BRB No. 13-0257 BLA

WAYNE E. JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG RIDGE, INCORPORATED	)	
	)	DATE ISSUED: 02/26/2014
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Jonathan Rolfe (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5563) of Administrative Law Judge Alice M. Craft, 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). This case involves a miner's claim filed on August 26, 2009. Director's Exhibit 2.

In a Decision and Order dated February 5, 2013, the administrative law judge credited claimant with twenty-five years of underground coal mine employment,[1] and found that the evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the presumption of amended Section 411(c)(4),[2] 30 U.S.C. §921(c)(4), that he is totally disabled 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 argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, urging the Board to reject employer's arguments that the administrative law judge erroneously relied on the preamble to the 2000 regulatory revisions when she assessed the medical opinion evidence and determined that employer failed to rebut the Section 411(c)(4) presumption. Employer has filed a reply brief, reiterating its arguments on appeal.[3]

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

[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. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). 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. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had twenty-five years of underground coal mine employment, that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and that he invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6, 25-27.

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 that he is totally disabled due to pneumoconiosis, the burden of proof shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 733, BLR (7th Cir. 2013)*; Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). The administrative law judge found that employer failed to establish rebuttal by either method.

After finding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis.[4] The administrative law judge considered the opinions of Drs. Repsher and Tuteur.[5] Decision and Order at 20-25, 31-32. Dr. Repsher opined that claimant's disabling chronic obstructive pulmonary disease (COPD) is due to smoking, and is unrelated to coal mine dust exposure. Employer's Exhibits 7, 17, 19. Dr. Tuteur diagnosed chronic bronchitis and COPD, and opined that claimant's disabling obstructive impairment is due entirely to smoking. Employer's Exhibits 10, 18, 20.

The administrative law judge discredited the opinions of Drs. Repsher and Tuteur because she found that each was inadequately explained and inconsistent with the scientific views endorsed by the Department of Labor (DOL) in the preamble to the 2000 regulatory revisions. Decision and Order at 31-32. The administrative law judge

[4] "Clinical pneumoconiosis" consists of "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 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).

[5] The administrative law judge also considered the opinion of Dr. Chavda, that coal mine dust exposure was a significant contributing factor to claimant's disabling respiratory impairment. Decision and Order at 19-20; Director's Exhibits 9, 12.

therefore found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 33.

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2000 regulatory revisions in determining the credibility of the medical opinion evidence. Employer's Brief at 14-20. It was within the administrative law judge's discretion to consult the discussion by DOL of sound medical science in the preamble to the amended regulations, when evaluating the reasoning of the medical opinions in this case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Further, contrary to employer's contention, the administrative law judge did not utilize the preamble as a legal rule, or as a presumption that all obstructive lung disease is pneumoconiosis, but merely consulted it as a statement of medical principles accepted by DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); Employer's Brief at 15-16.

Specifically, the administrative law judge found that Drs. Repsher[6] and Tuteur[7] relied, in part, on their shared views that coal mine dust exposure rarely causes a degree

[6] Dr. Repsher opined that, while studies showed that some miners would have a clinically significant drop in their FEV1 value, the vast majority would have none or only a clinically insignificant loss of FEV1. Employer's Exhibit 7 at 4. Based on these studies, Dr. Repsher opined that even if coal mine dust exposure contributed to claimant's decrease in FEV1, that contribution would be clinically insignificant compared to the effects of claimant's smoking and aging, and the potential contribution of claimant's congestive heart failure. *Id*. at 4-5. Dr. Repsher reiterated his conclusions during his deposition, ruling out coal mine dust as a cause of claimant's obstructive impairment because its effect on lung function "is very mild and de minimis compared to the effect of cigarette smoke." Employer's Exhibit 17 at 43-46.

[7] Dr. Tuteur opined that the development of clinically significant coal mine dust-related obstructive lung disease occurs "so infrequently" in the "rare individual." Employer's Exhibit 18 at 43-44. Dr. Tuteur acknowledged that whether an obstructive impairment is caused by coal mine dust exposure or cigarette smoke cannot be differentiated based on symptoms, appearance, physical examination, or testing, Employer's Exhibit 18 at 39-40, and he appeared to concede that claimant's "chronic bronchitis [is] associated with [claimant's] very heavy lifelong cigarette smoking and twenty-seven years of underground coal mining." Employer's Exhibit 10 at 3. However, Dr. Tuteur explained that, based on medical studies and the relative length of claimant's cigarette smoking and coal mine dust exposures, there was only a one or two percent

of obstructive impairment that is clinically significant. Decision and Order at 31-32. In promulgating the revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), DOL reviewed the medical literature on that issue and found that there was a consensus among medical experts that coal mine dust-induced COPD is clinically significant and is not rare. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; 65 Fed. Reg. 79,920, 79,930-40 (Dec. 20, 2000). Accordingly, the administrative law judge acted within her discretion as fact-finder in determining that the opinions of Drs. Repsher and Tuteur were entitled to diminished weight, to the extent that they relied upon studies that contradict the view accepted by DOL. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

Additionally, the administrative law judge noted, accurately, that Dr. Repsher relied, in part, on the fact that claimant stopped mining in 1999, but continued to smoke cigarettes, to conclude that coal mine dust did not contribute to claimant's COPD.[8] Decision and Order at 31; Employer's Exhibit 7 at 4. The administrative law judge permissibly discredited that reasoning as inconsistent with DOL's recognition that pneumoconiosis is "a latent and progressive disease that may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). Finally, noting that the preamble to the revised regulations acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited the opinions of Drs. Repsher and Tuteur, in part, because they did not adequately explain why claimant's obstructive impairment could not be caused by a combination of smoking and coal mine dust exposure. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d

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chance that claimant's obstruction was due to coal mine dust exposure. Employer's Exhibits 10 at 5; 18 at 40-42. Thus, Dr. Tuteur concluded that, considering the statistical likelihoods, together with the fact that claimant had smoked cigarettes for approximately sixty years but had mined coal for only approximately twenty-seven years, he was able to rule out coal mine dust exposure as a contributing cause of claimant's chronic obstructive pulmonary disease. Employer's Exhibit 18 at 40-45.

[8] Dr. Repsher testified that that "pneumoconiosis is a static condition." Employer's Exhibit 17 at 32. He acknowledged that "[a]s you continue to inhale more coal dust, it can get worse" but emphasized that "once you have it and you aren't being exposed to any further coal dust, it's not going to worsen, with a rare exception, very rare exception, but in general it does not worsen." Employer's Exhibit 17 at 32.

248, 24 BLR 2-369 (3d Cir. 2011); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 30-32.

Thus, the administrative law judge provided valid reasons for discrediting the opinions of Drs. Repsher and Tuteur, attributing claimant's disabling obstructive impairment solely to smoking.[9] Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Burris*, 732 F.3d at 734; Decision and Order at 33.

With regard to the second method of rebuttal, the administrative law judge permissibly found that the same reasons for which she discredited the opinions of Drs. Repsher and Tuteur, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling impairment is unrelated to his coal mine employment. *See Burris*, 732 F.3d at 735; *Stalcup v. Peabody Coal Co*., 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355 (7th Cir. 1990); Decision and Order at 32. Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and we affirm the award of benefits. 30 U.S.C. §921(c)(4).

[9] Thus, we need not address employer's additional allegations of error regarding the administrative law judge's determinations to discredit the opinions of Drs. Repsher and Tuteur, or to credit the opinion of Dr. Chavda. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 24-25.

Accordingly, the administrative law judge's Decision and Order Awarding 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