

BRB No. 13-0243 BLA

JENNIFER HARDISON)	
(on behalf of the Estate of JACKIE M. COBB))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PITTSBURG & MIDWAY COAL MINING)	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 Awarding Benefits on Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer.

Rita Roppolo (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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2008-BLA-05914) of Administrative Law Judge Joseph E. Kane with respect to a claim filed on October 15, 2007, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time.¹ In its previous decision, *Hardison v. Pittsburg & Midway Coal Mining*, BRB No. 11-0420 BLA (Mar. 29, 2012)(unpub.), the Board affirmed, as unchallenged on appeal, the administrative law judge's findings of twenty-two years of coal mine employment, that claimant² invoked the presumption that the miner's total disability was due to pneumoconiosis at amended Section 411(c)(4), and that employer did not rebut the presumption by establishing that the miner did not have pneumoconiosis.³ However, the Board vacated the denial of benefits because the administrative law judge did not adequately examine the reasoning underlying Dr. Selby's opinion concerning disability causation. The Board, therefore, remanded the case to the administrative law judge for reconsideration. On remand, the administrative law judge determined that employer did not rebut the presumption that the miner's disabling respiratory impairment was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge's initial February 8, 2011 Decision and Order denying benefits was supported by substantial evidence and should be reinstated. In the alternative, employer asserts that the administrative law judge erred, on remand, in discrediting Dr. Selby's opinion concerning disability causation and should have found that it rebutted the presumption at amended Section 411(c)(4). Further, employer contends that the administrative law judge applied the wrong rebuttal standard. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, also responds and asserts that the Board should reject employer's arguments on appeal.

¹ The miner filed his claim for benefits on October 15, 2007. Director's Exhibit 2. On February 8, 2011, the administrative law judge issued a Decision and Order Denying Benefits because, although he found that claimant invoked the presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), he determined that employer rebutted the presumption by establishing that the miner's totally disabling respiratory impairment did not arise out of coal mine employment. Claimant then appealed to the Board.

² Claimant is Jennifer Hardison, the miner's daughter, who is pursuing this claim on behalf of the miner's estate. By Order dated March 5, 2010, the administrative law judge designated Ms. Hardison as a party in the claim.

³ 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).

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole issue before the administrative law judge on remand was whether employer, relying on Dr. Selby's opinion, rebutted the presumed fact that the miner was totally disabled due to legal pneumoconiosis.⁵ After reconsidering Dr. Selby's opinion, in accordance with the Board's instructions, the administrative law judge determined that he was "no longer persuaded by Dr. Selby's reasoning," because the physician relied on premises in conflict with the positions set forth by the Department of Labor (DOL) in the preamble to the 2001 regulations. Decision and Order Awarding Benefits on Remand (Decision and Order on Remand) at 11-12. The administrative concluded, therefore, that employer did not rebut the presumption of total disability causation set forth in amended Section 411(c)(4). *Id.* at 13. Employer contends that the administrative law judge mischaracterized Dr. Selby's opinion and did not provide a valid rationale for according it little weight.

Contrary to employer's allegations, the administrative law judge's decision to discredit Dr. Selby's opinion, ruling out a causal connection between coal dust exposure and the miner's totally disabling obstructive lung disease, is rational and supported by substantial evidence.⁶ Dr. Selby testified that "[i]t's almost a hundred percent certain that pneumoconiosis did not cause [the drop in the miner's FVC value], especially in light of a negative chest x-ray as read by Dr. Whitehead." Employer's Exhibit 5 at 22. Dr. Selby

⁴ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 8. 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).

⁵ 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).

⁶ In determining whether Dr. Selby's opinion regarding disability causation was reasoned, the administrative law judge reviewed his opinion regarding the presence of legal pneumoconiosis. *See* Decision and Order on Remand at 11-12. Because the definition of 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), there is considerable overlap between the issues of the existence of legal pneumoconiosis and total disability due to pneumoconiosis.

also testified that, although emphysema can be caused by coal dust exposure, especially focal emphysema, the miner was diagnosed with the “typical” or “classic” emphysema, which is due to smoking, not coal dust exposure. *Id.* at 23-24. Similarly, although Dr. Selby acknowledged that pneumoconiosis may be latent and progressive, he testified that “[i]t’s virtually impossible to have no shortness of breath at all at the time one is removed from coal dust exposure and then to start experiencing it many years later and say that that is the result of coal mine dust.” Employer’s Exhibit 5 at 24. Dr. Selby was adamant that the miner’s twenty-two plus years of coal mine employment had not made any contribution to his respiratory impairment. *Id.* at 30.

The administrative law judge rationally found that Dr. Selby based his opinion, that coal dust exposure played no role in the miner’s pulmonary disease, on the absence of x-ray evidence of clinical pneumoconiosis, a view at odds with the comments by the DOL in the preamble to the 2001 regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-151 (6th Cir. 2012); 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); Decision and Order on Remand at 11. The administrative law judge also reasonably determined that Dr. Selby’s statement, indicating that coal dust exposure was associated with only focal emphysema, conflicted with the DOL’s recognition that there is an additive effect between smoking and coal dust exposure and that both smoking and coal dust can cause centrilobular emphysema. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order on Remand at 12. Similarly, the administrative law judge acted within his discretion in finding that Dr. Selby’s opinion, that pulmonary impairments due to coal dust exposure are rare and that the miner would have shown signs of pulmonary impairment at the time he stopped mining if coal dust exposure was a causal factor, do not accord with the DOL’s views. *See Banks*, 690 F.3d at 489, 25 BLR at 2-151; 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); 20 C.F.R. §718.201(c); Decision and Order on Remand at 11-12. Based on the administrative law judge’s rational determination that Dr. Selby’s opinion regarding the cause of the miner’s pulmonary impairment was entitled to little weight because he relied on several premises contrary to the DOL’s positions, as expressed in the preamble, we affirm his finding that employer failed to rebut the presumption that the miner’s totally disabling impairment is due to pneumoconiosis. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Employer also asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to show that coal mine dust exposure caused no part of the miner’s totally disabling respiratory impairment. Contrary to employer’s argument, the administrative law judge accurately indicated that, because claimant invoked the presumption that the miner’s total disability was due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to

employer to establish rebuttal by disproving the existence of pneumoconiosis, or by establishing that the miner's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order on Remand at 11-12; *see Big Branch Resources, Inc. v. Ogle*, F.3d , 2013 WL 6608019 (6th Cir. Dec. 17, 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). In addition, the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that, with respect to the latter method of rebuttal, the party opposing entitlement must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R. §]718.201."⁷ 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(1)(ii)). Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case, and we further affirm the award of benefits.

⁷ The Department of Labor (DOL) has explained that the "no part" standard recognizes that the courts have interpreted Section 411(c)(4) "as requiring the party opposing entitlement to 'rule out' coal mine employment as a cause of the miner's disabling respiratory or pulmonary impairment." 78 Fed. Reg. 59,105 (Sept. 25, 2013). The DOL also explicitly chose not to use the "contributing cause" standard set forth in 20 C.F.R. §718.204(c), and stated that the application of a different standard on rebuttal "is warranted by the statutory section's underlying intent and purpose," which "effectively singled out" totally disabled miners who had fifteen years of qualifying coal mine employment "for special treatment." 78 Fed. Reg. 59,106-07 (Sept. 25, 2013).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge