BRB No. 11-0466 BLA

JAMES V. MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PIKEVILLE COAL COMPANY	)	DATE ISSUED: 02/27/2012
	)	
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 on Second Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2006-BLA-06133) of Administrative Law Judge Daniel F. Solomon awarding benefits on a subsequent claim filed on November 4, 2005, 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).[1] This case is before the Board for the third time.[2] In considering the claim, the administrative law judge properly 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 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 amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment and has a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 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.[3] 30 U.S.C. §921(c)(4).

[1] Claimant filed his initial claim for benefits on August 30, 2002. Director's Exhibit 1. The claim was denied by the district director on November 25, 2003, because claimant failed to establish that he was totally disabled due to pneumoconiosis. *Id*. No further action was taken by claimant until he filed the present subsequent claim.

[2] In the Board's initial decision, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings of nineteen years of coal mine employment, and that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See J.V.M.* [*Martin*] *v. Pikeville Coal Co*., BRB No. 07-0944 BLA (Aug. 22, 2008)(unpub.). In addition, the Board affirmed the administrative law judge's finding that the x-ray evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but vacated his analysis of the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c), and remanded the case. *Id*. On remand, the administrative law judge determined that the evidence established the presence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and awarded benefits. Pursuant to employer's second appeal, the Board held that the administrative law judge erred in his consideration of the evidence pursuant to 20 C.F.R. §718.202(a)(4), and vacated his findings thereunder. The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c), and his determination of the date from which benefits commence pursuant to 20 C.F.R §725.503. *Martin v. Pikeville Coal Co*., BRB No. 09-0398 BLA (Feb. 26, 2010) (unpub.).

[3] In a December 2, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements, and he reopened the record to allow the parties to submit additional evidence to respond to the change in law. Claimant and the Director, Office of Workers' Compensation

Applying amended Section 411(c)(4), the administrative law judge found that claimant worked for more than fifteen years in underground coal mine employment. The administrative law judge also found that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found invocation of the rebuttable presumption established. 30 U.S.C. §921(c)(4). Further, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge applied an improper standard in finding that employer failed to rebut the Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge erred in requiring Drs. Rosenberg and Dahhan to "rule out" coal mining as a cause of claimant's respiratory impairment because such a standard "erroneously require[s] more than affirmative proof or reasoned medical certainty." Employer's Brief at 13. Rather, employer argues that Drs. Rosenberg and Dahhan appropriately addressed the issue of exposure to coal dust as a potential cause of claimant's obstructive respiratory impairment and "affirmatively showed the absence of legal pneumoconiosis within a reasonable medical certainty." *Id.* Employer also asserts that the administrative law judge erred in selecting November 2005, the month and year in which claimant filed his claim, as the date from which benefits commence. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's application of the appropriate rebuttal standard pursuant to Section 411(c)(4), and his analysis of the onset provisions for the payment of benefits. In a reply brief, employer reiterates its previous contentions.

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.[4] 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).

Programs (the Director), submitted position statements. Employer also responded, and submitted a supplemental medical opinion from Dr. Rosenberg. Decision and Order at 5; Dr. Rosenberg Supplemental Report dated Jan. 3, 2011 (Dr. Rosenberg Suppl. Rep.).

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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*).

After consideration of the administrative law judge's Decision and Order on Second Remand, the evidence of record, and the issues presented on appeal, we affirm the administrative law judge's award of benefits as it is rational, supported by substantial evidence and in accordance with applicable law. Initially, we affirm, as uncontested, the administrative law judge's application of the Patient Protection and Affordable Care Act (PPACA) in this case, and his determination that invocation of the Section 411(c)(4) presumption is established. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2-3, 7; *see* Employer's Brief at 17.

Next, we agree with the Director that the administrative law judge applied the correct standard in evaluating the issue of rebuttal of the presumption at Section 411(c)(4). Contrary to employer's argument, the administrative law judge properly relied on the standard enunciated in *Rose v. Director, OWCP*, 614 F.2d 936, 939, 2 BLR 2-38, 43 (4th Cir. 1980), requiring employer to affirmatively rule out any connection between the miner's disabling respiratory impairment and his coal mine employment. We agree with the Director that the standard set forth in *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, BLR 2- (6th Cir. 2011), issued subsequent to the decision before us, is equivalent to the standard in *Rose*, and is controlling in this case, which arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Therefore, we will address the administrative law judge's evaluation of the evidence relevant to rebuttal of the presumption at Section 411(c)(4). For the reasons that follow, we reject employer's assertions of error.

In evaluating the issue of rebuttal, the administrative law judge properly recognized that the burden is on employer to establish that claimant does not suffer from pneumoconiosis,[5] or that his respiratory impairment does not arise out of coal mine

[5] As the Director observes, the administrative law judge apparently assumed that the record establishes the absence of clinical pneumoconiosis, based on his prior determination, that claimant did not prove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Director's Response at 2-3 n.2. This finding was affirmed as uncontested. *See Martin*, BRB No. 07-0944 BLA, slip op. at 2, 5. However, we agree with the Director that the determinations of whether claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a) and whether employer rebutted the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), by ruling out the existence of clinical pneumoconiosis, involve different allocations of the burden of proof. Claimant had the burden of establishing the existence of pneumoconiosis as an essential element of entitlement, whereas under the current procedural posture of the case *vis a vis* Section 411(c)(4), employer must prove the absence of clinical and legal pneumoconiosis as an avenue of rebuttal. Director's Response at 2; *see* Section 1556 of Public Law No. 111-148 reinstating the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Notwithstanding the administrative law judge's omission, we conclude, in light of our

employment. Initially, the administrative law judge found that, of the four medical opinions of record, those of Drs. Rasmussen[6] and Agarwal[7] supported a finding of legal pneumoconiosis, while those of Drs. Dahhan and Rosenberg did not. However, in evaluating the medical opinions of Drs. Dahhan and Rosenberg, the administrative law judge found that employer failed to meet its burden of proof in order to establish rebuttal.

First, the administrative law judge found that "neither Dr. Rosenberg[8] nor Dr. Dahhan[9] submitted a report that rules out [a] connection between [claimant's] respiratory impairment and his [nineteen] years of coal mine employment." Decision and Order at 7. In particular, the administrative law judge found that no scientific evidence of record supports Dr. Rosenberg's view that cigarette smoke "penetrates more deeply than coal dust, resulting in a diffuse pattern of emphysema formation, in contrast to a more localized form of emphysema induced by coal mine dust." *Id*; Dr. Rosenberg Supplemental Report of Jan. 3, 2011 at 5 (Dr. Rosenberg Suppl. Rep.). As the objective evidence supporting a medical opinion is relevant to its reliability and credibility, an unsupported medical opinion may be assigned little weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1989). Moreover, a medical view

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disposition herein, that any error is harmless. *See* 30 U.S.C. §921(c)(4); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] Dr. Rasmussen diagnosed clinical pneumoconiosis, "which is a material contributing factor to [claimant's] disabling lung disease," and emphysema, with smoking and coal mine dust exposure contributing to claimant's disabling lung disease. Director's Exhibit 12 at 35-37.

[7] Dr. Agarwal diagnosed a severe pulmonary impairment of chronic obstructive pulmonary disease (COPD) due to smoking and coal mine employment, with a small but substantial contribution from coal mining. Claimant's Exhibit 5 at 4.

[8] Dr. Rosenberg diagnosed disabling airways disease in the form of "COPD related to [the miner's] long smoking history, and not [coal worker's pneumoconiosis]." Employer's Exhibit 4 at 4-5. Dr. Rosenberg opined as well that the miner's COPD and emphysema "are smoking related in etiology, as opposed to being caused by past coal mine dust exposure." *See* Decision and Order at 5, 7; Dr. Rosenberg Suppl. Rep. at 6.

[9] Dr. Dahhan opined that the miner's disabling pulmonary impairment resulted from smoking, and was not caused by, related to, contributed to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. Dr. Dahhan opined, as well, that the miner's last coal dust exposure since 1993 is "a duration of absence sufficient to cause cessation of any industrial bronchitis he may have had," and that his responsiveness to bronchodilation is inconsistent with the adverse effects of coal dust. Director's Exhibit 14 at 3.

that emphysema caused by smoking can be distinguished from obstruction caused by coal dust exposure may be found inconsistent with the Department of Labor findings, discussed in the preamble to the revised regulations, that smoking-related emphysema and coal dust-related emphysema occur through similar mechanisms. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Tenn. Consol. Coal Corp v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989). In this case, the administrative law judge found that Dr. Rosenberg provided no scientific evidence that "explains the mixture or combination of smoking and a stipulation to [nineteen] years of exposure to mining." Decision and Order at 8. As such an explanation would coincide with the Secretary of Labor's legislative factfinding, that smokers who mine have an additive risk of developing chronic bronchitis, this was rational. *See Odom*, 342 F.3d at 491, 22 BLR at 2-621; *Crisp*, 866 F.2d at 186, 12 BLR at 2-128. Additionally, although employer asserts that Dr. Rosenberg supported his views with more than twenty scientific studies, employer does not identify any part of a study discussing the points questioned by the administrative law judge. Employer's Brief at 12, 15; Employer's Exhibit 4; Dr. Rosenberg Suppl. Rep. at 5. Accordingly, we affirm the administrative law judge's finding that Dr. Rosenberg's opinion failed to rule out the existence of legal pneumoconiosis and was, therefore, insufficient to establish rebuttal of the Section 411(c)(4) presumption.

Next, the administrative law judge assigned diminished weight to Dr. Dahhan's medical opinion, that coal dust exposure did not cause, or contribute to, claimant's chronic obstructive pulmonary disease (COPD), because his medical opinion failed to "explain how [nineteen] years of mining applies in this fact pattern," and, therefore, was incompletely reasoned. Decision and Order at 7. A medical opinion that fails to address whether a miner's coal dust exposure was an aggravating, contributing or exacerbating cause of his pulmonary impairment, or to sufficiently explain a conclusion that cigarette smoking was the sole and exclusive cause of impairment, may be discounted. *See Cornett v. Benham Coal Co.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1998); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-19-20 (2004). The interpretation of medical evidence is properly for medical experts, *see Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987), and the administrative law judge is not required to accept any particular expert opinion, but to credit that evidence found most persuasive. Moreover, in view of employer's burden of production and persuasion in establishing rebuttal in this matter, we reject, as inapposite, employer's argument that Dr. Rosenberg's opinion was subjected to greater scrutiny than that of Dr. Rasmussen. *See* Employer's Brief at 10.[10] As the

[10] As an alternative finding, the administrative law judge found that Dr. Rasmussen's medical opinion is better reasoned, well-documented, and consistent with the physical factual findings indicating "that there had been an aggravation of other respiratory conditions . . . by exposure to breathing in materials found in mining." Decision and Order at 7. The administrative law judge accepted the opinions of Drs.

administrative law judge has permissibly rejected the only medical opinions supportive of employer's burden, we need not address employer's remaining arguments with respect to the administrative law judge's weighing of the medical opinions of Drs. Rasmussen and Agarwal.[11] *See* 30 U.S.C. §921(c)(4); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, the administrative law judge acted within his discretion in determining that the record contained no medical opinion that adequately and affirmatively demonstrated that the miner did not suffer from pneumoconiosis or that his condition was not significantly contributed to, or aggravated by, coal dust exposure. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-102; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In light of the foregoing, we hold that the administrative law judge properly allocated the burden of proof, and that his evaluation of the relevant medical evidence adequately complied with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-705 (1985). Substantial evidence supports his conclusion that employer failed to rebut the presumption at Section 411(c)(4), and it is affirmed. *See Morrison*, 644 F.3d at 480, BLR at 2- .

Finally, we reject employer's argument that the administrative law judge erred in determining the date of the onset of disabling pneumoconiosis and, therefore, erred in determining the date from which benefits commence pursuant to 20 C.F.R. §725.503. Contrary to employer's assertion, that the proper date for the onset of disabling pneumoconiosis is the February 7, 2007 date of Dr. Agarwal's finding of totally disabling pneumoconiosis, the administrative law judge properly determined that claimant was disabled due to pneumoconiosis at some point prior to Dr. Agarwal's February 7, 2007 finding of totally disabling pneumoconiosis. Thus, the administrative law judge reasonably determined that the filing date of claimant's subsequent claim, November 2005, was the date from which benefits commence, because there was no credible medical evidence that established that claimant was not totally disabled from pneumoconiosis between November 2005 and February 7, 2007. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-

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Rasmussen and Agarwal that both smoking and coal dust inhalation contributed to claimant's total respiratory disability. *Id*. at 7-8.

[11] According to employer, the medical opinions of Drs. Rasmussen and Agarwal fail to establish the existence of legal pneumoconiosis and disability causation, and were inadequately scrutinized by the administrative law judge. *See* Employer's Brief at 10-12, 16-17. However, having successfully invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), claimant need not establish either the existence of pneumoconiosis or disability causation. 30 U.S.C. §921(c)(4). These arguments are, therefore, inapposite.

184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Thus, we affirm the administrative law judge's award of benefits from November 2005, the month the subsequent claim was filed.

Accordingly, the administrative law judge's Decision and Order on Second Remand 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