BRB No. 12-0343 BLA

CLYDE CONNELLY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	DATE ISSUED: 02/19/2013
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 Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Margaret M. Scully (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, 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 Awarding Benefits (2009-BLA-5906) of Administrative Law Judge Thomas M. Burke granting claimant's request for modification of the denial of a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).

Claimant's prior claim for benefits, filed on September 6, 2001, was finally denied on November 20, 2003 because, even though claimant established the existence of a totally disabling respiratory impairment, he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. On December 29, 2006, claimant filed his current claim, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of his previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3. Administrative Law Judge Michael P. Lesniak denied this claim on January 16, 2009. Director's Exhibit 49. Claimant requested modification, pursuant to 20 C.F.R. §725.310, and on August 7, 2009, the district director denied claimant's request. Director's Exhibit 56. Claimant requested a hearing, and the case was forwarded to the Office of Administrative Law Judges, where it was assigned, without objection, to Administrative Law Judge Thomas M. Burke (the administrative law judge).

The administrative law judge credited claimant with twenty-one years of underground coal mine employment, and accepted employer's concession that claimant has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 4; Hearing Tr. at 19. Thus, the administrative law judge properly found that this claim is governed by the recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Decision and Order at 16.

Specifically, 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 Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, 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) (to be codified at 30 U.SC. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge invoked the rebuttable presumption of total disability due to pneumoconiosis.[1] Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement, through invocation of the presumption. *See* 20 C.F.R. §725.309(d). The administrative law judge further found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment and,

[1] In invoking the presumption, the administrative law judge noted that, in addition to employer's concession of total disability, the medical evidence of record establishes that claimant has a totally disabling respiratory impairment. Decision and Order at 16.

therefore, he found that employer failed to rebut the presumption. Accordingly, the administrative law judge found that claimant established a basis for modification of the prior denial, and awarded benefits. Decision and Order at 31.

On appeal, employer asserts that, in finding that employer failed to rebut the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), the administrative law judge failed to consider the evidence submitted with the prior claim, and erred in his analysis of the medical opinion evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments that the administrative law judge applied an improper rebuttal standard, and erred in referring to the preamble to the amended regulations in assessing the credibility of the medical opinions on the issue of legal pneumoconiosis.[2]

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.[3] 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).

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). The administrative law judge found that employer failed to establish rebuttal by either method. Specifically, the administrative law judge found that while employer disproved the existence of clinical pneumoconiosis, it failed to disprove the existence of legal pneumoconiosis.[4] Decision and Order at 19, 30. The administrative law judge further found that employer failed to disprove a causal

[2] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established twenty-one 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, thus, established invocation of the Section 411(c)(4) presumption and a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

relationship between claimant's disability and his pneumoconiosis. Decision and Order at 31.

Employer initially contends that, in finding that employer did not rebut the presumption of total disability due to pneumoconiosis, the administrative law judge erred in failing to consider the medical evidence submitted with the prior claim. Employer's Brief at 20-22. Employer asserts that consideration of the prior claim evidence is important, because several physicians who examined claimant in 2001 and 2002 opined that claimant does not have legal pneumoconiosis, and that his obstructive impairment is not due to coal mine dust exposure. Employer's Brief at 20-22. Employer's contention lacks merit.

The administrative law judge acknowledged that in the prior claim claimant established that he was totally disabled, but not that he suffered from pneumoconiosis. Decision and Order at 2, 18. Employer has not explained how medical evidence from the prior claim, which predates claimant's invocation of the rebuttable presumption of total disability due to pneumoconiosis, is relevant to whether employer has rebutted the presumption. *See Cooley v. Island Creek Coal Co*., 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988)(holding that it is illogical to allow an administrative law judge to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Thus, under the facts of this case, we find no reversible error in the administrative law judge's declination to discuss in detail the prior claim evidence.[5] *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer next contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Cohen, Rasmussen, Celko, Houser, Fino,

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[4] "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).

[5] The administrative law judge noted that the record includes x-ray consultations, radiology reports, computerized tomography scans and over one hundred and seventy pages of treatment notes, dating from 1989 to 2007, that were submitted in the prior claim. Decision and Order at 5-6.

Rosenberg, and Renn. Each of these physicians agreed that claimant suffers from a disabling obstructive ventilatory impairment, but differed as to whether it was related to claimant's coal mine dust exposure. Drs. Cohen, Rasmussen, Celko, and Houser opined that claimant's obstructive impairment is due to a combination of coal mine dust exposure and cigarette smoking. Claimant's Exhibits 4, 6, 7; Director's Exhibits 11, 38-3, 38-4. Conversely, Drs. Fino, Rosenberg, and Renn attributed claimant's obstructive impairment exclusively to cigarette smoking. Director's Exhibits 37-1, 37-2, 41, 42; Employer's Exhibits 7-10.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge accorded the greatest weight to Dr. Cohen's diagnosis of legal pneumoconiosis for several reasons; it was more persuasively explained; it was more consistent with the 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, as set forth in the preamble; and it was supported by the opinions of Drs. Rasmussen, Celko, and Houser. Decision and Order at 25-30. The administrative law judge found that Dr. Cohen's opinion was also entitled to greater weight based upon his superior qualifications. *Id.* at 26. Conversely, the administrative law judge found the opinions of Drs. Fino, Rosenberg, and Renn to be unpersuasive, in part, because he found that they were premised on assumptions that were inconsistent with the Act and the regulations. Decision and Order at 25-30. The administrative law judge, therefore, found that employer failed to carry its burden to disprove the existence of legal pneumoconiosis. Decision and Order at 29-30.

Initially, we reject employer's assertion that the administrative law judge erred in referring to the preamble to the revised regulations, when weighing the medical opinions relevant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 33-34. Contrary to employer's assertions, the administrative law judge did not treat the preamble as evidence, or as a presumption that all obstructive lung disease is pneumoconiosis; rather, he permissibly consulted the preamble as an authoritative statement of medical principles accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See 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); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

Employer next contends that the administrative law judge erred in crediting Dr. Cohen's opinion, that claimant's COPD is due in part to his coal mine dust exposure, over the contrary opinions of Drs. Fino, Rosenberg, and Renn. We disagree. In

considering Dr. Fino's opinion, that claimant suffers from COPD and emphysema due to smoking, the administrative law judge noted that Dr. Fino relied, in part, on a study by Attfield & Hodous that concluded that the average loss of lung function related to coal mine dust exposure is very small. Decision and Order at 20; Employer's Exhibits 3, 9 at 12-15. Utilizing the data provided by the study, Dr. Fino calculated that claimant's loss of lung function due to his coal mine dust exposure would be insignificant. Employer's Exhibit 9 at 12. On the other hand, the administrative law judge considered Dr. Cohen's opinion, that while the results of the Attfield & Hodous study are important, because they show statistically significant declines in lung function associated with coal mine dust exposure, it is imprudent to rely on the study's results that are based on averages, and thus are not reflective of the lung function of any individual miner. Decision and Order at 22-23; Claimant's Exhibit 7 at 16. Moreover, the administrative law judge found that Dr. Cohen accurately noted that, while the average decline in function related to coal mine dust was seen to be small, the average decline related to cigarette smoking was also small. Decision and Order at 22-23; Claimant's Exhibit 7 at 17. The administrative law judge permissibly credited Dr. Cohen's opinion, that claimant's COPD is due in part to his coal mine dust exposure, over Dr. Fino's contrary opinion, based on Dr. Cohen's superior credentials, and because he found that Dr. Cohen's opinion, and his interpretation of the medical literature, were more consistent with the findings of DOL, as set forth in the preamble to the revised regulations.[6] *See Obush*, 24 BLR at 1-125-26 (2009); Decision and Order at 22, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). Because the administrative law judge specifically found that Dr. Cohen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's lung disease was due to both smoking and coal mine dust exposure, consistent with the findings of the DOL, we affirm the administrative law judge's determinations to credit Dr. Cohen's diagnosis of legal pneumoconiosis, and to discredit the opinion of Dr. Fino. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

[6] The administrative law judge noted that the explanatory comments to the Attfield & Hodous study set forth in the preamble to the revised regulations instruct that:

> [a]s the majority of miners may well have small or, perhaps in some cases, no decline in pulmonary function, the average decline of the population studied can appear to be relatively small. Despite this, the individual miners affected can have quite severe disease, and statistical averaging hides this effect.

Decision and Order at 26, *quoting* 65 Fed. Reg. 79,941 (Dec. 20, 2000).

Employer also argues that the administrative law judge erred in his consideration of the opinions of Drs. Rosenberg and Renn. We disagree. In evaluating their opinions, the administrative law judge noted that both physicians opined that the FEV1/FVC ratio can be used to differentiate losses in lung function due to coal mine dust exposure, from losses due to smoking. Decision and Order at 20-21; Director's Exhibits 37 at 6, 42 at 19-22, Employer's Exhibits 2, 7, 8 at 18, 10 at 18-19. Based, in part, on claimant's demonstrated FEV1/FVC ratio, Drs. Rosenberg and Renn concluded that claimant's COPD is due exclusively to smoking. *Id.* The administrative law judge noted that, in contrast, Dr. Cohen rejected the suggestion that the FEV1/FVC ratio can be used to determine the cause of an obstructive impairment, stating that there is no test that can distinguish between the effects of coal mine dust exposure and the effect of smoking, as these exposures cause similar reactions in the lungs. Decision and Order at 22; Claimant's Exhibit 7 at 15-16, 26, 28-30, 39-40. The administrative law judge further noted that Dr. Rasmussen agreed with Dr. Cohen, explaining that emphysema caused by coal dust exposure or smoking is not distinguishable, because the lungs' response to coal mine dust and cigarette smoke is identical.[7] Decision and Order at 8, 27; Director's Exhibit 38; Claimant's Exhibit 6 at 14-20. The administrative law judge permissibly credited the opinions of Drs. Cohen and Rasmussen, that claimant's COPD is due in part to his coal mine dust exposure, over the contrary opinions of Drs. Rosenberg and Renn, based on their impressive credentials, and because he found that the opinions of Drs. Cohen and Rasmussen were more consistent with the findings of DOL, including that smoke-induced emphysema and dust-induced emphysema occur through similar mechanisms, and that the risks of coal mine dust exposure and smoking are additive. *See Obush*, 24 BLR at 1-125-26; *see also Adams*, 694 F.3d at 801-02, 25 BLR at 2-211;

[7] There is no merit to employer's contentions that the administrative law judge failed to consider whether Dr. Rasmussen's opinion was equivocal, or that his opinion is not sufficient to meet "claimant's burden." Employer's Brief at 22. The administrative law judge specifically noted Dr. Rasmussen's initial opinion, expressed in his written report, that smoking "would appear" to be the more significant contributing cause of claimant's obstructive impairment, with coal mine dust contributing "at least minimally." The administrative law judge permissibly found that Dr. Rasmussen clarified his opinion in his deposition, testifying that claimant's impairment was primarily related to his smoking, but that it is "also due in significant part to his coal mine dust exposure." *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order at 8; Director's Exhibit 38-4; Claimant's Exhibit 6 at 12-13, 14, 45-46. Moreover, contrary to employer's contention, as claimant established invocation of the rebuttal presumption of total disability due to pneumoconiosis, claimant does not have the burden to establish the existence of pneumoconiosis. Rather, employer bears the burden to disprove the existence of the disease. 30 U.S.C. §921(c)(4).

Looney, 678 F.3d at 314-16, 25 BLR at 2-130; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 27-29, *citing* 65 Fed Reg. at 79,940, 79,943.

As the administrative law judge permissibly relied on the superior qualifications of Drs. Cohen and Rasmussen,[8] and the fact that their opinions are supported by the opinions of Drs. Celko, Houser, and are more consistent with the findings of the DOL, we affirm the administrative law judge's determinations to credit the opinions of Drs. Cohen and Rasmussen, that claimant has legal pneumoconiosis, and to discount the opinions of Drs. Fino, Rosenberg and Renn. *See Obush*, 24 BLR at 1-125-26; *Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Rosenberg, Renn, and Fino, the only opinions 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 legal pneumoconiosis. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Kramer*, 305 F.3d at 211, 22 BLR at 2-481. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480 (6th Cir. 2011); *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). We, therefore, affirm the administrative law judge's finding that employer did not establish rebuttal by disproving the existence of pneumoconiosis.

Employer next argues that the administrative law judge applied an improper rebuttal standard in finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's pulmonary or respiratory impairment "did not arise out of,

[8] Contrary to employer's assertion, the administrative law judge permissibly accorded greater weight to Dr. Cohen's opinion, based upon his superior qualifications. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 280-81 (7th Cir. 2001) (holding that it is "rational to give great weight to Dr. Cohen's views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research"). The administrative law judge also permissibly credited Dr. Rasmussen's opinion based on his "impressive background in the study and treatment of coal dust induced lung diseases." *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order at 29. The administrative law judge found that while Drs. Renn, Fino and Rosenberg also have "excellent qualifications in the field of pulmonary medicine," their experience and study in the area of occupational pneumoconiosis is less than that of Drs. Cohen and Rasmussen. Decision and Order at 30.

or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4). Contrary to employer's contention, the administrative law judge properly found that, applying an analogous rebuttal standard at 20 C.F.R. §727.203(b), the United States Court of Appeals for the Third Circuit held that, in order for employer to meet its rebuttal burden, the medical evidence must be sufficient to rule out any causal link between claimant's total disability and his coal mine employment. Decision and Order at 30, *Plesh v. Director, OWCP*, 71 F.3d 103, 113, 20 BLR 2-30, 2-49 (3d Cir. 1995). Considering all of the medical opinions anew, the administrative law judge permissibly found that the same reasons for which he discounted the opinions of Drs. Fino, Rosenberg and Renn, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that the claimant's impairment is unrelated to his coal mine employment. *See Adams*, 886 F.2d at 826, 13 BLR at 2-63-64; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 30-31. Thus, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Cohen, Rasmussen, Celko, and Houser to conclude that employer failed to establish the second method of rebuttal. We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal.

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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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