BRB No. 13-0169 BLA

GLENN C. STOUT, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF RUN MINING COMPANY	)	DATE ISSUED: 01/31/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jeffrey S. Goldberg (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-6018) of Administrative Law Judge Richard A. Morgan with respect to a subsequent claim filed on August 25, 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 determined that claimant established at least twenty-five years of coal mine employment, with fifteen years or more underground, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and, therefore established a change in an applicable condition of entitlement at 20 C.F.R. §725.309[2] and invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge further determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant invoked the presumption at amended Section 411(c)(4) and challenges the administrative law judge's application of amended Section 411(c)(4) to this claim. Employer further asserts that the administrative law judge erred in determining that it did not rebut the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that

[1] Claimant filed his initial claim on July 12, 2007, which was denied by the district director on February 27, 2008, as claimant did not establish the existence of pneumoconiosis, total disability, or disability causation. Director's Exhibit 1. No further action was taken by claimant until he filed the current subsequent claim. Director's Exhibit 3.

[2] The Department of Labor (DOL) has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 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), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). 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).

the Board should reject employer's contentions that the presumption does not apply to responsible operators, and that the presumption does not have any effect, absent implementing regulations. Further, the Director urges the Board to decline to address employer's argument that the administrative law judge improperly required employer to rule out any contribution by coal mine dust exposure to claimant's pulmonary impairment, as employer's problem is not with the rebuttal standard but rather with the administrative law judge's credibility determinations.[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. Application of the Section 411(c)(4) Presumption

We reject employer's assertion that the administrative law judge's application of amended Section 411(c)(4) to this case was premature, in the absence of implementing regulations. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2010). Moreover, the Department of Labor (DOL) recently promulgated regulations that are consistent with the administrative law judge's application of the provisions. 78 Fed. Reg. 59,101, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established at least twenty-five years of coal mine employment, with fifteen years or more underground, and total disability at 20 C.F.R. §718.204(b)(2) and, therefore, established 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] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibits 5, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

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

We next consider employer's challenge to the administrative law judge's finding that it did not rebut the 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. 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).[6] We, therefore, reject it here for the reasons set forth in that decision.[7] *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Employer also 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 the miner's disabling respiratory impairment. Employer maintains that it need only prove that pneumoconiosis was not a contributing cause of claimant's disability, which "is a much lower burden than the rule-out standard adopted by this agency." Employer's Brief at 32. However, contrary to employer's assertion, 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.

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[6] Because the Fourth Circuit has already issued a decision in *Owens*, employer's request to hold the case in abeyance pending the court's decision in that case is moot. *See 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).

[7] The DOL dismissed this same 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, 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), regarding the application of the statutory limitations on rebuttal to responsible operators. *Id*.

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.

Additionally, employer maintains that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar, Bellotte, and Jaworski concerning the existence of legal pneumoconiosis.[8] Employer's Brief at 6-18. Employer asserts that the administrative law judge improperly found that Dr. Zaldivar's opinion is inconsistent with the definition of legal pneumoconiosis.[9] *Id*. at 6. Employer states that Dr. Zaldivar clearly explained why claimant's respiratory impairment is not due to coal dust exposure, based on the totality of the evidence, and acknowledged that, although coal workers' pneumoconiosis may be latent and progressive, it did not contribute to claimant's impairment. *Id*. at 7-11; Director's Exhibit 22; Employer's Exhibits 10 (at 43-44, 94, 111), 12. Employer argues that Dr. Bellotte's opinion is also consistent with the Act and regulations, and is sufficiently reasoned and documented to rebut the presumed existence of legal pneumoconiosis. Employer's Brief at 11-14; Employer's Exhibits 1, 15 at 28-29. In addition, employer contends that Dr. Jaworski's opinion is similarly reasoned and documented and supports the opinions of Drs. Zaldivar and Bellotte, that claimant has asthma and a cigarette smoke-induced respiratory condition, although Dr. Jaworski conceded the possibility that coal mine employment may have played a role, at most a minor role, in the development of claimant's impairment.[10] Employer's Brief at 17; Claimant's Exhibit 7 at 44.

[8] The administrative law judge determined that "the x-ray evidence disproves the existence of clinical pneumoconiosis." Decision and Order at 24. However, in order to establish the first method of rebuttal by proving that the miner did not suffer from pneumoconiosis, employer must establish that the miner had neither clinical *nor* legal pneumoconiosis. 30 U.S.C. §921(c)(4), *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

[9] Legal pneumoconiosis is defined as including " any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[10] Employer also asserts, correctly, that the administrative law judge misstated the professional status of Drs. Zaldivar and Bellotte. Contrary to the administrative law

Contrary to employer's contentions, the administrative law judge acted within his discretion in finding that the opinions of Drs. Zaldivar and Bellotte were insufficient to disprove the presumed existence of legal pneumoconiosis, as neither physician adequately discussed coal dust exposure as an aggravating agent of claimant's asthma and obstructive lung disease. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 28. The administrative law judge rationally determined that Dr. Zaldivar's opinion was inconsistent with the definition of legal pneumoconiosis, based on his statements that "[i]f an individual presents with asthma, this individual does not have legal pneumoconiosis[,]" and that, as asthma and smoking "fully explain the symptoms and condition of [claimant][,][t]here is no need to invoke any hypothetical condition which includes his occupation." Employer's Exhibit 10 at 85-86; *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Compton*, 211 F.3d at 211, 22 BLR at 2-175; Decision and Order at 28.

Similarly, the administrative law judge acted within his discretion in discrediting Dr. Bellotte's opinion as inconsistent with the definition of legal pneumoconiosis, based on his statement that claimant "has a mild to moderate pulmonary impairment which is readily explained by his lifelong untreated asthmatic condition and his continued tobacco abuse over the past 37 years." Employer's Exhibit 1; *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Compton*, 211 F.3d at 211, 22 BLR at 2-175; Decision and Order at 28. The administrative law judge also permissibly discredited Dr. Jaworski's opinion because his statement, that any contribution to claimant's impairment from coal dust would be insignificant based on the fact that claimant maintained good lung function after more than twenty years of coal mine employment, is inconsistent with the DOL's recognition of the latent and progressive nature of pneumoconiosis. *See* 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,972, 79,975 (Dec. 20, 2000); Decision and Order at 29; Claimant's Exhibit 7 at 43. Therefore, we affirm the administrative law judge's determination that employer did not rebut the presumption that claimant has legal pneumoconiosis. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Compton*, 211 F.3d at 211, 22 BLR at 2-175.

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judge's findings, Dr. Zaldivar is currently practicing and Dr. Bellotte was a B-reader when he offered his report. Director's Exhibit 22; Employer's Exhibit 2. The administrative law judge's errors are harmless, however, as he did not give less weight to the opinions of Drs. Zaldivar and Bellotte on these bases. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also asserts that the administrative law judge erred in determining that the opinions of Drs. Zaldivar and Bellotte were insufficient to rebut the presumption that claimant is totally disabled due to pneumoconiosis. Relying on its arguments concerning rebuttal of the presumed existence of legal pneumoconiosis, employer maintains that Drs. Zaldivar and Bellotte rebutted the presumption of disability causation by indicating that coal dust exposure did not contribute to claimant's disabling obstructive impairment. Additionally, employer contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion, that coal dust exposure contributed to claimant's impairment, when finding that disability causation was not rebutted.[11]

As we have affirmed the administrative law judge's findings concerning rebuttal of the presumed existence of legal pneumoconiosis, and employer relies on the same arguments on rebuttal of disability causation, we also affirm the administrative law judge's determination that employer did not rebut the presumption that claimant is totally disabled due to pneumoconiosis. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133. Because the administrative law judge permissibly gave less weight to the opinions of Drs. Zaldivar and Bellotte, the only evidence supportive of a finding that claimant is not totally disabled due to legal pneumoconiosis, it is not necessary to address employer's arguments concerning the administrative law judge's consideration of Dr. Rasmussen's contrary opinion. *See Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Consequently, we affirm the award of benefits.

[11] Employer further argues that, in violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), the administrative law judge did not provide "any bases for crediting the state award with some weight" on the issues of the existence of pneumoconiosis and disability causation. Employer's Brief at 20. It is not necessary to address employer's contention, as error, if any, in the administrative law judge's crediting of this determination is harmless, because he independently found that employer did not meet its burden to rebut the amended Section 411(c)(4) presumption. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.

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