BRB No. 13-0152 BLA

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| JOHN BUD RITCHIE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| JAMES RIVER COAL SERVICE COMPANY | ) | |
| | ) | |
| | ) | DATE ISSUED: 12/04/2013 |
| and | ) | |
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| JAMES RIVER COAL COMPANY | ) | |
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| Employer/Carrier-Petitioners | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5757) of Administrative Law Judge John P. Sellers, III, 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 August 6, 2008.

Applying amended Section 411(c)(4),[1] the administrative law judge found that claimant established that he had twenty-three years of coal mine employment in surface mining.[2] The administrative law judge further found that all of claimant's coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge, therefore, found that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. The administrative law judge further found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not 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 the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer failed to rebut the Section

[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, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3; Hearing Transcript at 28. 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 (1989) (en banc).

411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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 initially argues that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer specifically argues that claimant failed to prove that, during his twenty-three years as a surface miner, he was exposed to dust conditions substantially similar to those existing underground. Subsequent to the issuance of the administrative law judge's Decision and Order, the Department of Labor promulgated regulations implementing amended Section 411(c)(4). Those regulations provide that "[t]he 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."[4] 20 C.F.R. §718.305(b)(2); *see also Director, OWCP v. Midland Coal Co.*

[3] Because employer does not challenge the administrative law judge's finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b) (2013), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

[*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). As summarized by the administrative law judge, claimant "testified that throughout his mining career he was continually exposed to dust." Decision and Order at 22; Hearing Transcript at 32-35. Claimant's testimony regarding his working conditions, having been credited by the administrative law judge, is sufficient under *Leachman*, and the regulations, to satisfy the "substantially similar" requirement of Section 411(c)(4). We, therefore, affirm the administrative law judge's finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

In light of our affirmance of the administrative law judge's findings that claimant established 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) (2013), we also affirm the administrative law judge's finding 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 presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); 20 C.F.R. §718.305(d)(1); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method.[5] Decision and Order at 28-42.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[6] In evaluating whether employer

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78 Fed. Reg. 59,105 (Sept. 25, 2013).

[5] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 35-42. Employer does not challenge this aspect of the administrative law judge's decision.

[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) (2013).

disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Broudy and Westerfield. Drs. Broudy and Westerfield diagnosed claimant with chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Director's Exhibit 20; Employer's Exhibits 3, 11, 12. Moreover, Drs. Broudy and Westerfield each opined that claimant's COPD was not due to his coal mine dust exposure. *Id.*

The administrative law judge discredited the opinions of Drs. Broudy and Westerfield because the physicians did not adequately explain how they determined that claimant's twenty-three years of coal dust mine dust exposure did not contribute to his disabling COPD. Decision and Order at 37-39. The administrative law judge also accorded less weight to their opinions because he found that the doctors based their opinions on assumptions contrary to the regulations. *Id.*

Employer contends that the administrative law judge erred in his consideration of the opinions of Drs. Broudy and Westerfield. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Broudy and Westerfield, that claimant's COPD was due solely to smoking, because neither physician adequately explained how they eliminated claimant's twenty-three years of coal mine dust exposure as a source of his COPD. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge, therefore, properly discounted the opinions of Drs. Broudy and Westerfield. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The administrative law judge also found that the opinions of Drs. Broudy and Westerfield, that claimant's disabling obstructive impairment is unrelated to coal mine dust exposure, are inconsistent with scientific studies approved by the Department of Labor in the preamble to the amended regulations. Drs. Broudy and Westerfield each eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC, a characteristic that each found uncharacteristic of a coal mine dust-induced lung disease.[7] The administrative law judge noted, however, that scientific

[7] In attributing claimant's chronic obstructive airways disease to smoking, Dr. Broudy stated that "[c]oal dust exposure usually causes a parallel reduction in the FEV1 and FVC. Such was not the case in this instance." Employer's Exhibit 11. Dr. Westerfield similarly opined that the "physiological pattern demonstrated on [claimant's] spirometry testing which shows normal [FVC] with markedly reduced FEV1 is the pulmonary function abnormality associated with COPD *due to cigarette smoking*." Employer's Exhibit 12.

evidence endorsed by the DOL recognizes that coal dust exposure can cause a significant decrease in a miner's FEV1/FVC ratio. Decision and Order at 37-39; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) ("coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio."). Consequently, the administrative law judge permissibly discounted the opinions of Drs. Broudy and Westerfield, as to the cause of claimant's disabling obstructive pulmonary impairment, because the doctors relied on an assumption that is contrary to the medical science credited by the DOL. *See 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 A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). As the administrative law judge's basis for discrediting the opinions of Drs. Broudy and Westerfield is rational and supported by substantial evidence, it is affirmed.[8]

Because the opinions of Drs. Broudy and Westerfield are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, or that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption.[9] 20 C.F.R. §718.305(d)(1); *Morrison*, 644 F.3d at 480. Therefore, we affirm the administrative law judge's award of benefits. *See* 30 U.S.C. §921(c)(4).

[8] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Broudy and Westerfield, 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).

[9] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Therefore, we need not address employer's contention that the administrative law judge erred in finding that employer failed to disprove the existence of clinical pneumoconiosis.

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