BRB No. 13-0224 BLA

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| DONN WNEK | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| McELROY COAL COMPANY | ) | |
| | ) | DATE ISSUED: 01/14/2014 |
| 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Ann Marie Scarpino (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 Granting Benefits (2011-BLA-06308) of Administrative Law Judge Michael P. Lesniak, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp.

2011) (the Act). This case involves a miner's claim filed on August 4, 2010. Director's Exhibit 2.

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established.[1] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

The administrative law judge credited claimant with thirty-three years of underground coal mine employment,[2] and found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also challenges the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contentions regarding the application of amended Section 411(c)(4), and urging the Board to reject employer's contentions regarding the weighing

[1] 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)."

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, 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).

of the medical opinion evidence on rebuttal. Employer filed replies to both claimant's and the Director's response briefs, reiterating its contentions.[3]

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, the burden of proof shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's disabling respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The administrative law judge found that employer did not establish rebuttal by either method.

After finding that employer disproved the existence of clinical[4] pneumoconiosis, the administrative law judge addressed whether employer disproved the existence of legal[5] pneumoconiosis. The administrative law judge considered the opinions of Drs. Fino and Rosenberg. Dr. Fino opined that claimant's chronic obstructive pulmonary disease (COPD) is due to cigarette smoke-induced emphysema, and is unrelated to coal

[3] Employer does not challenge the administrative law judge's findings that claimant established thirty-three years of underground coal mine employment and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), and, therefore, invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4). These findings, therefore, are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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) (2013).

[5] 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) (2013). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (2013).

mine dust exposure. Employer's Exhibits 3, 7. Dr. Rosenberg also opined that claimant has disabling airway obstruction consistent with emphysema, and unrelated to coal mine dust inhalation. Director's Exhibit 27.

The administrative law judge discounted the opinions of Drs. Fino and Rosenberg, because he found that each was premised on assumptions that were contrary to the scientific views endorsed by the Department of Labor (DOL) in the preamble to the 2000 regulatory revisions. Decision and Order at 15-16. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 16.

Initially, employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 6-13. This 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*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision. *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). Moreover, as discussed *supra* n.1, the Department of Labor (DOL) recently promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 20 C.F.R. §718.305(d)(1).

Employer further asserts that the administrative law judge applied an incorrect rebuttal standard. Employer's Brief at 14-20. Contrary to employer's argument, the administrative law judge correctly stated that employer bore the burden to establish that claimant does not have pneumoconiosis. Decision and Order at 13; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); 65 Fed Reg. 59,102, 59,106 (Sept. 25, 2013); *Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the United States Court of Appeals for the Fourth Circuit has explicitly stated that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure.[6] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we reject employer's contention that the administrative law judge erred when he required employer's physicians to provide persuasive opinions establishing that claimant's thirty-three years of coal mine dust

[6] Similarly, the implementing regulation that was promulgated after the administrative law judge's decision was issued requires the party opposing entitlement in a miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(ii).

exposure did not contribute to his obstructive impairment. *See Id.*; 20 C.F.R. §718.201(a)(2) (2013).

Employer next contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Fino and Rosenberg did not disprove the existence of pneumoconiosis. Employer's Brief at 21-39. We disagree. As set forth below, the administrative law judge permissibly found that the reasons given by Drs. Fino and Rosenberg for excluding coal mine dust exposure as a cause of claimant's COPD were not persuasive. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

As an initial matter, we reject employer's assertion that the administrative law judge erred in referring to the preamble to the 2000 revised regulations, when weighing the medical opinions relevant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 21-22. Contrary to employer's assertions, the administrative law judge did not treat the preamble as a presumption that all obstructive lung disease is pneumoconiosis; rather, he permissibly consulted the preamble as a statement of the medical principles accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-211 (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); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

Considering the relevant medical opinions, the administrative law judge initially noted Dr. Fino's concession that there was "no doubt" that "some" of claimant's emphysema and a "slight reduction in his FEV1" is due to claimant's thirty-five years of coal mine employment. Decision and Order at 10; Employer's Exhibit 7 at 14. However, in concluding that any contribution caused by coal mine dust is not clinically significant and did not play a role in claimant's pulmonary impairment, Dr. Fino relied in part, on a study by Attfield & Hodous that concluded that the average loss of lung function related to coal mine dust exposure is very small. Decision and Order at 9-10; Employer's Exhibits 3 at 11; 7 at 14-15. Utilizing the data provided by the study, Dr. Fino calculated that claimant's loss of lung function due to his coal mine dust exposure would be insignificant. Employer's Exhibit 7 at 14-15. The administrative law judge permissibly discounted Dr. Fino's reliance on the "average loss of FEV1" as inconsistent with the findings of DOL, as set forth in the preamble to the 2000 revised regulations, that statistical averaging can hide the effect of coal mine dust exposure in individual miners.

*See Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; Decision and Order at 16, *citing* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000).

The administrative law judge also discounted Dr. Fino's opinion, that the miner's emphysema is due to smoking, because it was based on his view that the amount of emphysema present is related to the amount of coal mine induced disease seen pathologically or seen on the chest x-ray. Decision and Order at 32; Director's Exhibit 3 at 12. The administrative law judge also cited Dr. Fino's statement that he attributed the emphysema to claimant's smoking history because, based on claimant's chest x-rays, he does not have enough coal dust in his lungs to be of clinical significance. Decision and Order at 10; Employer's Exhibit 7 at 14-15. Finding that Dr. Fino's opinion was inconsistent with both the definition of legal pneumoconiosis and the provision that pneumoconiosis may be diagnosed "notwithstanding a negative X-ray," 20 C.F.R. §718.202(a)(4) (2013), the administrative law judge permissibly found that Dr. Fino's opinion was not sufficient to disprove the existence of legal pneumoconiosis. *See* 20 C.F.R. §§718.201, 718.202(a)(4) (2013); Decision and Order at 16.

In assessing the credibility of Dr. Rosenberg's opinion, the administrative law judge accurately noted that the physician eliminated coal mine dust exposure as a source of claimant's COPD, in part, because claimant had a "markedly reduced FEV1 with an associated severe reduction of his FEV1/FVC ratio," which Dr. Rosenberg explained is characteristic of cigarette smoke-induced lung disease, but not of lung disease caused by coal mine dust exposure. Decision and Order at 9, 15; Director's Exhibit 27 at 5-7. The administrative law judge permissibly discounted Dr. Rosenberg's opinion, noting that medical science endorsed by DOL recognizes that coal mine dust can cause clinically significant obstructive disease, as shown by a reduction in the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, BLR (4th Cir. 2013)(Traxler, C.J., dissenting); *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130., 694 F.3d at 801-02, 25 BLR at 2-210-11; Decision and Order at 15, *referencing* 65 Fed. Reg. 79,943 (Dec. 20, 2000). The fact that Dr. Rosenberg cited recent medical literature "establish[ing] the limitations of defining COPD as simply a reduction in FEV1 or FEV1 percent values," Employer's Brief at 25 n.14, 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 Cochran*, 718 F.3d at 324 (observing that neither of the employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the Preamble"). We therefore affirm the administrative law judge's finding that Dr. Rosenberg's opinion was entitled to little weight. Decision and Order at 15-16.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Rosenberg, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law

judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.

Employer next argues that, in finding that employer did not establish rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4), the administrative law judge erred in relying on the "presumed" finding of legal pneumoconiosis to reject the opinions of Drs. Fino and Rosenberg. Employer's Brief at 35. Employer contends that, because the existence of legal pneumoconiosis was established by a legal presumption, the opinions of Drs. Fino and Rosenberg are not contrary to any affirmative findings made by the administrative law judge. Employer's Brief at 35-36. Contrary to employer's contention, the administrative law judge reasonably found that the same reasons that he provided for discrediting the opinions of Drs. Fino and Rosenberg, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 16. Because the administrative law judge did not find the opinions of Drs. Fino and Rosenberg to be credible on the issue of legal pneumoconiosis, he could not credit their opinions on the causation of total disability, absent "specific and persuasive reasons for concluding that the doctor[s'] judgment on the question of disability causation d[id] not rest upon [their] disagreement with the [administrative law judge's] finding . . . ." *Toler*, 43 F.3d at 116, 19 BLR at 2-83; *see also Big Branch Res., Inc. v. Ogle*, F.3d , No. 13-3251, 2013 WL 6608019, at *8 (6th Cir. 2013). We therefore affirm the administrative law judge's determination that employer failed to establish that claimant's disabling impairment is unrelated to his coal mine employment. 30 U.S.C. §921(c)(4).

We affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Therefore, we affirm the award of benefits.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge