BRB No. 13-0279 BLA

CLIFFORD MARCUM, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUARTO MINING 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 – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Philadelphia, for claimant.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2011-BLA-6025) of Administrative Law Judge Michael P. Lesniak with respect to a subsequent claim filed on June 15, 2010, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge found that claimant established at least twenty-five years of underground coal mine employment, or employment in conditions substantially similar to those in an underground coal mine. The administrative law judge also found, based on the stipulation of the parties, that claimant established total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).[2] The administrative law judge determined that employer did not rebut the presumption and 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 those in underground employment, and, therefore, erred in finding that claimant invoked the presumption at amended Section 411(c)(4).[3] Employer further contends that the administrative law judge erred in determining that employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that the Board should reject employer's contentions that claimant's surface coal mine employment was not equivalent to

[1] This is claimant's fifth application for benefits. *See* Director's Exhibits 1-3, 5. In his most recent prior claim, filed on October 17, 2003, the district director denied benefits because claimant did not establish any of the elements of entitlement. Director's Exhibit 3. The record does not show that claimant took any further action on the October 17, 2003 claim.

[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) (2102); *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[3] Employer further notes that it "preserves all objections to the application of the [Affordable Care Act] amendments to this claim including, but not limited to, the requirement to proceed with defense of the claim without governing regulations." Employer's Brief at 6 n.1. We reject, as moot, employer's request to hold the case in abeyance pending the decision of the United States Court of Appeals for the Fourth Circuit in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds* 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring).

underground coal mine employment and that the amended Section 411(c)(4) presumption does not apply to responsible operators. The Director also maintains that employer's assertions that the "rule out" standard cannot be applied to rebut the presumption and that the administrative law judge erred in relying on the presumption of pneumoconiosis in discrediting its experts' opinions as to disability causation are without merit.[4]

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.[5] 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).

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

The administrative law judge initially agreed with employer that claimant did not establish at least fifteen years of underground coal mine employment. Decision and Order at 11. However, the administrative law judge further determined that claimant's work for employer[6] from 1971-1994 was at an underground mine site, stating:

> According to [the] miner's CM-911a form and [S]ocial [S]ecurity records, [the] miner worked for Consol from 1971-1994, a period of 23 years . . . This was clearly an underground mine site as [the] miner testified that he initially worked underground and was later switched from above to belowground and back up again.

Id. at 11-12, *citing* Hearing Transcript at 18-19, Director's Exhibits 6, 8. Relying on *Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011), the administrative law judge

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[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Claimant testified that, although he worked in mines in West Virginia and Ohio, he worked at Quarto's Number 4 mine, which is located in Ohio, from 1971 until he retired from mining in 1994. Hearing Transcript at 12-14. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[6] Employer concedes that Consolidation (Consol) Coal Company is Quarto Mining's parent company. *See* Decision and Order at 11 n.17.

concluded, therefore, that the miner did not need to show comparable conditions between his surface work and underground coal mine employment. Decision and Order at 12. Based on his consideration of the record and claimant's testimony, the administrative law judge found that claimant established at least twenty-five years of qualifying coal mine employment.[7] *Id*.

Employer argues that *Muncy* is not applicable to the current case, as there is insufficient evidence that claimant's aboveground work occurred at an underground mine site. In the alternative, employer asserts that the holding in *Muncy* is inconsistent with the plain language of amended Section 411(c)(4), and conflicts with subsequent decisions, as claimant bears the burden of proving that the dust conditions of his aboveground employment were substantially similar to those in an underground coal mine. Claimant responds, stating that the administrative law judge's finding should be affirmed. The Director urges the Board to reject employer's arguments, on the grounds that the administrative law judge's findings are consistent with the regulations and supported by the evidence of record.

Employer's assertions are rejected, as the administrative law judge's determination that claimant worked for employer as an aboveground worker at an underground coal mine from 1971-1994, is rational and supported by substantial evidence in the form of claimant's testimony at the hearing, his employment records, and the absence of evidence to the contrary. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Hearing Transcript at 13; Director's Exhibits 6, 8. Consequently, the administrative law judge properly found that claimant was not required to show comparability of environmental conditions in order to qualify for the Section 411(c)(4) presumption. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, F.3d (6th Cir. 2013); *Muncy*, 25 BLR at 1-29, *citing Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979). We affirm, therefore, the administrative law judge's finding that claimant established at least twenty-five years of qualifying coal mine employment. *Id*. Based on the administrative law judge's unchallenged determination that claimant

[7] In addition to his tenure with employer, claimant testified that he worked in an underground mine for Island Creek Coal Company for thirteen to fourteen months. Hearing Transcript at 12-13. His Form CM-911a lists employment with Island Creek from May 1969 to August 1970, a period of fifteen months. Director's Exhibit 6. Claimant also testified that he worked for Oglebay Norton for thirteen to fourteen months, and his Form CM-911a indicates employment with Oglebay Norton for a fifteen month period between August 1970 and November 1971. Hearing Transcript at 13; Director's Exhibit 6. Claimant further testified that he worked at least three years underground for Consol but that he did not know the total number of years that he was underground. Hearing Transcript at 13-14.

established total disability at 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4), 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).

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

Employer initially contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 16-17, *citing Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976). This argument is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, F.3d , No. 11-2418, 2013 WL 3929081 (4th Cir. July 31, 2013) (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision.[8] *See Owens*, 25 BLR at 1-4; *see also Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not have clinical or legal pneumoconiosis, or prove 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); 20 C.F.R. §718.305(d)(1); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). Under the first method of rebuttal, the administrative law judge found that employer established "by a preponderance of the evidence that miner does not suffer from clinical pneumoconiosis." Decision and Order at 13. The administrative law judge further found, however, that employer failed to rebut the presumed fact of the existence of legal pneumoconiosis,[9] as the opinions of Drs. Rosenberg and Tuteur conflicted with the views

[8] The Department of Labor (DOL) also dismissed this argument in the comments to the regulations implementing amended Section 411(c)(4). 78 Fed. Reg. 59,101, 59,109 (Sept. 25, 2013). The DOL explained that the 1978 revision of the definition of pneumoconiosis, to include any chronic lung disease or impairment arising out of coal mine employment, eliminated the concern regarding the application of the statutory limitations on rebuttal to responsible operators expressed by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976). *Id*.

[9] The regulatory 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).

expressed by the Department of Labor (DOL) in the preamble to the 2001 regulations. *Id*. at 14-15.

Employer argues that, contrary to the administrative law judge's finding, Dr. Rosenberg acknowledged the DOL's positions regarding the causal connection between coal dust exposure and obstructive lung disease, but explained why claimant's impairment was caused solely by his cigarette smoking, and relied on literature published subsequent to the preamble. Employer's Brief at 33. Concerning Dr. Tuteur's opinion, employer alleges that the administrative law judge erred in discrediting Dr. Tuteur's explanation as to why coal dust did not contribute to claimant's totally disabling respiratory impairment, on the ground that he relied on generalities, rather than the specifics of claimant's condition. Employer contends that Dr. Tuteur supported his opinion with citations to a variety of medical studies and provided numerous reasons why coal dust was not a cause of claimant's respiratory impairment. Further, employer argues that because the administrative law judge erred in discrediting Dr. Rosenberg's opinion, he also erred in giving less weight to Dr. Tuteur's opinion for relying on it.

Employer's allegations of error are without merit. The administrative law judge rationally determined that Dr. Rosenberg's opinion, that claimant's reduced FEV1/FVC ratio indicated that claimant's impairment was not due to coal dust exposure, is in conflict with the preamble to the 2001 regulations, "which recognizes that 'coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio.'" *Id*. at 14, quoting 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *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). Contrary to employer's contention, the fact that Dr. Rosenberg cited more recent medical literature did not require the administrative law judge to conclude that advancements in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs that was endorsed by DOL in the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013) (observing that neither of the employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the Preamble"). In addition, the administrative law judge reasonably found that Dr. Rosenberg's opinion was entitled to little weight, as it is contrary to the DOL's determination that coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms. *See* 65 Fed. Reg. at 79,940-43; *Obush*, 24 BLR at 1-125-26.

The administrative law judge's decision to discredit Dr. Tuteur's opinion was also rational. In support of his finding that coal dust did not contribute to claimant's respiratory impairment, Dr. Tuteur stated that "it is extremely well established that non-mining cigarette smokers with a history similar to [claimant] (thirty to sixty pack years)

develop a COPD [chronic obstructive pulmonary disease] phenotype approximately 20% of the time" and that legal pneumoconiosis occurs less than 2% of the time. Employer's Exhibit 6. Thus, the administrative law judge permissibly determined that Dr. Tuteur's disability causation opinion was entitled to diminished weight because he relied, at least in part, on generalities and statistics, rather than the miner's specific condition, and believed that legal pneumoconiosis is rare. *See* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

As the administrative law judge provided valid reasons for discounting the opinions of Drs. Rosenberg and Tuteur, it is not necessary for the Board to address employer's remaining arguments concerning the administrative law judge's consideration of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Accordingly, we affirm the administrative law judge's determination that employer did not rebut the presumption that claimant has legal pneumoconiosis. *See Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

With respect to rebuttal of the presumption of total disability causation, the administrative law judge relied on his findings on the issue of legal pneumoconiosis to determine that employer failed to establish that claimant's total disability did not arise out of his coal mine employment. Decision and Order at 15. Employer asserts that the administrative law judge applied an improper rebuttal standard by requiring employer to rule out coal mine dust exposure as a cause of the miner's disabling respiratory impairment. Further, employer contends that, because the existence of legal pneumoconiosis was established by presumption, the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Tuteur as to disability causation on the basis that they did not diagnose legal pneumoconiosis.

Contrary to employer's initial argument, the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that 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." 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(ii)). The 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); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. 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). Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

We also reject employer's contention that, because the existence of legal pneumoconiosis was established by invocation of the amended Section 411(c)(4) presumption, the administrative law judge could not discredit the opinions of Drs. Rosenberg and Tuteur on the issue of total disability causation, based on their failure to diagnose legal pneumoconiosis. In *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013), the United States Court of Appeals for the Sixth Circuit considered the same argument and held that it was within the administrative law judge's discretion to accord diminished weight to the opinions of employer's experts, both of whom ruled out the presence of legal pneumoconiosis, even though the existence of the disease was presumed, rather than established. The court stated:

> [Employer] was able to disprove the existence of clinical pneumoconiosis, but failed to disprove the existence of legal pneumoconiosis, which was its burden. Thus, while pneumoconiosis was first presumed, not found, the ALJ nevertheless concluded that the "[e]mployer has not rebutted the existence of legal coal workers' pneumoconiosis by a preponderance of the medical evidence." Thus, the ALJ determined that it was at least as likely as not that [the miner] suffered from legal pneumoconiosis. The ALJ did not err in using this determination to discredit the opinions of Dr. Jarboe and Dr. Castle, neither of whom diagnosed legal pneumoconiosis.

Ogle, 737 F.3d at 1074 (internal citations omitted). Based on the court's reasoning in *Ogle*, we affirm the administrative law judge's finding that the opinions of Drs. Rosenberg and Tuteur were insufficient to "rule out a possible causal connection between [claimant's] disability and his coal mine employment" pursuant to amended Section 411(c)(4). Decision and Order at 16. Consequently, we also affirm the administrative law judge's finding that employer did not rebut the presumption of disability causation. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(ii)); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8. In light of our affirmance of the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption, we further affirm the award of benefits.

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