BRB No. 13-0320 BLA

ARGUS TRENT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JUMACRIS MINING, INCORPORATED	)	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 Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly, PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2011-BLA-06017) of Administrative Law Judge Thomas M. Burke rendered on a subsequent claim filed on September 28, 2010, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012)(the Act).[1] The administrative law judge credited claimant with 16.4 years of underground coal mine employment, and found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against the miner and, thereby, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] Additionally, the administrative law judge found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not establish rebuttal of the presumption.[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of the Section 411(c)(4) presumption to this case. In addition, employer asserts that, in concluding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, the administrative law judge failed to properly evaluate the medical

[1] Claimant's previous claims, filed on February 10, 1993 and on November 19, 2002, were denied, respectively, on June 17, 1994 and on November 10, 2003, for failure to establish any of the elements of entitlement. Director's Exhibit 2; Decision and Order at 2, 12.

[2] Where a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2)(2013).

[3] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). 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 20 C.F.R. §718.305. 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)."

evidence and provide a complete rebuttal analysis, in violation of the requirements of the Administrative Procedure Act (APA).[4] Claimant responds to employer's appeal, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal, urging that the Board reject employer's arguments concerning the administrative law judge's application and interpretation of the Section 411(c)(4) presumption. The Director also urges the Board to affirm the administrative law judge's rejection of Dr. Rosenberg's opinion, that claimant does not have legal pneumoconiosis based on claimant's FEV_1/FVC values, as the opinion is inconsistent with the definition of legal pneumoconiosis as discussed in the preamble to the 2001 revised regulations.[5] Director's Response at 3-4.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[6] 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).

At the outset, we note our agreement with the Director that employer's challenges with respect to the reinstated Section 411(c)(4) presumption are meritless. Contrary to employer's allegations that the administrative law judge's application of the Section 411(c)(4) presumption constitutes a denial of due process for employer and violates the APA, employer was not restricted in the evidence it offered on rebuttal; the absence of implementing regulations did not prevent application of the presumption; and employer's due process rights were not violated by a lack of notice of the change of law, or by

[4] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 16.4 years of underground coal mine employment, a total respiratory disability pursuant to 20 C.F.R. §718.204(b), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 12-14, 15-18; Employer's Brief at 11.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibits 1 at 69, 2 at 130, 137; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

proceeding without implementing regulations. Furthermore, the mandatory language of the amended provisions of the Act indicates that the provisions were self-executing prior to the issuance of implementing regulations. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013)(Niemeyer, J., concurring); *Fairman v. Helen Mining Co*., 24 BLR 1-227, 1-229 (2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010). We therefore affirm the administrative law judge's application of the amended Section 411(c)(4) presumption in this case.

We also agree with the Director that employer's argument, that the administrative law judge imposed an improper "rule-out" standard in considering the issue of rebuttal, is meritless since the opinions of Drs. Rosenberg and Zaldivar were not discounted based on the application of an improper standard of rebuttal, but because the administrative law judge found that they were not credible. Director's Response at 3 n.4; *Rose v. Clinchfield Coal Co*., 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013); *see also Big Branch Resources, Inc. v. Ogle*, F.3d , 2013 WL 6608019 (6th Cir. Dec. 17, 2013); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 479-480, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

In order to rebut the amended Section 411(c)(4) presumption in this case, employer must affirmatively prove either that the miner does not suffer from legal pneumoconiosis[7] or that his disability is not due to coal mine employment. 30 U.S.C. 921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43; *see also Morrison*, 644 F.3d at 479-480, 25 BLR 2-8-9.

Employer argues that the opinions of Drs. Zaldivar[8] and Rosenberg[9] establish rebuttal of the Section 411(c)(4) presumption, and were improperly discounted. In particular, employer asserts that both Drs. Zaldivar and Rosenberg establish that claimant does not have legal pneumoconiosis and that his disabling respiratory impairment is due

[7] The administrative law judge found that employer "disprove[d] the existence of clinical pneumoconiosis." Decision and Order at 16, 18; *see* 30 U.S.C. §921(c)(4).

[8] Dr. Zaldivar performed a physical examination, and diagnosed totally disabling asthma and emphysema due wholly to smoking, and not to coal dust exposure. He found no clinical pneumoconiosis. Decision and Order at 6, 7 n.6, 8-9; Employer's Exhibits 1, 5, 6 at 9-10, 23-27, 32, 38-39.

[9] Dr. Rosenberg, who completed a consultative report, found no clinical pneumoconiosis and, in addition to asthma and allergies, diagnosed a totally disabling respiratory impairment due to smoking, and not to coal dust exposure. Decision and Order at 9-11; Employer's Exhibits 4 at 6-8, 7 at 4-8, 10-16, 19-20.

to non-occupational asthma aggravated by smoking, and not to his coal dust exposure. Employer asserts that both Drs. Zaldivar and Rosenberg provided multiple reasons demonstrating that claimant's respiratory impairment is unrelated to his coal dust exposure, and that the administrative law judge selectively analyzed the evidence in violation of the APA, to find that employer failed to rebut the presumption.[10] Employer's Brief at 12-25.

Considering the opinions of Drs. Zaldivar and Rosenberg, the administrative law judge determined that Dr. Zaldivar's opinion attributing claimant's disabling respiratory impairment to asthma, "does not necessarily preclude" a coal dust etiology, since "asthma is one of the forms of [chronic obstructive pulmonary disease] COPD that can be caused by coal dust exposure and therefore constitutes legal pneumoconiosis." Decision and Order at 18-19. The administrative law judge concluded therefore that Dr. Zaldivar's opinion, that claimant's COPD is not related to his coal mine employment because he has asthma, is inconsistent with the scientific views accepted by the Department of Labor (DOL), in defining the disease of pneumoconiosis.[11] The administrative law judge therefore properly found that Dr. Zaldivar's opinion warranted little weight. *See* 65 Fed. Reg. 79,920, 79,939, 79,944 (Dec. 20, 2000); *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 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). We reject, as meritless, employer's assertion that the administrative law judge erred in applying the preamble to the 2001 revised regulations to discredit Dr. Zaldivar's opinion. Employer's Brief at 17;

[10] The record also includes the opinions of Drs. Klayton, Gallai and Gaziano. Dr. Klayton diagnosed severe obstructive lung disease caused by coal dust exposure and smoking. Decision and Order at 11-12; Claimant's Exhibit 2. Dr. Gallai diagnosed chronic bronchitis with emphysema due to coal dust exposure. Decision and Order at 11; Claimant's Exhibit 1 at 1, 3. Dr. Gaziano diagnosed a severe disabling lung impairment due to coal dust exposure and smoking. Decision and Order at 6; Director's Exhibit 13.

[11] Dr. Zaldivar excluded a diagnosis of legal pneumoconiosis, stating: "[claimant] has smoked extensively and intensively enough to have developed the combination of asthma and emphysema which is the disease from which he suffers. Dr. Zaldivar stated that claimant's asthma and emphysema from smoking fully explains the state of his lungs at this time." Employer's Exhibit 1 at 4. Dr. Zaldivar also stated that "claimant's impairment was the result of asthma due to the variability and bronchoreversibility of the impairment, the fact that asthma was the most common source of such inflammation, [c]laimant's family history of asthma, the rapid decrease in PET figures…, and the good oxygen exchange during exercise." Decision and Order at 18; Employer's Exhibits 1, 5 and 6.

see Lewis Coal Co. v. Director, OWCP [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

Next, contrary to employer's argument, the administrative law judge permissibly rejected Dr. Rosenberg's opinion that claimant's reduced FEV_1/FVC ratio suggested that the cause of his disabling respiratory impairment was smoking, rather than coal mine employment. Because Dr. Rosenberg's opinion rested on reasoning that has been "rejected by the Board," and is inconsistent with the statement in the preamble that "coal dust can cause significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV_1/FVC ratio,"[12] the administrative law judge properly rejected it. Decision and Order at 19; Director's Response at 3-4 n.5 and 6; 65 Fed. Reg. 79943 (Dec. 20, 2000); *see Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 487 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Obush*, 24 BLR at 1-125-26.

Moreover, the administrative law judge properly discounted Dr. Rosenberg's opinion that claimant's "reduced diffusion capacity meant that [c]laimant's emphysema was of a character only caused by cigarette smoke, not coal dust." Decision and Order at 19; Employer's Exhibit at 7 at 8, 16-19. The administrative law judge found that this opinion was not credible as it "rest[ed] on the premise that [c]laimant suffer[ed] from a reduced diffusion capacity, [when] Dr. Zaldivar … persuasively [opined] that [c]laimant's diffusion capacity is not actually impaired, but only appeared to be." Decision and Order at 19; Employer's Exhibit 6 at 25-27. The administrative law judge therefore reasonably found that Dr. Rosenberg's opinion, attributing claimant's respiratory impairment to smoking, rather than coal mine employment, was not credible. *See Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

Further, contrary to employer's argument, Dr. Rosenberg's view, that there is a specific pattern of impairment that is characteristic of smoking versus coal mine dust

[12] Dr. Rosenberg described a "pattern of impairment" which is "characteristic of coal dust[-]induced obstruction…, where there's a symmetrical reduction of the FEV_1/FVC such that the ratio is generally preserved,"… "in contrast with smoking[-]related forms of obstruction." He stated that claimant's "FEV_1 is moderately to severely reduced," and that his FEV_1/FVC ratio is "47-50 percent or so," while the "preserved ratio is generally 70 percent or higher," demonstrating "a marked reduction of the ratio." He stated that "the preservation of the FEV_1/FVC ratio is "the norm in patients with coal mine[-]induced obstructive lung disease." Employer's Exhibits 4 at 6-7, 7 at 17-18, 22-23.

exposure,[13] is contrary to the preamble and regulations. *See* Employer's Brief at 23-25. The preamble and regulations acknowledge that coal dust-related and smoking-related pollutants cause pulmonary impairment by the same mechanism. Thus, the administrative law judge properly rejected Dr. Rosenberg's opinion. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000)(Medical literature "support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms."); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316, 25 BLR 2-115, 2-132-33 (4th Cir. 2012); *Obush*, 650 F.3d at 256-57, 24 BLR at 2-383; *Sewell Coal Co. v. Triplett*, 253 F. App'x 274, 277 (4th Cir. 2007).

Additionally, employer contends that the administrative law judge failed to address "significant portions" of Dr. Rosenberg's discussion concerning how "the abundance of free radicals and associated submicron particles within cigarette smoke," "large lung volumes", and "airtrapping", are "related to cigarette smoking." Employer's Brief at 24. This contention is belied by the administrative law judge's detailed review of Dr. Rosenberg's opinion, as well as his citation to the pages of Dr. Rosenberg's report, and to his testimony addressing smoking as the cause of claimant's COPD. *See* Decision and Order at 9-11, 19; *Lane Hollow Coal Co. v. Dir., OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir 1998); Employer's Brief at 24-25.

Further, the administrative law judge rationally found that the credibility of the opinions of Drs. Zaldivar and Rosenberg was diminished by their reliance on "generalities" in attributing claimant's COPD to smoking rather than coal mine dust exposure. Specifically, the administrative law judge stated that, "employer may not meet its burden by showing that an alternative etiology [*could*] be the cause of an abnormality like the claimant's."[14] Decision and Order at 19; *see Barber*, 43 BLR at 901, 19 BLR at 2-67.

Finally, the administrative law judge was unpersuaded by the view of Drs. Zaldivar and Rosenberg, that claimant's respiratory impairment was not due to coal mine employment because claimant lacks the typical presentation of destructive lung disease, in that he demonstrates variable bronchoreversibility and he benefits from medications

[13] For example, Dr. Rosenberg opined that there was a "quite different" disruption in tissue structure caused by cigarette smoke compared to coal dust. Employer's Exhibits 4, 6 and 7.

[14] For example, Drs. Rosenberg and Zaldivar opined that claimant's test results implied "ongoing smoking," noting that smoking from a young age put claimant at greater risk for lung damage. The doctors further opined that even if he had quit smoking, the lung damage caused by smoking can continue after quitting. Decision and Order at 18-19; *see* Employer's Exhibits 1 at 3-4; 5; 6 at 15-16, 32-33, 41-42; 7 at 19.

used for reversible airways disease.[15] Decision and Order at 19; Employer's Exhibits 4 at 8; 5 at 5; 6 at 9-11, 19, 22-24, 27, 201-21; 7 at 18. The administrative law judge found such reasoning contrary to the preamble, that coal dust exposure can cause a reversible obstructive pulmonary impairment, and to the preamble's explicit statement that coal dust exposure can cause asthma, which is a reversible pulmonary disease. Decision and Order at 19. Likewise, the administrative law judge found that, in view of the fact that claimant exhibited residual disability post-bronchodilation, employer failed to establish that the irreversible component of claimant's impairment is attributable to a non-coal dust etiology. *Id.*; *see Barrett*, 487 F.3d at 356, 23 BLR at 2-483; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

Based on the foregoing, the administrative law judge rationally concluded that Drs. Zaldivar and Rosenberg failed to credibly "rule out" coal dust exposure as a cause of claimant's disabling respiratory impairment. Decision and Order at 20; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see also Looney*, 678 F.3d at 316, 25 BLR at 2-132-33; *Obush*, 650 F.3d at 256-57, 24 BLR at 2-383. The administrative law judge properly discounted the opinions of Drs. Zaldivar and Rosenberg because they "rely on generalities, unproven facts, and medical principles hostile to the Act." Decision and Order at 20; *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-335. Consequently, we reject employer's assertion that the administrative law judge failed to provide valid reasons for rejecting the medical opinions of Drs. Zaldivar and Rosenberg, in violation of the APA. We affirm his conclusion that the opinions of Drs. Zaldivar and Rosenberg failed to carry employer's burden of rebutting the presumption of total disability due to pneumoconiosis at Section 411(c)(4) by disproving the existence of legal pneumoconiosis or by proving that claimant's disabling respiratory impairment did not arise out of coal mine employment. 30 U.S.C. §921(c)(4); s*ee Rose*, 614 F.2d at 939, 2 BLR at 2-43; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335. Thus, as the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Rosenberg, the only evidence of record supportive of employer's burden on rebuttal, we affirm the administrative law judge's award of benefits.[16]

[15] Dr. Zaldivar stated that he excluded coal dust exposure as a causative factor in claimant's impairment because "the presentation he has is identical to anyone who has longstanding asthma, a family history of asthma, allergic rhinitis, and, on top of that, smoking." Employer's Exhibit 6 at 33.

[16] Since we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), we also affirm the administrative law judge's determination that

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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claimant established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(d)(2013).