BRB No. 13-0242 BLA

CARMEL JARRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTERS RESOURCES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 02/07/2014
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 Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead, & Monroe, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2011-BLA-6090) of Administrative Law Judge Thomas M. Burke 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). This case involves a subsequent claim filed on June 24, 2010.[1]

Congress enacted 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 living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides that 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.[2] 30 U.S.C. §921(c)(4) (2012). 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 sixteen years of qualifying coal mine employment[3] and found that the medical evidence developed since the denial of claimant's prior claim established that claimant is totally disabled by a pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge thus found that claimant established a change in the applicable condition of entitlement, *see* 20 C.F.R. §725.309(c), and considered his claim on its merits. Having found that claimant worked for more than fifteen years in qualifying coal mine employment, and that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), the administrative law judge determined

[1] Claimant's prior claim, filed on July 12, 2000, was finally denied on October 19, 2000 because claimant failed to establish any elements of entitlement. Director's Exhibit 1.

[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.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[3] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibit 1. 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).

that claimant invoked the Act's Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[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. 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 the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that the burden of proof shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's disabling 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.[5]

In determining whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Rasmussen, Gaziano, Zaldivar, and Castle. All of the physicians agreed that claimant suffers from a disabling

[4] Employer does not challenge the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, that the evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b) (2013), 725.309(c), and that claimant invoked the Section 411(c)(4) presumption. Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of clinical and legal pneumoconiosis, with his discussion of whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 15. Employer does not challenge this aspect of the administrative law judge's decision.

obstructive pulmonary impairment, but disagreed as to the cause of the impairment. Drs. Rasmussen and Gaziano diagnosed legal pneumoconiosis,[6] in the form of disabling obstructive lung disease and emphysema due to a combination of cigarette smoking and coal mine dust exposure. Director's Exhibit 14; Claimant's Exhibits 2, 5. In contrast, Drs. Zaldivar and Castle opined that claimant does not have legal pneumoconiosis, and that his disabling obstructive impairment is caused by tobacco smoke-induced bullous emphysema and lung cancer, unrelated to coal mine dust exposure. Decision and Order at 6-8; Director's Exhibit 26 at 2-3; Employer's Exhibit 2 at 18-19. The administrative law judge found that the opinions of employer's physicians, Drs. Zaldivar and Castle, were not sufficiently reasoned to establish rebuttal. Decision and Order at 13-15.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Zaldivar and Castle did not establish rebuttal. Employer's Brief at 6-9. Moreover, employer argues that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Gaziano. Employer's Brief at 9-10.

Contrary to employer's assertion, the administrative law judge provided valid reasons for discounting the opinions of Drs. Zaldivar and Castle. The administrative law judge first considered Dr. Zaldivar's opinion, that claimant's obstructive impairment is due to smoking, and cannot be explained by the possible impact of coal mine dust on his respiratory system. Decision and Order at 14; Director's Exhibit 26 at 3. The administrative law judge found Dr. Zaldivar's opinion to be not well-reasoned because he based his conclusions, in part, on medical studies showing that chronic obstructive pulmonary disease (COPD) is more prevalent in cigarette smokers and that the earlier a person begins to smoke, the greater the expected lung damage. Decision and Order at 14; Director's Exhibit 26 at 2. Noting that the preamble to the revised regulations acknowledges the prevailing views of the medical community that coal mine dust exposure can be an independent cause of an obstructive respiratory impairment, the administrative law judge permissibly found that Dr. Zaldivar did not adequately explain why studies showing that cigarette smoking is a predominant cause of COPD necessarily precluded claimant's sixteen years of coal mine dust exposure from being a contributing cause of his impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 14, *citing* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000).

[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).

The administrative law judge further noted that Dr. Zaldivar emphasized the appearance of claimant's lungs on x-ray to support his conclusion that only claimant's cigarette smoking, and not his coal mine dust exposure, contributed to his obstructive airways disease.[7] Decision and Order at 14; Director's Exhibit 26 at 2. The administrative law judge permissibly concluded that, to extent that Dr. Zaldivar relied on the absence of x-ray evidence of pneumoconiosis, his opinion was inconsistent with both the definition of legal pneumoconiosis and the Department of Labor's recognition, as set forth in the preamble to the revised regulations, that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of evidence of clinical pneumoconiosis.[8] *See* 20 C.F.R. §§718.201, 718.202(a)(4) (2013); *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); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 14.

The administrative law judge next considered the opinion of Dr. Castle, that claimant's obstructive impairment is due to cigarette smoking and not coal mine dust exposure. Contrary to employer's assertion, the administrative law judge fully considered Dr. Castle's conclusions as set forth in his March 7, 2012 report, Employer's Exhibit 1; Decision and Order at 6-7, 14-15, but permissibly discounted Dr. Castle's opinion because he relied, in part, on the partial reversibility of the miner's impairment after bronchodilator administration to exclude coal mine dust exposure as a cause of the miner's obstructive impairment. Decision and Order at 14-15; Employer's Brief at 8.

[7] In support of his conclusion that coal mine dust did not contribute to claimant's disabling impairment, Dr. Zaldivar stated that claimant's x-ray is free of any changes of occupational lung disease, and opined that "[i]In contrast to the damage done by his smoking which is a chemical damage with destruction of lung tissue, the coal dust causes damage through deposition of dust and mechanical damage to the airways as fibrotic changes occur giv[ing] rise to the macules." Director's Exhibit 26 at 2.

[8] The premises underlying the regulations permit a finding of legal pneumoconiosis, notwithstanding the absence of radiographic evidence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000)(indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]").

Noting that claimant's pulmonary function studies demonstrated the presence of a totally disabling impairment even after the administration of bronchodilators, the administrative law judge concluded, as was within his discretion, that Dr. Castle did not adequately explain why the irreversible portion of the miner's pulmonary impairment was unrelated to coal mine dust exposure, or why the miner's response to bronchodilators necessarily eliminated coal mine dust exposure as a contributing cause of the miner's obstructive impairment.[9] *See* 20 C.F.R. §718.201(a)(2); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 14; Director's Exhibits 14, 26.

In addition, the administrative law judge noted that, like Dr. Zaldivar, Dr. Castle relied, in part, on the appearance of claimant's lungs on x-ray to support his conclusion that only claimant's cigarette smoking, and not his coal mine dust exposure, caused his emphysema.[10] Decision and Order at 14; Employer's Exhibit 2. The administrative law judge permissibly concluded that, to the extent Dr. Castle based his opinion on the absence of x-ray evidence of clinical pneumoconiosis, his opinion was contrary to the Department of Labor's recognition that pneumoconiosis may be diagnosed "notwithstanding a negative X-ray." *See* 20 C.F.R. §§718.201, 718.202(a)(4) (2013); *Obush*, 24 BLR at 1-125-26; Decision and Order at 14.

[9] Contrary to employer's assertion, while Dr. Castle stated that lung cancer and its treatment can result in "significant symptomatic worsening as well as physiologic changes including restrictive findings and hypoxemia," and that claimant is "totally disabled from a pulmonary standpoint due to tobacco smoke induced pulmonary emphysema and lung cancer," Dr. Castle did not opine that lung cancer was responsible for the irreversible portion of claimant's obstructive impairment. Employer's Exhibit 2 at 17, 19; Employer's Brief at 9. Rather, Dr. Castle stated that the degree of reversibility following bronchodilators demonstrated on claimant's pulmonary function testing "does not occur with . . . coal workers' pneumoconiosis," which "typically causes a mixed, irreversible obstructive and restrictive ventilatory defect." Dr. Castle concluded that claimant's "severe airway obstruction associated with significant reversibility . . . is entirely due to tobacco smoke induced bullous emphysema." Employer's Exhibit 2 at 18.

[10] Dr. Castle stated that a reduced diffusing capacity, as seen on claimant's pulmonary function testing, is not generally associated with coal workers' pneumoconiosis, and opined that "when it does occur, it is in the presence of a high degree of profusion of either p or t type opacities," and such "x-ray findings were not present in this case." Employer's Exhibit 2 at 18.

In sum, substantial evidence supports the administrative law judge's finding that the opinions of Drs. Zaldivar and Castle are not sufficiently reasoned to disprove the existence of pneumoconiosis, or to establish that the miner's disabling impairment did not arise out of, or in connection with, coal mine employment.[11] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 15. We, therefore, affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

[11] We need not address employer's allegations of error regarding the administrative law judge's consideration of the contrary medical opinions of Drs. Gaziano and Rasmussen. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge