer did not rebut the presumption by proving that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. The administrative law judge determined, therefore, that employer did not rebut the presumption of total disability due to pneumoconiosis and awarded benefits accordingly.

Employer appeals, arguing that the administrative law judge erred in finding that it is the properly designated responsible operator. On the merits, employer contends that the administrative law judge erred in finding that claimant established the existence of

[1] Claimant filed a previous claim on February 24, 1993, which was denied by reason of abandonment on July 20, 1993. Director's Exhibit 1. Contrary to the administrative law judge's finding, the denial, by reason of abandonment, of claimant's 1993 application for benefits was equivalent to a finding that claimant did not establish any of the applicable conditions of entitlement for the purposes of 20 C.F.R. §725.309(d). *See* 20 C.F.R. §725.409(c). Based on our affirmance of the administrative law judge's finding of total disability, *see* n.3, *infra*, we hold that claimant has established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), as a matter of law. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

[2] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

legal pneumoconiosis[3] at 20 C.F.R. §718.202(a) and total disability causation at 20 C.F.R. §718.204(c). Claimant has not filed a response brief. The Director has responded and contends that employer waived any assertion that it is not the responsible operator. The Director argues that, in the alternative, the Board should affirm the administrative law judge's responsible operator finding, as employer does not contend that it does not meet the criteria for a potentially liable operator and the later operator it identified did not employ claimant for the required cumulative year, pursuant to 20 C.F.R. §725.495(c)(2). On the merits, the Director maintains that the Board should affirm the administrative law judge's discrediting of the opinions of Drs. Broudy and Dahhan, that coal dust exposure played no role in causing claimant's totally disabling respiratory impairment.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 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).

[3]Under 20 C.F.R. §718.201(a)(2), "legal pneumoconiosis" is defined as, "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides, "[t]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*.

[4] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his findings that the presumption set forth in Section 411(c)(4) of the Act was invoked, the preponderance of the x-ray evidence was positive for pneumoconiosis at 20 C.F.R. §718.202(a)(1), and total disability was established at 20 C.F.R. §718.204(b)(2)(ii), (iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

I. Responsible Operator

A. Background

Claimant's coal mine employment history, as it appears on his work history form and earnings records, indicates that his last two coal mine employers were B R & D Enterprises, Inc. (employer), from April 2002 through May 2003, and D & C Mining, from July 2004 through December 2004 and January 2006 through May 2006. Director's Exhibits 5, 8, 12, 13. Claimant's Social Security and FICA earnings records indicate that he also worked for a third company, B & D Mining, in 2002 and 2003, overlapping his tenure with employer. Director's Exhibits 12, 13. The district director identified employer as a potentially liable operator and ultimately designated it as the responsible operator, as the evidence did not demonstrate at least one year of subsequent employment with another operator. Director's Exhibits 27, 48; *see also* Director's Exhibits 32, 33.

At the hearing, claimant testified that he went to work for B & D Mining after his work for employer. Hearing Transcript at 16. He also stated that B & D Mining and employer were the same company, with the same owner, operating at the same location with the same equipment, and that they existed at the same time. *Id*. at 16-17. Claimant did not indicate whether there was a similar relationship between employer and D & C Mining.

B. The Administrative Law Judge's Findings

The administrative law judge initially indicated that, pursuant to 20 C.F.R. §725.495(c)(2), employer "bears the burden of proving that it is not the potentially liable operator that most recently employed the miner." Decision and Order at 21. The administrative law judge found that, contrary to employer's contention, claimant's dates of employment with D & C Mining did not meet the one-year requirement because the regulations require one cumulative calendar year of employment, rather than 125 days. *Id*. at 21-22 The administrative law judge further determined that, as the Director asserted, claimant's two periods of work for D & C Mining added up, at most, to a cumulative period of eleven months. *Id*. at 22. Consequently, the administrative law judge concluded that employer is the responsible operator in this case, as it is the operator that most recently employed claimant for a period of at least one calendar year. *Id*.

C. Arguments on Appeal

Employer asserts that, contrary to the administrative law judge's statement, it is the Director, and not employer, that bears the burden of establishing that the designated responsible operator meets the criteria for a potentially liable operator at 20 C.F.R. §725.494. Employer argues that the Director did not meet his burden because he did not

provide evidence establishing that employer and D & C Mining were the same entity, operating under common ownership. Instead, employer indicates that the Director submitted a "Responsible Operator Rationale," in which he incorrectly identified B & D, as opposed to D & C Mining, as the subsequent operator. Employer's Brief at 15; *see* Director's Exhibit 26. In addition, employer states that the Director did not provide any support for its contention that the earnings from the subsequent operator were not sufficient to prove the required year of employment.

The Director responds, arguing that employer waived any assertion that it is not the properly identified responsible operator by failing to respond to the administrative law judge's August 26, 2009 Pre-Hearing Order, in which he required employer to notify the parties if it planned to allege that it was improperly identified as the responsible operator. In the alternative, the Director asserts that the Board should affirm the administrative law judge's determination that employer is the responsible operator, as it is rational and supported by substantial evidence. In support of his position, the Director states that employer does not contend that it does not meet the criteria for identification as a potentially liable operator, but rather merely asserts that a later operator, D & C Mining, employed claimant for a cumulative year. The Director further argues that, even assuming that employer's assertion that claimant worked for D & C Mining for 125 working days is accurate, the claimant's term of employment with D & C Mining was only eleven months. The Director also notes that employer is incorrect in arguing that the Director must prove that employer was the last coal mine operator to have employed the miner for a period of at least one year. Director's Brief at 4.

We reject employer's allegations of error. Contrary to employer's assertion, the regulations do not require the Director to prove that employer was the last coal mine operator to have employed claimant for at least one year. Rather, the Director must demonstrate that employer is a potentially liable operator by establishing that claimant worked for employer for a period of at least one year. 20 C.F.R. §725.494(c). The burden then shifts to employer to prove, *inter alia*, that a more recent operator employed claimant for at least a year. *See* 20 C.F.R. §§725.494(a), 725.495(b), (c)(2). In the present case, the administrative law judge rationally concluded that employer did not satisfy its burden, as the maximum length of claimant's employment with D & C Mining, claimant's subsequent employer, was eleven months. 20 C.F.R. §§725.101(a)(32), 725.495(c)(2); *see Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 22 BLR 2-349 (6th Cir. 2002); Decision and Order at 22. Consequently, we affirm the administrative law judge's finding that employer is the properly designated responsible operator in this case.[6]

[6] We reject the argument by the Director, Office of Workers' Compensation Programs (the Director), that employer waived the issue of whether it was the responsible operator. Although the Director is correct that employer did not respond to the

II. Rebuttal of the Amended Section 411(c)(4) Presumption

A. The Administrative Law Judge's Findings

In considering whether employer established that claimant's totally disabling respiratory impairment did not arise out of, or in connection with his coal mine employment, the administrative law judge accorded little weight to the opinions in which Drs. Dahhan and Broudy ruled out coal dust exposure as a contributing cause of claimant's total disability. Decision and Order at 20. The administrative law judge found that the view expressed by Drs. Dahhan and Broudy, that simple pneumoconiosis cannot cause the respiratory impairment that claimant exhibits, is "hostile to the Act because it is contrary to the Act's purpose and is a generalization rather than an opinion based on a specific claim." *Id*. In addition, the administrative law judge determined that the study cited by Dr. Dahhan in support of his opinion was actually credited by the Department of Labor (DOL) as confirming the link between coal dust exposure and significant pulmonary impairment. *Id*., *citing* 65 Fed. Reg. 79,919, 79,940 (Dec. 20, 2000). Further, the administrative law judge found that the statements made by Drs. Dahhan and Broudy, that without the presence of complicated pneumoconiosis or progressive massive fibrosis, no part of claimant's respiratory impairment could be due to coal dust exposure, are contrary to the DOL's position that the effects of coal dust exposure and smoking are additive. Decision and Order at 20, *citing* 65 Fed. Reg. at 79,939 (Dec. 20, 2000). The administrative law judge accorded greater weight to the opinion in which Dr. Alam identified pneumoconiosis as a contributing cause of claimant's total disability, based on his status as a treating physician and the quality of his reasoning. Decision and Order at 19, 21. Consequently, the administrative law judge determined that claimant established that pneumoconiosis is a contributing cause of his totally disabling respiratory impairment, thereby precluding a finding that employer rebutted the amended Section 411(c)(4) presumption. *Id*. at 21.

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administrative law judge's Pre-Hearing Order requiring employer to serve notice upon the parties of its intention to challenge its identification as the responsible operator, this issue was identified by the district director as contested by employer on Form CM-1025. Director's Exhibit 54. In addition, at the December 16, 2009 hearing, counsel for the Director agreed with the administrative law judge's statement that identification of the responsible operator was an issue in this case. Hearing Transcript at 7-8. Under these circumstances, a finding of waiver is not appropriate**.** *See Carpenter v. Eastern Associated Coal Corp.*, 6 BLR 1-784 (1984); *Grant v. Director, OWCP*, 6 BLR 1-619 (1983).

B. Arguments on Appeal

Employer contends that the medical opinions that it has submitted are sufficient to meet its burden to establish that claimant's totally disabling respiratory impairment is unrelated to coal dust exposure. Specifically, employer maintains that the administrative law judge erred in determining that Drs. Dahhan and Broudy relied on the view that simple coal workers' pneumoconiosis cannot cause the respiratory impairment exhibited by claimant. Rather, employer states that Dr. Dahhan based his opinion on the objective evidence pertaining specifically to claimant, and Dr. Broudy opined, "it would not be medically likely" that claimant's impairment was due to coal dust exposure. Employer's Brief at 16. Employer also asserts that Dr. Vuskovich's medical opinion, which the administrative law judge excluded from the record because it exceeded the evidentiary limitations at 20 C.F.R. §725.414, was not hostile to the Act, as Dr. Vuskovich acknowledged that simple pneumoconiosis can cause a disabling respiratory impairment. The Director responds, asserting that the administrative law judge properly excluded Dr. Vuskovich's opinion as being in excess of the evidentiary limitations at 20 C.F.R. §725.414. The Director also states that the administrative law judge acted rationally in discrediting the opinions of Drs. Dahhan and Broudy.

As a threshold matter, we affirm, as unchallenged on appeal, the administrative law judge's exclusion of Dr. Vuskovich's opinion, as it exceeded the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(i). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9 n.7. With respect to employer's allegations of error regarding the administrative law judge's weighing of the opinions of Drs. Dahhan and Broudy, we hold that they are without merit.

While Dr. Dahhan acknowledged that coal miners can suffer an average annual loss in FEV1 of about five to nine milliliters due to coal dust exposure, he stated that because "susceptible" smokers may suffer an FEV1 loss of ninety milliliters yearly due to smoking, the loss from coal dust "can hardly be significant" when compared to the total loss in claimant's FEV1. *See* Director's Exhibit 22. As the administrative law judge found, this view is contrary to the literature that the DOL cited in the preamble to the regulations, indicating that the average loss of FEV1 in smokers is about five milliliters per pack year, which is roughly equivalent to the average annual loss of FEV1 in miners. *See* Decision and Order at 20; 65 Fed. Reg. at 79,941 (Dec. 20, 2000). Because Dr. Dahhan did not explain why, based on this literature, at least part of claimant's impairment was not due to coal dust exposure, the administrative law judge rationally discredited his opinion. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-123-24 (6th Cir. 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

The administrative law judge also acted within his discretion in determining that Dr. Broudy's opinion was insufficient to rebut the presumption that coal dust exposure was a contributing cause of claimant's disabling respiratory impairment. Without citing any sources, Dr. Broudy indicated that "evidence in the literature . . . does not support the conclusion that early simple coal workers' pneumoconiosis is medically likely to cause severe disabling obstructive respiratory impairment." Director's Exhibit 18. Thus, the administrative law judge rationally concluded that Dr. Broudy relied, in part, upon a view contrary to that adopted by the DOL in ruling out pneumoconiosis as a contributing cause of claimant's total disability. *See Crockett*, 478 F.3d at 356, 23 BLR at 2-483; *Cornett*, 227 F.3d at 578, 22 BLR at 2-123-24.

The administrative law judge also indicated correctly that Drs. Dahhan and Broudy did not acknowledge the possibility that, although not the primary causal factor, claimant's pneumoconiosis contributed to, or aggravated, his disabling impairment. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-123-24. Consequently, we affirm the administrative law judge's determination that the opinions of Drs. Dahhan and Broudy were insufficient to establish that claimant's totally disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment.

Regarding employer's ability to rebut the amended Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis, we have affirmed, as unchallenged on appeal, the administrative law judge's finding that the preponderance of the x-ray evidence is positive for clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See s*lip op. at 4 n.4. Consequently, we also affirm the administrative law judge's finding that employer did not establish rebuttal by establishing that claimant does not have pneumoconiosis.[7] 30 U.S.C. §921(c)(4); Decision and Order at 18. The administrative law judge's conclusion that employer did not establish rebuttal of the amended Section 411(c)(4) presumption is affirmed, therefore, as it is rational and supported by substantial evidence.

[7] The administrative law judge's finding that employer failed to prove that claimant's totally disabling respiratory impairment is unrelated to his coal mine employment also precludes a determination that employer has established the absence of legal pneumoconiosis, i.e., "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Thus, we decline to address employer's allegations of error regarding the administrative law judge's weighing of the evidence relevant to legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge