



BRB No. 17-0185 BLA

WALTER F. MILLER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PITTSTON COAL COMPANY)	
)	DATE ISSUED: 01/17/2018
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 Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (16-BLA-5250) of Administrative Law Judge Natalie A. Appetta, rendered on a claim filed on December 2,

2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),¹ the administrative law judge credited claimant with at least twenty-six years of underground coal mine employment and found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Further, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in 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, did not file a brief in this appeal.²

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.³ 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).

¹ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

² We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-six years of underground coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Company*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 17, 19.

³ Claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,⁴ or by establishing that “no part of [claimant’s] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201.” 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to rebut the presumption at Section 411(c)(4) by either method.

Relevant to the existence of legal pneumoconiosis,⁵ the administrative law judge considered the opinions of Drs. Celko, Jaworski, Sood, Zaldivar and Spagnolo, together with the physicians’ qualifications. The administrative law judge initially found that while Dr. Celko is not a pulmonologist and Dr. Jaworski’s credentials are unknown, Drs. Sood, Zaldivar, and Spagnolo ranked “about equally.” Decision and Order at 25. Drs. Celko, Jaworski, and Sood opined that claimant has legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), emphysema, and possible asthma, due to both cigarette smoking and coal-mine dust exposure.⁶ In contrast, Drs. Zaldivar and

⁴ “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). “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.” 20 C.F.R. §718.201(a)(1).

⁵ The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 24, 29.

⁶ Dr. Celko examined claimant on May 18, 2016. Decision and Order at 10-11; Claimant’s Exhibits 8, 8a. In a report dated June 7, 2016, Dr. Celko diagnosed chronic obstructive pulmonary disease (COPD), emphysema, and chronic bronchitis, due to both smoking and coal dust exposure. Decision and Order at 10-11; Claimant’s Exhibits 8, 8a. Dr. Celko agreed that there might be an asthmatic component to claimant’s obstructive lung disease. Decision and Order at 10-11; Claimant’s Exhibits 8, 8a.

Dr. Jaworski examined claimant on behalf of the Department of Labor. In a report dated January 22, 2015, Dr. Jaworski diagnosed COPD due to both smoking and coal

Spagnolo opined that claimant's disabling obstructive pulmonary impairment is due to emphysema caused by cigarette smoking and asthma, and not by coal mine dust exposure.⁷ The administrative law judge found that Drs. Celko and Sood provided persuasive, well-documented and well-reasoned opinions that claimant's COPD/emphysema was due to both smoking and coal dust exposure.⁸ *Id.* at 28. In contrast, she found that the opinions of Drs. Zaldivar and Spagnolo are unpersuasive and inadequately explained. *Id.* at 26-29. Consequently, the administrative law judge found that employer did not disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).

Employer initially argues that the administrative law judge failed to explain, in accord with the requirements of the Administrative Procedure Act (APA),⁹ why she

dust exposure, and exercise-induced hypoxemia, due to COPD. Decision and Order at 9-10; Director's Exhibit 13.

Dr. Sood reviewed claimant's medical records and in reports dated June 20, 2016 and November 4, 2016, opined that claimant has COPD of mixed emphysema and chronic bronchitis phenotype, with both smoking and coal dust exposure as substantial contributing factors. Decision and Order at 11-13; Claimant's Exhibits 9, 9a.

⁷ Dr. Zaldivar examined claimant and, in a report dated March 23, 2016, diagnosed severe airway obstruction and emphysema due entirely to smoking. Decision and Order at 13-14; Employer's Exhibit 1. At deposition, Dr. Zaldivar opined that claimant likely also has asthma with remodeling, and reiterated that all of claimant's impairment is due to smoker's emphysema, unrelated to his coal mine employment. Decision and Order at 14; Employer's Exhibit 9.

In a report dated September 4, 2016, based on a medical records review, Dr. Spagnolo opined that claimant does not have legal pneumoconiosis. Decision and Order at 14-15; Employer's Exhibit 7. Dr. Spagnolo diagnosed COPD/emphysema related to claimant's heavy smoking, complicated by an allergic bronchitis condition, and unrelated to coal dust exposure. *Id.*

⁸ The administrative law judge found Dr. Jaworski's opinion, that claimant has legal pneumoconiosis, to be poorly documented and reasoned and entitled to little weight. Decision and Order at 26.

⁹ The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A) as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge

ranked the professional qualifications of Drs. Sood, Zaldivar and Spagnolo “about equally.” Decision and Order at 25; Employer’s Brief at 15-17. Employer’s contention lacks merit.

The administrative law judge properly observed that physicians’ qualifications are a relevant factor in determining the respective probative value of medical opinions, and summarized the physicians’ qualifications accordingly.¹⁰ *Milburn Colliery Co. v. Hicks*,

independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

¹⁰ The administrative law judge summarized the medical qualifications of the five physicians as follows:

Dr. Jaworski, “whose [complete] qualifications are not in the record,” is a B-reader and a Fellow of the American College of Chest Physicians. Decision and Order at 9; Director’s Exhibit 13.

Dr. Celko is Board-certified in internal medicine, and has been appointed to the Division of Pulmonary Disease in several hospitals in the Pittsburgh, Pennsylvania area. He has contributed to three publications, and previously taught at the Community College of Allegheny County. Decision and Order at 10; Claimant’s Exhibit 7.

Dr. Sood is Board-certified in internal medicine with subspecialties in pulmonary disease, critical care and occupational medicine. He is a professor at the University of New Mexico School of Medicine and Department of Health, Exercise & Sports Sciences, an adjunct associate scientist in the pathophysiology division of a research institute, and a clinical assistant professor at Southern Illinois University School of Medicine. He is a medical staff physician at two hospitals, has presented at numerous conferences and is “very well-published in pulmonary topics.” Decision and Order at 11; Claimant’s Exhibit 10.

Dr. Spagnolo is Board-certified in internal medicine with a subspecialty in pulmonary disease, is a professor of medicine at George Washington University School of Medicine, and is an attending physician in the pulmonary and critical care medicine division at the Department of Medicine, Medical Faculty Associates. He is senior attending physician in pulmonary disease and medical director of respiratory care series at VAMC in Washington, D.C, and is “extremely well-published on pulmonary topics.” Decision and Order at 14; Employer’s Exhibit 8.

138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999). Contrary to employer's argument, the administrative law judge explained her conclusion, stating: "[B]ecause of their various Board-certifications, B-reader status, and expertise, as noted above, I rank Drs. Sood, Spagnolo and Zaldivar about equally, then Dr. Celko, because he is not a pulmonologist, and finally Dr. Jaworski, because his credentials are unknown." Decision and Order at 25. Moreover, employer does not dispute the accuracy of the administrative law judge's summary of the physicians' respective qualifications, or otherwise assert that the physicians were ranked incorrectly. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the alleged "error to which [it] points could have made any difference"). We therefore affirm the administrative law judge's determination that Drs. Sood, Zaldivar and Spagnolo are "about equally" qualified to render an opinion in this case, as it is rational, and supported by the substantial evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Employer next asserts that the administrative law judge irrationally discredited Dr. Zaldivar's opinion that claimant does not have legal pneumoconiosis because he opined that it is possible to differentiate COPD caused by coal mine dust from COPD caused by cigarette smoking. Employer's Brief at 9-10. Employer argues that an opinion that a miner's disabling COPD is due solely to his lifelong exposure to cigarette smoke is not contrary to the preamble to the revised regulations. *Id.* at 9.

Contrary to employer's argument, the administrative law judge did not automatically reject Dr. Zaldivar's opinion because he concluded that claimant's obstructive impairment is unrelated to coal mine dust exposure. Employer's Brief at 9-10. Rather, the administrative law judge permissibly discounted Dr. Zaldivar's opinion, in part, because he failed to adequately explain why claimant's more than twenty-six years of coal mine dust exposure did not substantially aggravate claimant's COPD and emphysema. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21

Dr. Zaldivar is Board-certified in internal medicine with subspecialties in pulmonary diseases, critical care and sleep disorders. He is a clinical professor of medicine at West Virginia School of Medicine and Director of the Respiratory Therapy Department and Sleep Center at Charleston Area Medical Center. He has published several articles about sleep disorders and an article on airway obstruction, coal mining, and disability. Decision and Order at 13; Employer's Exhibit 1.

BLR at 2-275-76; Decision and Order at 28. Moreover, the administrative law judge found that Dr. Zaldivar failed to consider the additive effect of exposure to coal mine dust and cigarette smoking on airway obstruction, as noted in the preamble. *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663 (4th Cir. 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 322-24, 25 BLR 2-255, 2-263 (4th Cir. 2013); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 828-29 (10th Cir. 2017); Decision and Order at 28. These findings are supported by substantial evidence, and employer raises no arguments to the contrary. We therefore affirm the administrative law judge’s permissible conclusion that Dr. Zaldivar’s opinion is unpersuasive and merits “less weight.”¹¹ Decision and Order at 28; *see Compton*, 211 F.3d at 207-208, 22 BLR at 2-168.

We further reject employer’s contention that the administrative law judge erred in her evaluation of Dr. Spagnolo’s opinion that claimant does not have legal pneumoconiosis. Employer’s Brief at 12. The administrative law judge recognized that employer has the burden to establish, by a preponderance of the evidence, that claimant does not have a lung disease “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” Decision and Order at 17; *citing* 718.201(b). In support of his opinion, Dr. Spagnolo noted that claimant is taking multiple medications, including Spiriva, and stated that “[n]one of these agents [is] for the treatment of pneumoconiosis.” Employer’s Exhibit 7 at 7. Dr. Spagnolo also stated that claimant’s most recent pulmonary function test, performed by Dr. Celko on May 10, 2016, showed a moderately severe obstructive defect with significant improvement following a bronchodilator. *Id.* Dr. Spagnolo stated that reversibility is “not consistent with coal[-] dust related emphysema/COPD where the obstructive abnormality is fixed and not responsive to bronchodilators.”¹² *Id.*

¹¹ Because we affirm the administrative law judge’s discounting of Dr. Zaldivar’s opinion for the reasons set forth above, we need not address employer’s additional challenges to the administrative law judge’s analysis of Dr. Zaldivar’s opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer’s Brief at 4-9.

¹² Claimant’s January 22, 2015 and March 23, 2016 pulmonary function studies, performed by Drs. Jaworski and Zaldivar, respectively, demonstrated no reversibility following the administration of a bronchodilator. Director’s Exhibit 13; Employer’s Exhibit 1. While Dr. Spagnolo reviewed these studies, he did not discuss the significance of the post-bronchodilator results. Employer’s Exhibit 7 at 1, 2-3. Further, while Dr. Spagnolo did not state that claimant’s May 10, 2016 study, performed by Dr. Celko, reversed completely, he did not address the significance of any remaining fixed portion of

The administrative law judge correctly noted that Dr. Sood disagreed with Dr. Spagnolo, explaining that “the use of [a] Spiriva inhaler cannot be used to differentiate COPD related to coal mine dust exposure and COPD related to smoking[]” because “Spiriva can be used to treat COPD from any cause.” Decision and Order at 26, *quoting* Claimant’s Exhibit 9a at 9. Dr. Sood also explained that because dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, “the clinical, radiological, physiological and pathological presentation of coal dust[-]induced COPD is no different from that of tobacco smoke[-]induced COPD.” Decision and Order at 26, *quoting* Claimant’s Exhibit 9a at 9. Further, Dr. Sood explained, “the two diseases are also treated similarly and there is no evidence that some respiratory medications work differently in one group as compared to the other.” *Id.*

The administrative law judge permissibly found Dr. Sood’s opinion to be well-reasoned, well-documented and more persuasive than Dr. Spagnolo’s opinion, because Dr. Sood “thoroughly describes his reasoning” and because Dr. Sood’s explanation has been accepted by the Department of Labor. Decision and Order at 26, 28, *citing* 65 Fed. Reg. at 79,943; *see Cochran*, 718 F.3d at 322-24, 25 BLR at 2-263; *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). In asserting that Dr. Spagnolo’s opinion is also well-reasoned and is supported by the opinion of Dr. Zaldivar, employer is essentially asking the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Further, we reject employer’s argument that the administrative law judge erred in crediting Dr. Sood’s opinion. Employer asserts that Dr. Sood opined, contrary to the preamble, that smoking-induced COPD and coal dust-induced COPD cannot be distinguished. Employer’s Brief at 11, *referencing* Claimant’s Exhibit 9 at 8. Contrary to employer’s arguments, Dr. Sood clarified that “in the case of [claimant]” he could not distinguish between the various significant contributory exposures. Claimant’s Exhibit 9a at 8; *see Cochran*, 718 F.3d at 319, 323, 25 BLR at 2-255, 2-264 (holding that whether a particular miner’s emphysema arose out of coal mine dust exposure must be determined on a case-by-case basis, in light of the evidence of record). We therefore affirm the administrative law judge’s permissible finding that, to the extent he relied on claimant’s response to bronchodilators to conclude that claimant does not have legal

the impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App’x 227, 237 (4th Cir. 2004).

pneumoconiosis, Dr. Spagnolo's opinion is "not well reasoned"¹³ and is entitled to "less weight" than Dr. Sood's opinion.¹⁴ Decision and Order at 26, 28.

For the foregoing reasons, we affirm the administrative law judge's finding that the opinions of Drs. Zaldivar and Spagnolo "are insufficient to disprove the presumption of legal pneumoconiosis by a preponderance of the evidence." Decision and Order at 29; *see* 20 C.F.R. §718.305(d)(1)(i)(B). Thus, we further affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29-31. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Spagnolo that claimant's pulmonary impairment is not caused by pneumoconiosis because the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 30. We therefore affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

¹³ We also note that, like Dr. Zaldivar, Dr. Spagnolo did not address the additive effects of coal dust and cigarette smoke exposure, or discuss whether coal dust could have aggravated claimant's COPD. Employer's Exhibit 7. Employer does not address this aspect of Dr. Spagnolo's opinion.

¹⁴ Therefore we need not address employer's argument that the administrative law judge erred in finding that Dr. Celko's opinion, that claimant suffers from legal pneumoconiosis, is also more credible than Dr. Spagnolo's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 28; Employer's Brief at 13.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge