BRB No. 14-0144 BLA

LARRY RICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 12/04/2014
	)	
and	)	
	)	
WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
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 Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Rita Roppolo (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (11-BLA-05846) of Administrative Law Judge Theresa C. Timlin rendered on a subsequent claim,[1] filed on May 4, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least 16.5 years of underground coal mine employment, and found that new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Considering the entire record, the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge improperly restricted employer's ability to rebut the amended Section 411(c)(4) presumption, and that she imposed an improper standard on rebuttal. Employer also argues that the

[1] Claimant's prior claim, filed on July 20, 1999, was dismissed on February 26, 2002, because claimant failed to attend the hearing. Director's Exhibit 1; Decision and Order at 2 n.4.

[2] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

[3] Where a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3); 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

administrative law judge erroneously relied on the preamble to the amended regulations to credit the opinions of Drs. Rasmussen and Gaziano, and inadequately considered the contrary medical assessments provided by Drs. Zaldivar and Rosenberg, in violation of the requirements of the Administrative Procedure Act (APA).[4] Claimant has not responded to the appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments regarding the methods of rebuttal and the rebuttal standard applicable to employer. Additionally, the Director observes that Drs. Zaldivar and Rosenberg attributed claimant's disabling respiratory impairment entirely to smoking, but "offered no timely support or authority for their view that coal mine employment will not cause bullous emphysema," given that "the preamble makes clear that 'emphysema' (without qualification as to a particular form) may be legal pneumoconiosis if it arises from coal-mine employment." Director's Brief at 2. Employer has filed a reply brief reiterating its arguments.[5]

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.[6] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. At the outset, we agree with the Director that, contrary to employer's assertion that the amended Section 411(c)(4) rebuttal

[4] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least 16.5 years of underground coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and that claimant was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

provisions apply only to the Secretary of Labor and do not apply to responsible operators, the record reflects that employer was not restricted in the evidence it offered on rebuttal. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013) (Niemeyer, J., concurring); *Fairman v. Helen Mining Co.*, 24 BLR 1-227, 1-229 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We also agree with the Director that the fact-finder may appropriately consult the preamble in evaluating medical opinion evidence. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 3783 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Further, the record does not support employer's assertion that the administrative law judge applied an improper standard on rebuttal.[7] Rather, prior to reaching the issue of whether claimant was entitled to invocation of the amended Section 411(c)(4) presumption, the administrative law judge placed the burden on claimant to establish the existence of pneumoconiosis.[8] The administrative law judge found that claimant failed to establish clinical pneumoconiosis, but concluded that the weight of the newly submitted evidence established legal pneumoconiosis.[9] In so finding, the administrative law judge provided a

[7] Employer asserts that the appropriate standard on rebuttal is for employer to show that pneumoconiosis is not a substantially contributing cause of the miner's disability. Employer's Brief at 15-22. However, the Department of Labor explicitly chose not to use the "substantially contributing cause" standard set forth in 20 C.F.R. §718.204(c), and expressed its acceptance of the "rule out" standard on rebuttal in the preamble to the revised regulations. 78 Fed. Reg. 59,102-07 (Sept. 25, 2013). Effective October 25, 2013, the implementing regulation requires that employer establish 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)(ii).

[8] We note that, if amended Section 411(c)(4) applies, the administrative law judge should first determine whether total respiratory disability is established. If the presumption at amended Section 411(c)(4) is invoked, the administrative law judge must then place the burden on employer to disprove the existence of pneumoconiosis arising out of coal mine employment, or disability due to pneumoconiosis.

[9] "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). "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).

detailed summary of the conflicting medical opinions, the physicians' explanations for their conclusions, and the underlying documentation, and determined that Drs. Zaldivar, Rosenberg, Gaziano, and Rasmussen all diagnosed totally disabling chronic obstructive pulmonary disease (COPD)/emphysema. Decision and Order at 11-17; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Drs. Zaldivar and Rosenberg opined that "the type of emphysema seen on claimant's chest x-rays (characterized by bullae), is typical of smoking-induced emphysema," with a possible genetic component;[10] that "coal dust cannot cause bullous emphysema;" and that, because claimant's emphysema "cannot be related to coal mine employment," coal dust exposure played no role in his lung disease. *Id*. at 12-17, 27; Employer's Exhibits 1, 4, 6, 7 at 21, 28-29, 31-32. In contrast, Drs. Gaziano and Rasmussen diagnosed legal pneumoconiosis, opining that both smoking and coal dust exposure were substantially contributing causes of claimant's disabling obstructive impairment, and that the relative contributions of each could not be separated. Decision and Order at 12, 16-17, 19, 27-28; Director's Exhibit 12; Claimant's Exhibits 7, 8. The administrative law judge determined that all four physicians were highly credentialed, and cited medical studies and research. Finding that the opinions of Drs. Gaziano and Rasmussen were more consistent with the Department of Labor's position, that miners who smoke are at an "additive risk for developing significant obstruction," the administrative law judge acted within her discretion in concluding that these opinions were more persuasive and entitled to greater weight than the contrary opinions of Drs. Zaldivar and Rosenberg. Decision and Order at 17; 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013)(Traxler, C.J. dissenting). As the Director points out, the preamble states, without qualification or limitation as to a particular form, that coal mine dust exposure can cause emphysema. 65 Fed. Reg. 79,939 (Dec. 20, 2000). In differentiating bullous emphysema from other forms of the disease, the Director maintains that Drs. Zaldivar and Rosenberg have failed to offer timely support or authority for their position, that coal mine employment will not cause bullous emphysema, sufficient to invalidate or outweigh the medical principles and scientific studies accepted by the Department of Labor in the preamble. Director's Brief at 2; *see Cochran*, 718 F.3d at 319, 25 BLR at 2-265. Because the administrative law judge provided a valid reason for according greater weight to the opinions of Drs. Gaziano and

[10] Dr. Zaldivar explained that claimant's smoking history "is sufficient to produce emphysema of varying degrees depending on individual susceptibility," and attributed claimant's emphysema to smoking and "possibly a genetic component" of Alpha-1 antitrypsin deficiency. Dr. Rosenberg similarly opined that claimant's emphysema was from smoking, "which can be hereditary if one has an Alpha-1 antitrypsin deficiency," and agreed with Dr. Zaldivar that claimant should be screened for this condition. Decision and Order at 12-13, 15; Employer's Exhibit 6 at 8-9, 15-16, 22; Employer's Exhibit 7 at 19-21, 29-30.

Rasmussen, and her findings are supported by substantial evidence, we affirm her credibility determination.

As she found that the weight of the newly submitted evidence established legal pneumoconiosis, the administrative law judge properly found that claimant established a change in an applicable condition of entitlement at Section 725.309. Decision and Order at 6, 17, 20 n.9; *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Considering the entire record, the administrative law judge rationally found that the more recent evidence was the most probative and, weighing all types of relevant evidence together, she found that claimant established legal pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202. Decision and Order at 17-19; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). As substantial evidence supports the administrative law judge's findings thereunder, they are affirmed.

The administrative law judge then found, and employer does not challenge, that claimant established total respiratory disability pursuant to Section 718.204(b) and was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 20-27. Because she found that claimant established the existence of legal pneumoconiosis, the administrative law judge properly found that employer could not rebut the presumption by showing that claimant does not suffer from the disease, and as Drs. Zaldivar and Rosenberg did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding, she permissibly discounted their opinions that claimant's disability was unrelated to coal dust exposure. Decision and Order at 27; *see Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and we affirm the award of benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision to affirm, as supported by substantial evidence and/or as unchallenged on appeal, the administrative law judge's findings that claimant established 16.5 years of underground coal mine employment; total respiratory disability pursuant to 20 C.F.R. §718.204(b); a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309; and that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). However, because the administrative law judge failed to provide an adequate explanation for her credibility determinations, I would vacate her findings on the issues of legal pneumoconiosis and disability causation, and remand the case for further findings.

The administrative law judge credited the opinions of Drs. Gaziano and Rasmussen, that claimant's disabling chronic obstructive pulmonary disease/emphysema constituted legal pneumoconiosis and was caused by both smoking and coal dust exposure, on the sole ground that they were more consistent with the Department of Labor's position that miners who smoke are at an additive risk for developing significant obstruction. However, the administrative law judge failed to provide any reason for discrediting the contrary opinions of Drs. Zaldivar and Rosenberg, that claimant's disabling condition did not constitute legal pneumoconiosis. Finding that claimant established the existence of legal pneumoconiosis and was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the administrative law judge concluded that employer could not establish rebuttal.

As Drs. Zaldivar and Rosenberg opined that claimant's disabling disease was bullous emphysema, a form of emphysema that they opined is unrelated to coal dust exposure, and as the preamble does not identify bullous emphysema as a specific type of emphysema or chronic obstructive pulmonary disease that may be caused by coal dust exposure,[11] these opinions are not inconsistent with the preamble.[12] *See* 65 Fed. Reg. 79,

[11] To the extent that the preamble discusses specific types of emphysema that may be caused by coal dust exposure, I note that the preamble identifies centrilobular emphysema, centriacinar emphysema and focal emphysema, but not bullous emphysema. Consequently, the administrative law judge is required to weigh the scientific evidence before her rather than using the preamble as a basis for discounting the opinions of Drs. Zaldivar and Rosenberg.

[12] The Director suggests that Drs. Zaldivar and Rosenberg did not provide an adequate scientific basis for their opinions. The evaluation of that contention is properly the province of the administrative law judge in finding the facts and determining credibility. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 536, 21 BLR 2-341 (4th Cir.

941-42 (Dec. 20, 2000). Thus, I would remand the case for the administrative law judge to resolve the conflict between the expert opinions, and provide valid reasons for her credibility determinations. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 536, 21 BLR 2-341 (4th Cir. 1998). On remand, the administrative law judge must place the burden on employer to establish rebuttal.

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JUDITH S. BOGGS
Administrative Appeals Judge

1998); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989), 12 BLR 1-190 (1989).