BRB No. 13-0324 BLA

JERRY FLOYD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROOKS RUN MINING	)	DATE ISSUED: 02/25/2014
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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.

Roger D. Forman (The Law Office of Roger D. Forman, L.C.), Buckeye, West Virginia, for claimant.

Kevin T. Gillen and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Maia S. Fisher (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-5474) of Administrative Law Judge Michael P. Lesniak, rendered on a claim filed on November 3, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with at least forty-five years of coal mine employment, most of which was underground, and determined that claimant has a totally disabling respiratory impairment. Based on these determinations, and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to rebut that presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge applied an improper rebuttal standard and did not rationally weigh the evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, asserting that the administrative law judge applied the correct rebuttal standard. The Director contends that the administrative law judge permissibly rejected the opinions of Drs. Zaldivar and Bellotte on the issue of whether claimant's totally disabling respiratory or pulmonary impairment arose out of, or in connection with, coal mine employment.

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.[2] 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).

Initially, we affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption. *See Skrack v.*

[1] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he worked at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and also has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[2] As claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction 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); Hearing Transcript at 22.

Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983). We also reject employer's argument that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator, as that argument was rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring).[3] The Department of Labor (DOL) has also promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013).

In considering whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge found that employer disproved the existence of clinical pneumoconiosis.[4] Decision and Order at 23-24. However, the administrative law judge found that employer's experts, Drs. Zaldivar and Bellotte, failed to adequately explain their bases for excluding coal dust exposure as a cause of claimant's disabling obstructive respiratory condition. Thus, the administrative law judge determined that employer failed to satisfy its burden to affirmatively establish that claimant does not have legal pneumoconiosis.[5] *Id.* Additionally, because neither Dr. Zaldivar, nor Dr. Bellotte, diagnosed legal pneumoconiosis, the administrative law judge

[3] Employer's related request that this case be held in abeyance pending a decision on appeal from *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), is moot. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring).

[4] The regulations provide:

> "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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[5] "'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

determined that their opinions were not credible on the issue of disability causation. *Id*. at 25-26. Thus, the administrative law judge concluded that "[e]mployer cannot rule out a causal connection between [claimant's] disability and his coal mine employment," and that it failed to rebut the amended Section 411(c)(4) presumption. *Id*. at 26.

Employer asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory or pulmonary impairment. Employer's Brief in Support of Petition for Review at 11-17. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption that his total disability is due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by establishing that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 22; *see* 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). Furthermore, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an employer must "effectively . . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure in order to meet its rebuttal burden. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). In addition, the DOL has expressed its acceptance of the "rule out" standard on rebuttal.[6] 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013). Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

[6] The regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that in order to prove that claimant's disability did not arise out of, or in connection with coal mine employment, 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)(1)(ii)). 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).

Employer next contends that the administrative law judge erred in finding that the opinions of Drs. Zaldivar and Bellotte, that claimant's disabling obstructive respiratory disease was not due to coal dust exposure, were insufficient to rebut the presumed fact of legal pneumoconiosis. We disagree. Dr. Zaldivar opined that claimant suffers from asthma aggravated by smoking, based on claimant's medical history and the partial reversibility he demonstrated on pulmonary function testing after the use of a bronchodilator. Employer's Exhibits 1, 2, 4, 8. Dr. Zaldivar specifically testified that coal dust exposure is not "associated with the production or worsening of asthma." Employer's Exhibit 8 at 12. Similarly, Dr. Bellotte attributed claimant's respiratory condition to asthma and smoking. Director's Exhibit 29; Employer's Exhibits 5, 6. He explained that there is less than an "8% chance that [claimant] has had a significant decrease in FEV1 due to coal dust exposure." Director's Exhibit 29. He testified that claimant has exhibited "reversibility determined on a number of his pulmonary function test[s], and that's the way we diagnose asthma from a pulmonary function test." *Id*. Dr. Bellotte also testified that asthma is not a disease caused by coal dust exposure. Employer's Exhibit 6 at 27-28.

In rejecting the opinions of employer's experts, the administrative law judge noted correctly that DOL has recognized that the "term 'chronic obstructive pulmonary disease' (COPD) includes three disease processes characterized by airways dysfunction: chronic bronchitis, emphysema, and *asthma*." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *see* Decision and Order at 24. Moreover, the DOL has stated that "the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease." 65 Fed. Reg. at 79,994. Therefore, to the extent that Drs. Zaldiver and Bellotte "believ[e] that asthma cannot be caused by coal dust exposure," we affirm the administrative law judge's determination that they expressed views at odds with the regulations, and that their opinions are not reasoned. Decision and Order at 24-25; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Additionally, the administrative law judge rationally rejected the opinions of Drs. Zaldivar and Bellotte insofar as he found that they failed to explain why the non-asthmatic component of claimant's obstructive respiratory condition, which was not reversible after the use of a bronchodilator, was not caused by coal dust exposure. *See Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Furthermore, the administrative law judge permissibly determined that Dr. Bellotte's opinion was not persuasive as he "relied on the *probability* of developing COPD due to coal dust exposure versus smoking" and did not explain, based on the specifics of this case, why claimant's respiratory impairment was unrelated to his coal

mine employment. Decision and Order at 25; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Thus, we affirm the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by affirmatively establishing that claimant does not have legal pneumoconiosis.

Lastly, we reject employer's contention that the administrative law judge erred in finding that it did not rebut the presumed fact of disability causation. The administrative law judge properly found that the opinions of Drs. Zaldivar and Bellotte were not credible to establish that claimant's disability did not arise out of, or in connection with his coal mine employment, as they did not diagnose legal pneumoconiosis. Decision and Order at 25-26, citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). In affirming the administrative law judge's credibility determination, we reject employer's argument that *Scott* and *Toler* are inapplicable in cases involving rebuttal of the amended Section 411(c)(4) presumption where legal pneumoconiosis is only presumed, rather than factually found. Contrary to employer's contention, an administrative law judge may use the determination that employer has failed to rebut the presumption of legal pneumoconiosis to discredit, on the issue of disability causation, the opinions of physicians who failed to diagnose legal pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with proof that claimant does not have pneumoconiosis, or that his disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. *See* 30 U.S.C. §921(c)(4); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

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