BRB No. 12-0285 BLA

LARRY T. STERLING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CENTRAL OHIO COAL COMPANY	)	DATE ISSUED: 02/28/2013
	)	
and	)	
	)	
GENERAL RECOVERY INCORPORATED	)	
	)	
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 – Award of Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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 – Award of Benefits in a Subsequent Claim (2007-BLA-6088) of Administrative Law Judge Larry S. Merck, with respect to a claim filed on October 11, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] Based on the stipulations of the parties, the administrative law judge credited claimant with twenty-three years of coal mine employment and determined that claimant is totally disabled under 20 C.F.R. §718.204(b)(2). The administrative law judge further found, therefore, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). The administrative law judge also determined that, because claimant had at least fifteen years of employment in conditions substantially similar to an underground mine, he invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant's surface mine employment was substantially similar to that of an underground coal miner and did not correctly determine the length of claimant's smoking history.[3]

[1] Claimant filed his initial claim for benefits on December 19, 2000. Director's Exhibit 1. On February 7, 2001, the district director issued an Order to Show Cause why the claim should not be deemed abandoned, based on claimant's failure to provide evidence essential to the processing of the claim. *Id*. The record does not reflect that any action was taken on the claim and it was deemed abandoned. *Id*. No further action was taken by claimant until he filed the current claim. Director's Exhibit 3.

[2] On March 23, 2010, Congress enacted amendments to the Black Lung Benefits Act, that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In pertinent part, the amendments reinstated Section 411(c)(4), 30 U.S.C. §921(c)(4), which provides that 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).

[3] By Order dated August 9, 2012, the Board previously denied employer's request that this case be held in abeyance pending resolution of the legal challenges to the PPACA. *Sterling v. Central Ohio Coal Co.*, BRB No. 12-0285 BLA (Aug. 9, 2012) (unpub. Order).

Further, employer argues that the administrative law judge did not properly weigh the evidence in determining that employer failed to rebut the amended Section 411(c)(4) presumption. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, filed a limited brief in which he urges the Board to hold that substantial evidence supports the administrative law judge's coal mine employment findings.[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 rational, supported by substantial evidence, and 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).

I. Coal Mine Employment

Claimant testified at the hearing that his coal mine employment was all aboveground and "very dusty." Hearing Transcript at 20-21. Claimant further testified that the equipment he operated had enclosed cabs for the last twenty years that he worked but he operated machines without enclosed cabs for "five years probably." *Id*. at 22, 28. Claimant stated that the cabs would help with the dust "[f]or awhile and then they would . . . leak" after "probably a year." *Id*. at 22. Claimant also indicated that, as a dozer operator, he pushed dirt to remove overburden and placed dirt back on the strip mine, resulting in a lot of dust. *Id*. at 24, 29. Claimant also testified that trucks driving by on the haul road generated dust, especially on hot and dry days. *Id*. at 29-30. Claimant stated that, at the end of a work day, his clothes would "be very dirty" from "dust and grease or oil, and other stuff." *Id*.

At a deposition taken on December 13, 2007, Dr. Knight was asked whether claimant provided any information about the amount of coal dust he was exposed to as a coal miner. Employer's Exhibit 2 at 12. Dr. Knight responded that claimant indicated he "was covered with dust because of the clouds of dust that get stirred up in the course of

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[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that claimant's coal mine employment was in Ohio. 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).

[his] driving the . . . machinery." *Id*. When asked if claimant would have less exposure to coal dust than underground miners, Dr. Knight stated, "that's hard to say, I think. Obviously the quality of your work surroundings and how well they do about ventilation and following the rules has a large effect on . . . things like that." *Id*.

Relying on the testimony of claimant and Dr. Knight, the administrative law judge found that claimant's surface mine employment exposed him to heavy amounts of dust, including coal dust. Decision and Order at 10. The administrative law judge also determined that claimant's uncontradicted testimony concerning the work he performed at the mines, and the conditions of his work environment, established that his surface mine work was substantially similar to underground mine conditions. *Id*.

Employer argues that the evidence the administrative law judge relied on was insufficient to support his determination that claimant's surface coal mine employment was substantially similar to underground conditions. In addition, employer asserts that, because there are no standards in the statute or regulations governing proof of comparability between surface mine employment and underground conditions, its right to due process has been denied. The Director contends, in response, that the evidence is sufficient to meet claimant's burden of proof.

Claimant bears the burden of establishing comparable conditions between surface and underground mining. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988); 20 C.F.R. §725.103. Claimant does not need to present evidence of the actual conditions in an underground mine, but need only show that the miner was exposed to sufficient coal mine dust during his employment. *See Leachman*, 855 F.2d at 512. "Sufficient" exposure relates to the miner's personal exposure to coal dust and not the level or extent of the dust environment in an underground mine generally. *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). Further, a claimant's unrefuted testimony is sufficient to support a finding of similarity. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Therefore, contrary to employer's contentions, substantial evidence, in the form of claimant's uncontradicted testimony about his dust exposure, supports the administrative law judge's finding that claimant established at least fifteen years of coal mine employment in a working environment that was substantially similar to underground mine conditions. *See Blakley*, 54 F.3d at 1319, 19 BLR at 2-202. Consequently, we affirm the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption by establishing that he has at least fifteen years of qualifying employment and has a totally disabling respiratory impairment.

II. Smoking History

In rendering a finding as to the length of claimant's smoking history, the administrative law judge considered claimant's hearing testimony, medical reports and deposition testimony, and claimant's treatment records.[6] The administrative law judge found:

> Although Claimant's smoking history is somewhat contradictory, based on the submitted evidence, I find that Claimant smoked cigarettes from about November 1966 to February 2005, or approximately 38 years. The evidence regarding the amount Claimant smoked is varied. After reviewing all the evidence on Claimant's smoking history, I find the preponderance of the evidence establishes that Claimant averaged about one and one-half packs of cigarettes per day. Accordingly, I find the preponderance of the evidence establishes a smoking history of at least 57 pack-years.

Decision and Order at 5.

Employer contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), by failing to adequately explain his finding that claimant smoked an average of one and a half packs per day. Employer asserts that the administrative law judge should have considered that the physicians who examined claimant in connection with his federal black lung claim, relied on a shorter history of cigarette smoking than his treating physicians. Employer's Brief at 8-9. Employer maintains that the flaws in the administrative law judge's finding regarding claimant's smoking history require remand, since he relied upon that history in weighing the medical opinions of record on the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Although we agree with employer that the administrative law judge did not fully explain how he resolved the conflicts in the evidence as to the extent of claimant's smoking, remand is not required under the circumstances of this case. Contrary to employer's suggestion, the administrative law judge provided rationales for discrediting

[6] Claimant testified that he began smoking in November of 1966 and quit in February of 2005. Hearing Transcript at 20-21. Claimant stated that he "started out at one pack a day for ten or fifteen years and it gradually got to a pack and a half." *Id*. at 21. Claimant further stated that during twelve hour shifts, he would smoke up to three packs of cigarettes a day but that he averaged about a pack and a half a day during the entire period he smoked. *Id*. at 23. Physicians recorded smoking histories ranging from approximately thirty-six pack years to approximately sixty-eight pack years. Director's Exhibits 10, 12; Claimant's Exhibits 2, 4; Employer's Exhibits 1 at 9, 3, 6 at 12.

the opinions of employer's experts at 20 C.F.R. §718.202(a)(4) that were unrelated to his finding regarding claimant's smoking history. *See* Decision and Order at 18-21, 26-31. Thus, error, if any, in the administrative law judge's conclusion that claimant had a fifty-seven pack year history of smoking is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

III. Rebuttal of the Presumption

A. Existence of Pneumoconiosis

The administrative law judge initially considered whether employer rebutted the amended Section 411(c)(4) presumption by proving that claimant does not have clinical or legal pneumoconiosis.[7] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge weighed six interpretations of three x-rays. The administrative law judge found that the November 9, 2006 x-ray was inconclusive, as the physicians who were dually-qualified as Board-certified radiologists and B readers disagreed as to whether pneumoconiosis was present. Decision and Order at 13; Director's Exhibits 10, 13; Employer's Exhibits 4, 5. The administrative law judge determined that Dr. Ahmed's positive reading of the March 29, 2007 x-ray outweighed Dr. Fox's contrary reading, based on Dr. Ahmed's status as a dually-qualified radiologist. Decision and Order at 13-14; Director's Exhibit 12; Claimant's Exhibits 1, 5. The administrative law judge found that the x-ray dated May 11, 2011, was negative for pneumoconiosis, based on Dr. Rosenberg's uncontradicted reading. Decision and Order at 14; Employer's Exhibit 3. The administrative law judge determined that the x-ray evidence was inconclusive, as the dually-qualified readers disagreed as to the presence of pneumoconiosis. Decision and Order at 14. Accordingly, the administrative law judge found that employer "has failed to rebut the presumption by a preponderance of the evidence that [c]laimant suffers from clinical pneumoconiosis." *Id*.

[7] The regulation at 20 C.F.R. §718.201(a)(1) provides:

> "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 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).

Employer contends that the administrative law judge's finding that the March 29, 2007 x-ray is positive for pneumoconiosis is "unexplained," as Dr. Fox, who read the film as negative for pneumoconiosis, has qualifications equal to those of Dr. Ahmed, who read the film as positive. Employer further asserts that the administrative law judge should have given greatest weight to the May 11, 2011 x-ray, which he determined was negative for pneumoconiosis, as it is the most recent x-ray of record. Employer also maintains that the case should be remanded because the administrative law judge did not adequately explain why the x-ray evidence did not establish rebuttal of the presumption of clinical pneumoconiosis.

Employer's contentions are without merit. The administrative law judge acted within his discretion as fact-finder in giving greater weight to Dr. Ahmed's positive reading of the March 29, 2007 x-ray because he is a Board-certified radiologist. *See* 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Although Dr. Fox is Board-certified in Nuclear Medicine, he is not a Board-certified radiologist, and employer has not provided any reasoning for why Dr. Fox's certification by the American Board of Nuclear Medicine would entitle his x-ray interpretation to additional weight. *See* Director's Exhibit 12. In addition, because the United States Court of Appeals for the Sixth Circuit has held that the "later evidence" rule applies only when newer evidence demonstrates worsening of a miner's condition consistent with the existence of pneumoconiosis, we reject employer's argument that the May 11, 2001 x-ray is entitled to greatest weight. *See Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *see also Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997). Consequently, we affirm the administrative law judge's determination that employer failed to establish the absence of clinical pneumoconiosis by the x-ray evidence, as it was inconclusive.

Employer also contends that the administrative law judge erred in his consideration of the medical opinion evidence, relevant to whether claimant has clinical or legal pneumoconiosis. Regarding the administrative law judge's determination that Dr. Grodner's opinion, that claimant does not have clinical or legal pneumoconiosis, is entitled to little weight, employer asserts that Dr. Diaz's opinion, that the x-ray evidence supports a diagnosis of chronic obstructive pulmonary disease (COPD), rather than clinical pneumoconiosis, supports Dr. Grodner's opinion. In addition, employer states that the administrative law judge erred in "appl[ying] a rote methodology to disregard Dr. Grodner's opinion[,] believing that COPD can be attributed to dust exposure based on statements in the preamble to the revised regulations," as the preamble does not contain a presumption that all COPD is due to legal pneumoconiosis. Employer's Brief at 13. Employer also states that, contrary to the administrative law judge's analysis, "20 C.F.R. §718.201(a)(2) does not alter the requirement that a miner prove a causal relationship between coal mine employment and any obstructive lung disease." *Id.*

These contentions are without merit. Amended Section 411(c)(4) shifts the burden to employer to prove "that the miner does not have pneumoconiosis . . . or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4); *see Morrison v. Tennessee Consolidation Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). In this case, the administrative law judge properly applied this standard to employer and did not, as employer alleges, treat the preamble as a presumption that claimant's COPD constitutes legal pneumoconiosis. *See Morrison*, 644 F.2d at 479, 25 BLR at 2-8. Rather, the administrative law judge reasonably consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor (DOL), when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012). Thus, the administrative law judge rationally found that Dr. Grodner's opinion was "inconsistent with the [DOL]'s determinations" as set forth in the preamble, as Dr. Grodner "conflat[ed] the concepts of clinical and legal pneumoconiosis" by stating that claimant's COPD is not related to coal dust exposure because he does not have coal workers' pneumoconiosis. Decision and Order at 21; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Adams*, 694 F.3d at 802, 25 BLR at 2-206.

Moreover, the validity of the administrative law judge's rationale for discrediting Dr. Grodner's opinion is not altered by Dr. Diaz's statement that the x-ray evidence is consistent with a diagnosis of COPD, rather than coal workers' pneumoconiosis, as Dr. Diaz's opinion reflects the same conflation of the concepts of clinical and legal pneumoconiosis. The administrative law judge also rationally found that Dr. Grodner's determination that claimant does not have clinical pneumoconiosis was merely a reiteration of readings of the x-ray dated March 29, 2007, as Dr. Grodner stated: "There is no evidence of coal workers' pneumoconiosis. The chest x-ray that was taken at this time and interpreted by myself and by B reader Dr. Fox does not indicate evidence of parenchymal abnormalities nor of any pleural changes." Director's Exhibit 12. The administrative law judge acted within his discretion, therefore, in discrediting Dr. Grodner's opinion on the issue of the existence of clinical pneumoconiosis because the administrative law judge had determined that the March 29, 2007 film was positive for clinical pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). Accordingly, we affirm the administrative law judge's determination that Dr. Grodner's opinion was insufficient to establish that claimant does not have clinical or legal pneumoconiosis.

Employer also asserts that the administrative law judge erroneously discredited Dr. Rosenberg's opinion based on the preamble to the regulations, as "[t]he preamble does not state that a physician cannot differentiate the etiology of the COPD based on the patterns or decrements in [the FEV1/FVC] values." Employer's Brief at 20. Employer

further argues that the administrative law judge must resolve the conflict between medical experts as to whether obesity is the cause of claimant's poor ventilation, as Dr. Rosenberg cited obesity as a contributing cause of claimant's respiratory impairment.

Employer's contentions are without merit. The administrative law judge found correctly that Dr. Rosenberg stated that smoking-related forms of obstructive lung disease are associated with a reduction in the FEV1/FVC ratio, while impairments related to coal dust exposure generally do not affect the ratio. Decision and Order at 29. Thus, the administrative law judge rationally determined that Dr. Rosenberg's opinion is in conflict with the preamble to the regulations, as "Dr. Rosenberg apparently disagrees [with] the [DOL which] . . . concluded that coal mine dust exposure may cause COPD, with associated decrements in FEV1/FVC."[8] *Id*. at 29-30; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11.

Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Grodner and Rosenberg, ruling out the presence of clinical and legal pneumoconiosis, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant does not suffer from either disease.[9] *See Morrison*, 644 F.2d at 479, 25 BLR at 2-8.

B. Total Disability Due to Pneumoconiosis

We further affirm the administrative law judge's finding that employer did not rebut the amended 411(c)(4) presumption by establishing that claimant's totally disabling

[8] Contrary to employer's assertion, the administrative law judge did not merely reiterate the Board's holdings with regard to the discrediting of Dr. Rosenberg's opinion in a series of unpublished cases. Rather, he properly evaluated Dr. Rosenberg's opinion based on the facts of this case and permissibly cited to *M.A.* [*Amburgey*] *v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009)(unpub.) and *Y.D.* [*Dyke*] *v. Diamond May Coal Co.*, BRB No. 08-0176 BLA (Nov. 26, 2008)(unpub.), as support for his credibility determination.

[9] We decline to address employer's arguments regarding the administrative law judge's weighing of the medical opinions of Drs. Diaz, Forrestal and Branditz, diagnosing clinical and/or legal pneumoconiosis. Because employer bears the burden of establishing rebuttal of the amended Section 411(c)(4) presumption by proving that claimant does not have clinical or legal pneumoconiosis, error, if any, in the administrative law judge's crediting of these opinions is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

respiratory impairment did not arise out of, or in connection with, his coal mine employment. Decision and Order at 33-35. The administrative law judge permissibly discredited the opinions of Drs. Grodner and Rosenberg, stating that there was no relationship between coal dust exposure and claimant's totally disabling impairment on the ground that they did not credibly rule out the presence of clinical or legal pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits in a Subsequent Claim 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