BRB No. 13-0280 BLA

HUGH LINKOUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/31/2014
	)	
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 on Remand of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly and Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2009-BLA-05910) of Administrative Law Judge Kenneth A. Krantz, rendered on a subsequent claim filed on

December 5, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. In the prior Decision and Order, the Board rejected employer's arguments regarding the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] *Linkous v. Consolidation Coal Co.*, BRB No. 11-0529 BLA, slip op. at 3-4 (May 30, 2012) (unpub.). The Board affirmed the administrative law judge's determination that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id*. at 7-9. However, because the administrative law judge did not explain, in accordance with the Administrative Procedure Act,[3] the bases for his finding that claimant established at least fifteen years of underground coal mine employment, the Board vacated the administrative law judge's determination that claimant invoked the amended Section 411(c)(4) presumption and the award of benefits.

On remand, the administrative law judge found that claimant established 15.35 years of underground coal mine employment and was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge also determined, based on invocation of the presumption, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[4] With regard to rebuttal, the administrative law judge found that employer

[1] A complete procedural history of the case is set forth in *Linkous v. Consolidation Coal Co.*, BRB No. 11-0529 BLA, slip op. at 1-2 (May 30, 2012) (unpub.).

[2] Relevant to this claim, Section 1556 of the Patient Protection and Affordable Care Act revived 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), which provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if he establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[3] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[4] The Department of Labor 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).

failed to establish either that claimant does not suffer from pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, coal mine employment. Accordingly, benefits were awarded.

On appeal, employer asserts 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, urging the Board to reject employer's assertion that the administrative law judge applied an improper rebuttal standard. Employer also filed a reply brief, reiterating its arguments.

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.[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).

Initially, we affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and, having previously established a totally disabling respiratory impairment, is entitled to invocation of the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Insofar as claimant is presumed to be totally disabled due to pneumoconiosis, he has satisfied his initial burden to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant has neither clinical nor legal pneumoconiosis, or that his disability did not arise out of, or in connection with, coal mine employment. 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); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011). In this case, the administrative law judge considered the opinions of employer's experts, Drs. Zaldivar and Habre, and found that they were insufficient to

[5] Because the record indicates that claimant's last coal mine employment was in Virginia, we will apply the law 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); Director's Exhibit 5.

disprove the presumed fact that claimant has legal pneumoconiosis[6] or establish that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order on Remand at 9-11, 19-20.

Citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), employer argues that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief in Support of Petition for Review at 12-19. This argument is rejected for the reasons set forth 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, BLR (4th Cir. 2013) (Niemeyer, J., concurring).[7] *See also Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Moreover, as indicated *supra* at 3 n.4, the Department of Labor (DOL) has 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 (to be codified at 20 C.F.R. §718.305(d)(1), (2)).

We also reject employer's assertion that the administrative law judge applied an improper rebuttal standard, to the extent that he required employer to "rule out" coal dust exposure as a causative factor for claimant's disabling respiratory impairment. Employer's Brief in Support of Petition for Review at 19-22; Employer's Reply Brief in Support of Petition for Review at 12-14. Contrary to employer's contention, 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*, 614 F.2d at 939, 2 BLR at 2-43-44; *see* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (to be codified at 20 C.F.R. §718.305); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). In addition, in the comments accompanying the regulation, the DOL expressed its acceptance of the "rule out" standard on rebuttal. 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013). Therefore, we

[6] Legal pneumoconiosis is defined as "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).

[7] 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, BLR (4th Cir. 2013) (Niemeyer, J., concurring).

conclude that the administrative law judge applied the correct rebuttal standard in this case.

The administrative law judge discussed the opinions of each of employer's experts separately and determined that they were insufficient to prove that claimant did not have pneumoconiosis or that his disability was unrelated to coal dust exposure. We reject employer's contention that the administrative law judge mischaracterized or selectively analyzed Dr. Zaldivar's opinion, in finding that it did not rebut the presumption of legal pneumoconiosis. Employer's Brief in Support of Petition for Review at 22-24. Dr. Zaldivar opined that claimant suffers from a disabling diffusion impairment resulting in hypoxemia, based on the results of the exercise portion of his arterial blood gas testing, which showed a drop in the PO2. Employer's Exhibits 3, 6. As a basis for excluding coal dust exposure as a causative factor for claimant's respiratory condition or disability, Dr. Zaldivar noted the absence of radiographic evidence for clinical pneumoconiosis and the fact that claimant did not have any evidence of airway obstruction. According to Dr. Zaldivar, coal workers' pneumoconiosis "causes an airway obstruction when it causes any impairment at all." Employer's Exhibit 3. During his deposition, Dr. Zaldivar reiterated that claimant's diffusion impairment was due to smoking and/or heart disease, because "[c]oal mining causes airway problems with airway obstruction. That is not present in this case or [is] minimally present." Employer's Exhibit 6 at 30.

Contrary to employer's argument, the administrative law judge permissibly determined that Dr. Zaldivar's opinion was not persuasive to rebut the amended Section 411(c) (4) presumption as "Dr. Zaldivar's definition of legal pneumoconiosis contradicts the regulatory definition of legal pneumoconiosis." Decision and Order on Remand at 19. The administrative law judge observed correctly that legal pneumoconiosis "is clearly not limited to airway obstruction, but includes '*any* chronic lung disease or impairment and its sequelae arising out of coal mine employment' [and] 'includes, *but is not limited to*, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.'" Decision and Order on Remand at 19, *quoting* 20 C.F.R. §718.201(a)(2); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Because the administrative law judge acted within his discretion in rendering this credibility determination, we affirm his finding that Dr. Zaldivar's opinion is insufficient to establish either that claimant does not have legal pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. *See* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

With respect to Dr. Habre's opinion, the administrative law judge noted correctly that Dr. Habre diagnosed chronic obstructive pulmonary disease (COPD), in the form of emphysema and chronic bronchitis. Decision and Order at 19; Employer's Exhibit 5. Dr. Habre opined that claimant did not have legal pneumoconiosis because claimant's COPD was due primarily to smoking, and because "coal dust seems to play a secondary role" and not the primary role in claimant's respiratory condition. Employer's Exhibit 5. However, as the administrative law judge noted, if "a physician concludes that the miner suffers from COPD arising out of coal mine employment, then his opinion supports a finding of legal [coal workers' pneumoconiosis]." Decision and Order at 20, *citing Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). We, therefore, affirm the administrative law judge's determination that Dr. Habre's opinion does not rebut the presumption of legal pneumoconiosis. Furthermore, as Dr. Habre opined that claimant is not totally disabled, contrary to the administrative law judge's determination, we affirm the administrative law judge's finding that Dr. Habre's opinion is insufficient to establish that claimant's disability did not arise out of, or in connection with, coal mine employment. *See* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *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).

Lastly, we reject employer's contention that the administrative law judge did not explain the weight he accorded its experts based on their qualifications. Employer's Brief in Support of Petition for Review at 24-25. The administrative law judge rationally concluded that the opinions of Drs. Zaldivar and Habre were insufficient to rebut the amended Section 411(c)(4) presumption, based on the medical rationales and explanations they provided. *See Hicks*, 138 F.3d at 533 n.9, 21 at 2-335 n.9. 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 Looney* 678 F.3d at 314, 25 BLR at 2-130; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing either that claimant does not have pneumoconiosis, or that

his disability did not arise out of, or in connection with, coal mine employment.[8] 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[8] Employer contends that the administrative law judge erred by not considering whether Dr. Rasmussen's opinion can rebut the presumption. Employer's Brief in Support of Petition for Review at 25. However, the administrative law judge observed correctly that "Dr. Rasmussen concluded that [c]laimant has legal pneumoconiosis (interstitial fibrosis caused primarily by coal mine dust exposure) which contributes materially to his disabling chronic lung disease." Decision and Order on Remand at 13. Thus, Dr. Rasmussen's opinion does not aid employer in establishing rebuttal.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge