BRB No. 13-0220 BLA

KYLE S. OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KOCH CARBON-RAVEN DIVISION VA	)	
	)	DATE ISSUED: 02/20/2014
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 Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Subsequent Claim (2011-BLA-05082) of Administrative Law Judge Christine L. Kirby, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed this claim on September 18, 2009.[1] Director's Exhibit 3.

[1] This is claimant's second claim for benefits. His prior claim, filed on June 16, 1997, was denied by the district director on January 8, 1998, for failure to establish any element of entitlement. Director's Exhibit 1.

In her Decision and Order issued on January 15, 2013, the administrative law judge noted the recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress 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 underground or substantially similar coal mine employment, and establishes that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 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).[2] If the presumption is invoked, the burden shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id*.

The administrative law judge credited claimant with at least twenty-three years of qualifying coal mine employment,[3] and noted that employer conceded that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge thus concluded that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d),[4] and considered his claim on its merits. Based on claimant's years of qualifying coal mine employment and his total disability, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. The administrative law

[2] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id*. We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Unless otherwise indicated, the relevant version of all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] The record indicates that claimant's last coal mine employment was in Virginia. Director's Exhibit 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] After the administrative law judge issued her decision, the Department of Labor revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language that was set forth in 20 C.F.R. §725.309(d) and applied by the administrative law judge is now set forth, in identical form, at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.[5] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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. 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 Section 411(c)(4) presumption, the burden of proof shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The administrative law judge found that employer did not establish rebuttal by either method.

Existence of Pneumoconiosis

To rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, employer must affirmatively prove the absence of both clinical and legal pneumoconiosis.[6] *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber*, 43 F.3d at 900-01, 19 BLR

[5] Employer does not challenge some of the administrative law judge's findings: that claimant has at least twenty-three years of qualifying coal mine employment; that he established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c); and that he invoked the Section 411(c)(4) presumption. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Clinical pneumoconiosis is defined as "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 tissue 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).

at 2-65-66. In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge weighed the opinions of Drs. Forehand and Rosenberg. Dr. Forehand diagnosed claimant with pneumoconiosis based on his years of underground coal mining, shortness of breath, abnormal breath sounds, chest x-ray, and arterial blood gas study. Director's Exhibit 13. Dr. Forehand opined that claimant has a "significant respiratory impairment" due to both a smoking history of sixty-eight pack years, and twenty-seven years of underground mining that "scarred his lungs . . . to the point that he cannot normally oxygenate his lungs." *Id*.

In contrast, Dr. Rosenberg opined that claimant's totally disabling impairment is due to an obstructive impairment and marked hypoxemia, but concluded that claimant does not have legal pneumoconiosis. Employer's Exhibit 1 at 8-10. Citing studies to support his view that obstruction and emphysema due to coal mine dust exposure are distinct from obstruction and emphysema due to smoking, Dr. Rosenberg opined that claimant's reduced FEV1/FVC ratio is "inconsistent with obstruction related to past coal mine dust exposure," and that claimant's significant response to bronchodilators "would not be expected in the presence of legal CWP." *Id*. at 8-10. Dr. Rosenberg concluded that claimant's obstructive impairment is due to "his long smoking history, combined with sarcoidosis and an asthmatic component." *Id*. at 10.

The administrative law judge noted that Dr. Forehand's opinion did not specifically state whether he diagnosed clinical or legal pneumoconiosis, but found that Dr. Forehand's opinion was well-reasoned and documented, and constituted a determination that claimant has both forms of the disease. Decision and Order at 10. The administrative law judge discredited Dr. Rosenberg's opinion because she found that Dr. Rosenberg failed to relate the studies he cited to "specific factors" in claimant's case that would indicate that claimant's emphysema is due solely to smoking. Further, the administrative law judge found that Dr. Rosenberg diagnosed sarcoidosis without conducting or citing tests to establish that claimant has sarcoidosis, and that the doctor failed to adequately explain why claimant could not have pneumoconiosis concurrently with sarcoidosis. *Id*. at 11. The administrative law judge determined that Dr. Forehand's opinion was more credible than that of Dr. Rosenberg, and concluded that Dr. Forehand's opinion established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). *Id*. at 11-12. The administrative law judge thus found that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. *Id*. at 12.

Employer argues that the administrative law judge erred in finding that Dr. Forehand's opinion constituted a reasoned diagnosis of legal pneumoconiosis. Employer's Brief at 9-11. Employer contends that Dr. Forehand's opinion cannot support a finding of legal pneumoconiosis because Dr. Forehand did not specifically diagnose legal pneumoconiosis, and asserts that the administrative law judge improperly

drew her own medical conclusions in finding that claimant has legal pneumoconiosis. *Id*. This argument lacks merit. Although he did not use the specific phrase "legal pneumoconiosis" in his report, Dr. Forehand diagnosed claimant with pneumoconiosis and as having a significant respiratory impairment that he opined was due, in part, to claimant's coal mine employment. Director's Exhibit 13. Contrary to employer's argument, the administrative law judge did not draw her own medical conclusions, but reasonably found that Dr. Forehand's opinion constituted a diagnosis of legal pneumoconiosis, which is defined to include "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2); Decision and Order at 10. Thus, we reject employer's allegation of error and affirm the administrative law judge's permissible determination that Dr. Forehand's opinion is a well-reasoned diagnosis of legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Next, employer argues that the administrative law judge erred in discrediting Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis. Employer's Brief at 13-15. We disagree. As an initial matter, employer does not challenge the administrative law judge's permissible decision to discount Dr. Rosenberg's opinion because the physician failed to adequately explain why, if claimant does have sarcoidosis, he could not have legal pneumoconiosis at the same time. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87, 24 BLR 2-269, 2-285-87 (4th Cir. 2010); Decision and Order at 11. We therefore affirm that credibility determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, contrary to employer's contention, the administrative law judge permissibly discredited Dr. Rosenberg's opinion for not linking the studies he cited, as support for his position that smoking-related and coal dust-related emphysema are distinct, to claimant's condition. Although Dr. Rosenberg referred to studies associating emphysema due to smoking with reduced diffusion capacity, and emphysema due to coal mine dust exposure with preserved diffusion capacity, he did not discuss claimant's diffusion capacity or explain how claimant's diffusion capacity values supported his conclusion that claimant does not have legal pneumoconiosis. Employer's Exhibit 1 at 9-10. It was within the discretion of the administrative law judge to discount Dr. Rosenberg's opinion on that basis. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). We therefore affirm the administrative law judge's determination that Dr. Rosenberg's opinion is entitled to less weight than that of Dr. Forehand.

Employer also argues that the administrative law judge erred in her consideration of the medical evidence from claimant's previous claim. Employer's Brief at 4-6. This argument lacks merit. The administrative law judge considered the x-ray and medical opinion evidence from claimant's previous claim, but determined that it had little

probative value. Decision and Order at 7, 11. Contrary to employer's contention, the administrative law judge did not mechanically credit the new evidence from this claim because it is more recent. Employer's Brief at 5-6. The administrative law judge permissibly discounted the evidence from the prior claim after determining that it was several years older than the new evidence and, therefore, less likely to reflect claimant's current condition. *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 7, 11.

Therefore, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 11-12. Consequently, we also affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[7] 30 U.S.C. §921(c)(4); *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66.

Impairment Arising Out of Coal Mine Employment

In determining that employer also failed to rebut the Section 411(c)(4) presumption by proving that claimant's disabling respiratory impairment did not arise out of his coal mine employment, the administrative law judge discounted Dr. Rosenberg's opinion for concluding, contrary to the administrative law judge's finding, that claimant does not have legal pneumoconiosis, and for failing to provide "a reasoned explanation as to why coal dust exposure could not be a contributing factor." Decision and Order at 12.

Employer contends that the administrative law judge failed to evaluate the medical opinion evidence and failed to adequately discuss the issue of disability causation. Employer's Brief at 20. This argument lacks merit. Given her finding that employer failed to disprove the existence of legal pneumoconiosis because Dr. Rosenberg's medical opinion was not well-reasoned as to the etiology of claimant's impairment, the administrative law judge permissibly discredited Dr. Rosenberg's opinion that claimant's coal mine employment did not contribute to his disabling respiratory impairment. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We therefore affirm the administrative law judge's determination that employer failed to

[7] We need not consider employer's contentions that the administrative law judge erred in weighing the evidence regarding the existence of clinical pneumoconiosis. Employer's Brief at 6-8. Because employer failed to disprove the existence of legal pneumoconiosis, employer cannot rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995).

establish that claimant's disabling impairment is unrelated to his coal mine employment. 30 U.S.C. §921(c)(4).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption,[8] we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Subsequent Claim is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[8] Thus, we need not address employer's argument that the administrative law judge erred by failing to determine the length of claimant's smoking history.