BRB No. 12-0145 BLA

AUBREY A. GENT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAHON ENTERPRISES, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 12/18/2012
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Administrative Law Judge Richard A. Morgan, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (10-BLA-5441) of Administrative Law Judge Richard A. Morgan awarding benefits 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). This case involves a claim filed on May 19, 2009.

The administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption at 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 underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, 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 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Applying amended Section 411(c)(4), the administrative law judge found that because claimant established thirty-four years of underground coal mine employment,[1] and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that claimant did not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[2]

[1] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, 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 (1989) (en banc).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established thirty-four years of underground coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thereby invoked the Section 411(c)(4) rebuttable presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Employer specifically asserts that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.[3] In addressing this first method of rebuttal, the administrative law judge considered the opinions of Drs. Rasmussen, Gaziano, and Zaldivar. Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema related to coal dust exposure and claimant's smoking history. Director's Exhibit 9. Similarly, Dr. Gaziano opined that claimant suffers from legal pneumoconiosis, in the form of emphysema, which he also attributed to claimant's coal mine employment and smoking history. Claimant's Exhibit 3. In contrast, Dr. Zaldivar opined that, while claimant suffers from "very advanced emphysema," specifically bullous emphysema, this disease is due solely to his smoking history, and is unrelated to his coal mine employment. Employer's Exhibit 3.

In his consideration of the conflicting evidence, the administrative law judge found the opinions of Drs. Rasmussen and Gaziano to be reasoned, and supported by objective medical evidence. Decision and Order at 17, 19-20. Conversely, the administrative law judge found Dr. Zaldivar's opinion insufficiently explained and inadequately supported by the record evidence. *Id.* at 20. Accordingly, the administrative law judge determined that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* He therefore held that employer failed to rebut the presumption that claimant suffers from pneumoconiosis. *Id.* at 25.

Employer contends that the administrative law judge erred in his consideration of Dr. Zaldivar's opinion. We disagree. The administrative law judge permissibly found that Dr. Zaldivar's opinion was not sufficiently reasoned because the doctor did not adequately explain how he eliminated claimant's thirty-four years of coal dust exposure as a source of his "very advanced emphysema." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 20;

[3] "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).

Employer's Exhibit 3. In addition, the administrative law judge noted that Dr. Zaldivar opined that coal dust does not cause bullous emphysema, which he related to smoking. Decision and Order at 20; Employer's Exhibit 4. The administrative law judge reasonably found Dr. Zaldivar's opinion was entitled to less weight, as it is contrary to the Department of Labor's determination that coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms.[4] *See* 65 Fed. Reg. 79,940-43 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-292 n.7 (7th Cir. 2001).

Because Dr. Zaldivar's opinion is the only opinion potentially supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of the disease. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. We, therefore, affirm the administrative law judge's determination that employer failed to establish the first method of rebuttal.

Employer next argues that the administrative law judge erred in finding that employer failed to establish rebuttal by showing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Employer's Brief at 20-23. We disagree. The record reflects, and employer concedes, that all of the physicians agree that claimant's disability is due to his pulmonary impairment. Decision and Order at 29; Employer's Brief at 21. The administrative law judge permissibly concluded that the same reasons for which he discredited Dr. Zaldivar's opinion, on the issue of pneumoconiosis, also undercut his opinion that claimant's impairment is unrelated to his coal mine employment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 29. Because Dr. Zaldivar's opinion is the only opinion supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

[4] Because the administrative law judge provided valid reasons for according less weight to Dr. Zaldivar's opinion, we need not address employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

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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REGINA C. McGRANERY
Administrative Appeals Judge