BRB No. 13-0210 BLA

REDDIN BYRGE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIUM COAL COMPANY	)	DATE ISSUED: 02/24/2014
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2011-BLA-05897) of Administrative Law Judge Daniel F. Solomon with respect to a subsequent claim filed on June 17, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant had at least fifteen years of coal mine employment in conditions

[1] Claimant filed his initial claim for benefits on April 12, 2007, which was denied by the district director on November 5, 2007, because claimant did not establish the existence of pneumoconiosis or total disability causation. Director's Exhibit 1. The record does not show that claimant took any other action on his 2007 claim before filing the current claim.

substantially similar to underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also determined that employer did not rebut the presumption that claimant has pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis, and that claimant established a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(c).[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge did not sufficiently explain his determination that claimant's surface coal mine employment was in conditions substantially similar to underground employment and, therefore, erred in applying the presumption at amended Section 411(c)(4). In addition, employer contends that the administrative law judge erred in finding that it failed to rebut the presumption. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[3] The Department of Labor (DOL) has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

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

I. Invocation of the Amended Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

At the hearing in this case, claimant testified on direct examination that he worked primarily on the surface at a strip mine for sixteen years and performed duties around coal tipples and augers. Hearing Transcript at 14, 20. Claimant also stated that his work was dusty because he "dropped railroad cars and crushed coal," and did not have a respirator or dusk mask, aside from the last two years that he worked for employer. *Id*. at 15-16, 24. On cross-examination, claimant indicated that employer "hired me to set trees out and after that, they hired me to work on augers and stuff." *Id*. at 22. Claimant further testified that he set out trees for three months and that he sowed grass a few days a week when he was not working on the auger. *Id*. In treatment notes from October 28, 1983, Dr. Winn, claimant's rheumatologist, reported that claimant "has been able to work on the 'powder crew' putting powder in for the [dynamiting] of the strip mines," and "[h]e has also been able to sow grass seed for the mine, which are two activities he had not previously been able to muster." Director's Exhibit 14. In a note dated December 10, 1984, Dr. Winn indicated that claimant said that he was "recently put on the 'Powder Crew' which means he is responsible for spreading fertilizer and seed for the topsoil of the strip mining region." *Id*. In a note dated May 14, 1985, Dr. Winn stated that claimant "is working on the 'powder crew,' which is fertilizing the soil from the strip mining." *Id*.

The administrative law judge acknowledged that claimant's testimony regarding the extent to which he performed work related to reclaiming the spent strip mining areas was imprecise, but determined that "there is nothing of record that undermines the allegation" that claimant was exposed to coal dust. Decision and Order at 4. The administrative law judge further found:

> Whatever time may have been attributed to reclamation work is entirely speculative. I inquired about it on the record, but I accept Claimant's allegation that he seldom performed reclamation work. He stated that dropping cars and crushing coal were "dusty" jobs. I accept this testimony.

Decision and Order at 4, quoting Hearing Transcript at 15 (internal citations omitted). Therefore, the administrative law judge concluded that claimant's surface coal mine employment at the tipple, which totaled at least fifteen years, was equivalent to underground coal mine employment. Decision and Order at 4.

Employer argues that the administrative law judge did not perform a proper analysis of the comparability of claimant's surface mine work to conditions at an underground mine. Employer asserts that the reasoning applied by the administrative law judge "effectively makes all surface coal mining substantially similar to underground employment." Employer's Brief at 21. Employer further maintains that, because there is

no guidance as to what constitutes substantially similar conditions, it cannot adequately defend against an assertion that the conditions were comparable.

Employer's allegations are without merit. Contrary to employer's contention, there is statutory and regulatory guidance on the issue of the comparability of conditions in an aboveground mine and an underground mine. Amended Section 411(c)(4) provides that a claimant must prove that the conditions aboveground "were substantially similar to those in an underground mine." 30 U.S.C. §921(c)(4). Under the case law interpreting the statute, a claimant is not required to present evidence of the conditions in an underground mine, but must establish comparable conditions by showing that the miner was exposed to sufficient coal mine dust at the aboveground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979). The administrative law judge must then render factual findings by comparing the aboveground mining conditions established by claimant to the conditions known to prevail in underground mines. *Id*. Pursuant to the implementing regulations, which became effective on October 25, 2013, "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(b)(2)).

In the present case, the administrative law judge properly considered the miner's testimony regarding the conditions in his aboveground coal mine employment, and compared that with his knowledge of conditions that prevail in underground coal mine employment. *See Leachman*, 855 F.2d at 512; *Muncy*, 25 BLR at 1-29; Decision and Order at 4. In addition, the administrative law judge acted within his discretion in accepting claimant's hearing testimony regarding the extent to which he was exposed to coal mine dust, rather than lending weight to the limited information in the treatment notes. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-167 (1986). Consequently, we affirm, as rational and supported by substantial evidence, the administrative law judge's finding that claimant had at least fifteen years of qualifying coal mine employment for the purpose of invoking the presumption at amended Section 411(c)(4). Because employer does not challenge the administrative law judge's finding of a totally disabling respiratory impairment, we also affirm his determination that claimant established invocation of the amended Section 411(c)(4) presumption.[5] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Employer asserts correctly that the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by establishing that he is totally disabled, as claimant proved this element of entitlement in his previous claim. However, this error is harmless insofar as claimant

II. Rebuttal of the Amended Section 411(c)(4) Presumption

The administrative law judge noted that, in order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not suffer from pneumoconiosis, or that his disability did not arise out of, or in connection with, his coal mine employment. Decision and Order at 6. The administrative law judge indicated that, "to rule out legal pneumoconiosis,"[6] employer relied on the opinions of Drs. Rosenberg and Tuteur, both of whom attributed claimant's totally disabling pulmonary impairment to bronchiectasis, which they stated was related to claimant's rheumatoid arthritis. Decision and Order at 6; *see* Employer's Exhibits 1, 3, 6. The administrative law judge found that, although the evidence supported their diagnoses, the opinions of Drs. Rosenberg and Tuteur were not persuasive or well-reasoned, as they did not adequately explain how the diagnoses of rheumatoid arthritis and bronchiectasis excluded a contribution from coal dust exposure. Decision and Order at 8-9. The administrative law judge concluded that "[e]mployer failed to tender reasoned opinions that meet the rebuttable presumption of total disability due to pneumoconiosis." Decision and Order at 9.

Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Tuteur on the ground that they failed to explain how bronchiectasis and legal pneumoconiosis were mutually exclusive. Employer notes that each physician acknowledged that coal dust could have contributed to claimant's respiratory impairment but explained why it did not.

We reject employer's allegation of error, as the administrative law judge's decision to discredit the opinions of Drs. Rosenberg and Tuteur is rational and supported by substantial evidence. The administrative law judge acted within his discretion in determining that, although Drs. Rosenberg and Tuteur explained why they ruled out coal dust exposure as a *cause* of claimant's bronchiectasis, they did not set forth the rationale

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successful invoked the amended Section 411(c)(4) presumption that he has pneumoconiosis and is totally disabled by it, thereby satisfying the requisite change in applicable condition of entitlement. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibit 1.

[6] 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). Pursuant to 20 C.F.R. §718.201(b), "'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

underlying their opinion that coal dust exposure did not *aggravate* claimant's bronchiectasis. 20 C.F.R. §718.201(a)(2), (b); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Because the administrative law judge provided a valid reason for discrediting the opinions of Drs. Rosenberg and Tuteur,[7] we affirm, as supported by substantial evidence, his finding that employer did not rebut the presumption that the miner has legal pneumoconiosis.[8] *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011).

Employer also contends that the administrative law judge also erred in finding that the opinions of Drs. Rosenberg and Tuteur were insufficient to rebut the presumption of disability causation on the ground that they did not diagnose legal pneumoconiosis. Employer maintains that the cases cited by the administrative law judge in support of his finding are distinguishable. With respect to the administrative law judge's reliance on *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995), employer asserts that the present case differs from *Skukan* because employer's experts acknowledged that claimant is totally disabled and assumed that he has legal pneumoconiosis. Similarly, employer takes issue with the administrative law judge's citation of *Trujillo v. Kaiser Steel Corp*, 8 BLR 1-472 (1986), noting that the present case does not involve the presumption available to survivors at 30 U.S.C. §921(c)(5), which was at issue in *Trujillo*.[9]

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[7] We decline to address, therefore, employer's remaining arguments regarding the weight accorded these opinions on this method of rebuttal. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[8] Because we have affirmed the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis, we need not address employer's arguments concerning the administrative law judge's findings as to whether employer rebutted the presumed existence of clinical pneumoconiosis. 30 U.S.C. §921(c)(4), *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

[9] Under 30 U.S.C. §921(c)(5), the survivors of a miner who dies on or before March 1, 1978, and who had more than twenty-five years of coal mine employment before June 30, 1971, are entitled to benefits unless it is established that the miner was not partially or totally disabled due to pneumoconiosis at the time of death.

Employer's contentions are without merit. Contrary to employer's contention, in *Skukan*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, did not distinguish between physicians who have assumed the existence of legal pneumoconiosis and those who have ruled out its presence. Rather, the court held that administrative law judges should "treat as less significant those physician's conclusions about causation when they find no pneumoconiosis," regardless of whether they were asked to assume that the miner had the disease. *Skukan*, 993 F.2d at 1233, 17 BLR at 2-104; *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 267, 22 BLR 2-372, 2-379-80 (4th Cir. 2002). In *Trujillo*, the Board's holding, that "[t]he administrative law judge did not err on remand in determining that [an] opinion on causation was entitled to no weight because its underlying premise, that the miner did not have pneumoconiosis, was inaccurate," was not dependent on the application of the presumption at 30 U.S.C. §921(c)(5). *Trujillo*, 8 BLR at 1-473. We affirm, therefore, the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. *See Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

Accordingly, the administrative law judge's Decision and Order Award of 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