BRB No. 13-0188 BLA

FULLER W. VARNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 02/05/2014
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Richard A. Seid (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 Awarding Benefits (2011-BLA-6037) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim[1] filed

[1] Claimant's initial claim was filed on November 6, 1996 and denied by the district director on March 25, 1997. The district director found that while claimant's objective tests established a total respiratory disability, claimant failed to establish the existence of

on May 13, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Initially, the administrative law judge found that this claim was timely filed pursuant to 20 C.F.R. §725.308. After crediting claimant with at least twenty-nine years of underground coal mine employment, the administrative law judge found a total respiratory disability established, and that claimant was, thereby, entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012).[2] The administrative law judge further found that, as claimant was entitled to benefit of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, a change in an applicable conditions of entitlement was established, based on invocation of the Section 411(c)(4) presumption since the denial of claimant's prior claim pursuant to 20 C.F.R. §725.309.[3] Consequently, the administrative law judge considered claimant's subsequent claim on the merits. Finding invocation of the amended Section 411(c)(4) presumption established on the merits, the administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

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pneumoconiosis or that his total disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.202, 718.204. Director's Exhibit 1. No further action was taken on this claim.

[2] 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. In pertinent part, amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes over fifteen years of underground, or substantially similar, coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012).

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "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(d); *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(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and that his total disability was due to pneumoconiosis. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to establish one of these elements. 20 C.F.R. §725.309(d). Herein, the administrative law judge found a change in an applicable condition of entitlement based on invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 24.

On appeal, employer contends that the administrative law judge erred in finding that the subsequent claim was timely filed pursuant to Section 725.308. With respect to the merits of the claim, employer contends that the administrative law judge erred in finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Claimant has not responded to employer's appeal. In a limited response to employer's appeal, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's finding that the subsequent claim was timely filed pursuant to Section 725.308.[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).

Timeliness of the Claim

Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after whichever of the following occurs later -- (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. §932(f). Miners' claims for black lung benefits are presumptively timely filed. 20 C.F.R. §725.308(c). In addition, the implementing regulation requires that the medical determination must have "been communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.308(a). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 996-97, 23 BLR 2-302, 2-314-15 (7th Cir. 2005).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-nine years of coal mine employment, a total respiratory disability and invocation of the amended Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] 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 Exhibits 1, 5.

Employer contends that claimant's 2010 subsequent claim was not timely filed because Dr. Manchin told claimant in 2000 or 2001, more than three years before the 2010 subsequent claim was filed, that he was totally disabled.

In finding that the 2010 claim was timely filed, the administrative law judge considered claimant's testimony regarding the diagnoses rendered by Dr. Manchin in 2000 or 2001. *See* Hearing Transcript at 19-21. The administrative law judge found that claimant's mere testimony that Dr. Manchin told him that he was disabled was not sufficient to trigger the running of the statute of limitations. Thus, contrary to employer's contention, the administrative law judge properly found that claimant's *hearing testimony* was insufficient to rebut the presumption of timeliness. Consequently, we affirm the administrative law judge's finding that claimant's testimony regarding Dr. Manchin's 2000 or 2001 statement is insufficient to rebut the Section 725.308 presumption of timeliness. 20 C.F.R. §725.308; *see Furgerson v. Jericol Mining Inc.*, 22 BLR 1-206 (2002). We therefore affirm the administrative law judge's finding that claimant's subsequent claim was timely filed.

Rebuttal of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge applied an incomplete rebuttal standard in stating that the presumption at amended Section 411(c)(4) may be rebutted in only two ways: (1) that the miner does not have pneumoconiosis; or (2) that the miner's respiratory or pulmonary impairment did not arise out of coal mine employment. Employer's Brief at 10. Rather, employer contends that it may also rebut the presumption by showing that mild pneumoconiosis did not cause the disabling respiratory or pulmonary impairment. *Id*. at 11. Consequently, employer contends that the case must be remanded for the administrative law judge to consider this additional method of rebuttal.

Contrary to employer's contention, in order to rebut the presumption at amended Section 411(c)(4), employer must establish either (1) that claimant does not suffer from pneumoconiosis; or, (2) that claimant's that the respiratory or pulmonary impairment did not arise out of coal mine employment. Decision and Order at 38; *see* 30 U.S.C. §921(c)(4); 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305). Further, the administrative law judge acknowledged that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has specifically stated that, in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Consequently, we reject employer's argument that the administrative law judge applied an incorrect legal standard, and hold that the administrative law judge properly stated that, in order to establish rebuttal, employer must "rule out" any

contribution to claimant's disabling respiratory or pulmonary impairment by coal mine dust exposure. Decision and Order at 38; *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

Employer further challenges the administrative law judge's finding that the evidence is insufficient to establish rebuttal, arguing that the administrative law judge's resolution of the conflicting evidence is not supported by substantial evidence. In considering whether employer disproved the existence of legal pneumoconiosis, or established that claimant's impairment is unrelated to coal mine employment, the administrative law judge considered the opinions of Drs. Gaziano, Jaworski, Basheda and Bellotte. Drs. Gaziano and Jaworski opined that claimant has disabling COPD, in the form of severe emphysema, due to both coal mine dust exposure and cigarette smoking.[6]

[6] Dr. Gaziano, based on his July 22, 2010 examination, diagnosed claimant with severe chronic obstructive pulmonary disease (COPD) with emphysema, opining that the severe impairment was due to claimant's coal mine employment and also contributed to by claimant's cigarette smoking history. Director's Exhibit 14. Dr. Gaziano also opined that claimant is totally disabled from performing his usual coal mine employment. *Id*. In a deposition dated February 9, 2011, Dr. Gaziano reiterated the conclusions from his written report, that claimant has a severe restrictive and obstructive ventilatory impairment, such as is seen in emphysema. Employer's Exhibit 5. Dr. Gaziano further explained that the severe emphysema was due to both claimant's coal mine employment and cigarette smoking, but that he could not differentiate the effect of the two causes. *Id*.

Dr. Jaworski, one of the miner's treating physicians, diagnosed claimant with severe COPD as shown through a series of pulmonary function studies, but noted a "complex" etiology for the pulmonary disease. Claimant's Exhibit 2. Noting claimant's relatively short smoking history, approximately 6 cigarettes per day for 33 years, and his coal mine employment of at least 29 years, Dr. Jaworski attributed claimant's COPD to both coal mine employment and cigarette smoking, as he stated that there is no way to differentiate between the effects of the two exposures. *Id*. Dr. Jaworski also diagnosed bronchial asthma, which he opined contributed to claimant's COPD. *Id*. Moreover, Dr. Jaworski opined that claimant is totally disabled from performing his last coal mine employment. *Id*. In a deposition dated January 19, 2011, Dr. Jaworski reiterated his opinion from his written report, confirming that claimant has COPD caused by claimant's coal dust exposure, as well as his cigarette smoking and asthma. Employer's Exhibit 8. Dr. Jaworski further stated that he did not believe that claimant's asthma fully explains the irreversible nature of claimant's COPD and because asthma, by itself, does not normally result in an irreversible obstruction. *Id.* at 15. Dr. Jaworski concluded that, while he did not believe that claimant suffers from clinical pneumoconiosis, he did

Director's Exhibit 14; Claimant's Exhibit 2; Employer's Exhibits 5, 8. In contrast, Drs. Basheda and Bellotte opined that claimant's COPD is due to cigarette smoking and bronchial asthma. Employer's Exhibit 4, 7, 11, 17. Specifically, Dr. Basheda opined that claimant has severe COPD, due to cigarette smoking as shown by the characteristics of the airways obstruction, as well as a possible asthmatic component. Employer's Exhibits 3, 7. Dr. Basheda stated that he could not entirely exclude coal dust exposure as causing a component of claimant's airways disease. Rather, he stated that claimant's airways disease is unlikely due to coal dust exposure because of the partial reversibility of the airway obstruction and the presence of wheezing, neither of which is associated with coal dust exposure related obstructive pulmonary disease. Employer's Exhibit 7 at 7-9. Dr. Basheda therefore opined that claimant does not have legal pneumoconiosis, but that claimant is totally disabled due to a pulmonary impairment, with the primary cause of the disability being claimant's tobacco-related COPD and bronchial asthma. *Id*. at 14-17.

Similarly, Dr. Bellotte, based on his review of the medical evidence of record, opined that it is insufficient to establish either clinical or legal pneumoconiosis. Employer's Exhibit 11. Dr. Bellotte diagnosed a severe pulmonary impairment, but opined that none of it is due, even in part, to pneumoconiosis. *Id*. Rather, Dr. Bellotte opined that the severe impairment is due to asthma, with remodeled airways, and also due to emphysema caused by cigarette smoking, both of which are diseases of the general public and not caused by coal mine dust. *Id*. Moreover, Dr. Bellotte stated that he had never seen COPD of this severity in a miner with coal workers' pneumoconiosis, but had seen it in a miner with a forty pack-year history of smoking. Employer's Exhibit 17 at 44-46. Dr. Bellotte concluded that claimant is totally disabled from performing coal mine employment, but that claimant's coal dust exposure did not materially contribute to his disability. *Id*. at 64-65.

In weighing the conflicting evidence, the administrative law judge found that Dr. Basheda's opinion was entitled to less weight. The administrative law judge found that Dr. Basheda stated that disabling COPD only occurs in young miners. Additionally, the administrative law judge found that Dr. Basheda's discussion that claimant's severe obstructive defect is solely due to cigarette smoking, was based on his determination that the expected loss of cc's in the spirometry testing due to coal dust and smoking can be differentiated, which is inconsistent with the preamble to the 2001 revised regulations. Decision and Order at 33.

Additionally, the administrative law judge found that Dr. Bellotte's opinion was entitled to little weight because the doctor relied on an exaggerated smoking history and his opinion is contrary to the preamble to the 2001 revised regulations. Decision and

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believe that legal pneumoconiosis is present in the form of COPD caused, at least in part, by coal dust exposure. *Id*. at 15-17.

Order at 33. Therefore, the administrative law judge found that the opinions of Drs. Basheda and Bellotte do not satisfy employer's burden to rebut the Section 411(c)(4) presumption. *Id.* at 33-34.

Employer argues that the administrative law judge erred in weighing the opinions of Drs. Basheda and Bellotte to find that they did not provide an adequate rationale for ruling out coal mine dust exposure as a cause of claimant's COPD. Employer's Brief at 13-15. We disagree.

Contrary to employer's contention, the administrative law judge acted within his discretion in finding that Dr. Basheda's statement that disabling COPD only occurs in young miners, cannot be reconciled with the principle that pneumoconiosis is a progressive and irreversible disease. 65 Fed. Reg. 79,971 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-34-35 (2004), *citing National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); Decision and Order at 33; Employer's Exhibit 3 at 12. Moreover, the administrative law judge reasonably found that Dr. Basheda's reliance on the theory of the expected loss of cc's on spirometry per year to differentiate the effects of smoking and coal dust exposure was unpersuasive. The Department of Labor (DOL) discredited such reasoning in the preamble to the 2001 revised regulations. 65 Fed. Reg. 79,920, 79,940-41, 79,943 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2007); Decision and Order at 33.

We also reject employer contention that the administrative law judge erred in finding that Dr. Bellotte relied on an exaggerated smoking history. The administrative law judge, in weighing the evidence of record, determined that claimant had a smoking history of approximately six cigarettes per day for thirty-three years, crediting claimant's testimony and the histories provided by the examining physicians. Decision and Order at 7-8. Dr. Bellotte, however, relied on a smoking history of one to one and a half packs of cigarettes per day for a similar length of time.[7] Employer's Exhibit 11. Additionally, the administrative law judge, in discussing claimant's smoking history, noted that Dr. Bellotte, in his deposition testimony, was uncertain regarding what records he relied on in

[7] Employer, in challenging this finding, points to notations in treatment records from Wedgewood Family Practice in 2009-2011, stating that claimant was being counseled on smoking cessation. Employer's Brief at 15; Employer's Exhibit 2. However, Dr. Bellotte questioned these notations, stating that he believed that claimant quit smoking in 1988 and that these statements were just boilerplate notations in the record. Employer's Exhibit 17 at 30.

determining claimant's smoking history. Decision and Order at 7-8 n.10; Employer's Exhibit 17 at 37-40. Therefore, contrary to employer's contention, the administrative law judge reasonably found that Dr. Bellotte's opinion was based on an inaccurate smoking history, and permissibly accorded it less weight. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). Moreover, the administrative law judge permissibly accorded less weight to Dr. Bellotte's opinion, finding that the doctor's conclusions that the effects of smoking and coal dust exposure are separate and can be distinguished are contrary to DOL's recognition, as set forth in the preamble to the 2001 revised regulations, that the risks of smoking and coal mine dust exposure are additive. 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *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); Decision and Order at 33.

Because the opinions of Drs. Basheda and Bellotte are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis or that his pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal of the presumption at amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4). Therefore, 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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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