BRB No. 11-0626 BLA

CURTIS T. HUFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 07/12/2012
	)	
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (2006-BLA-05421) of Administrative Law Judge Daniel F. Solomon, rendered on an initial claim filed on April 11, 2005, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the Board for the second time. The Board previously affirmed the administrative law judge's unchallenged finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Huff v. Peabody Coal Co.*, BRB No. 09-0494 BLA, slip op. at 2 n.3 (Mar. 16, 2010) (unpub.). The Board, however, vacated the

administrative law judge's finding that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), because he erred in concluding that the readings of an April 26, 2005 x-ray were in equipoise and in according greater weight to an August 15, 2005 x-ray. *Id*. at 6. The Board also vacated the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), because the administrative law judge did not adequately explain the basis for his decision to assign controlling weight to the opinion of Dr. Simpao, that claimant has an obstructive and restrictive respiratory impairment due to coal dust exposure, over the contrary opinions of Drs. Repsher and Fino, that claimant has a purely obstructive respiratory impairment unrelated to his coal mine employment. *Id*. at 8. Since the Board concluded that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis, the Board also vacated his finding of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 10. Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id.*

While the case was pending on remand, amendments to the Act were enacted. Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to this living miner's claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

On December 1, 2010, the administrative law judge issued an Interim Order directing the parties to file position statements with regard to the applicability of amended Section 411(c)(4). Although the administrative law judge denied employer's request to remand the case to the district director for development of evidence, he gave the parties time to submit supplemental medical reports. Interim Order at 2. Following the admission of the parties' supplemental evidence, the administrative law judge issued his Decision and Order on Remand, dated May 11, 2011, which is the subject of this appeal. The administrative law judge determined that amended Section 411(c)(4) was applicable, based on the filing date of the claim, and also found that claimant invoked the presumption because he worked for more than fifteen years in underground coal mine employment and has a totally disabling respiratory or pulmonary impairment. The

administrative law judge further found that employer failed to rebut the presumption.[1] Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge applied an improper standard in considering whether employer established rebuttal of the amended Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge erred in requiring Drs. Repsher and Fino to "rule out" the existence of pneumoconiosis or that coal dust exposure was a cause of claimant's respiratory disability. Employer's Brief in Support of Petition for Review at 13. Employer asserts that the opinions of Drs. Repsher and Fino satisfy employer's burden, as they explain why "coal dust did not contribute in any way to [claimant's] problems within a degree of medical certainty." *Id.* Employer also argues that the administrative law judge failed to comply with the Board's remand instructions, with regard to Dr. Simpao, and requests that the Board vacate the award of benefits and remand the case to a different administrative law judge. Employer also challenges the administrative law judge's alternate findings that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c).[2] In response, claimant urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not submit a substantive response in this appeal, unless requested to do so by the Board. Employer has 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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] The administrative law judge also made alternate findings that claimant established the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and that his total disability is due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Decision and Order on Remand at 6-8.

[2] Employer further notes that challenges to the constitutionality of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), of which the amendments are a part, could affect the viability of amended Section 411(c)(4). Employer's Brief at 15 n.8. Subsequent to the filing of employer's Brief In Support of Petition for Review, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

[3] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant has more than fifteen years of underground coal mine employment and suffers from a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's finding that invocation of the amended Section 411(c)(4) presumption is established. *Id.*; Decision and Order on Remand at 2; *see* Employer's Brief at 2.

With regard to the issue of rebuttal, we reject employer's contention that the administrative law judge applied an incorrect legal standard in evaluating the medical opinions, insofar as he cited to *Rose v. Director, OWCP*, 614 F.2d 936, 939, 2 BLR 2-38, 43 (4th Cir. 1980), and required employer to affirmatively rule out any connection between the miner's disabling respiratory impairment and his coal mine employment. Decision and Order on Remand at 2. The United States Court of Appeals for the Sixth Circuit, wherein jurisdiction for this case arises, set forth the proper rebuttal standard in *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1 (6th Cir. 2011). In *Morrison*, the Sixth Circuit held that rebuttal requires an affirmative showing that the miner does not suffer from pneumoconiosis, or that the disease is not related to coal mine work. *Id*. We will address the administrative law judge's rebuttal findings under the standard set forth in *Morrison.*

In considering whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge noted that employer relied upon the opinions of Drs. Repsher and Fino to satisfy its burden of proof. Dr. Repsher, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant and opined that he is disabled by severe chronic obstructive pulmonary disease (COPD). Director's Exhibit 14. Dr. Repsher testified that smoking was the causative factor for claimant's disabling COPD, and that coal dust exposure played only a *de minimus* role in his obstructive respiratory impairment, as proven by the medical literature.[4] Employer's

[4] Dr. Repsher specifically stated that "any loss of pulmonary abilities from exposure to coal dust" is *de minimus*, based on the findings of the Attfield and Hodous study. Employer's Exhibit 4 at 28. Dr. Repsher explained that, according to this study, the average loss of FEV1 caused by coal mine dust, after 1970, is 2.5 cubic centimeters (ccs) per year, which is less than the average 30 ccs per year that is lost due to age, and the average 83 ccs per year that is lost by a "sensitive smoker." *Id*. at 27-28. Dr. Repsher opined that claimant is a sensitive smoker because he has developed severe COPD. *Id.* at 31.

Exhibit 4. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed certain medical evidence, including the opinions of Drs. Simpao and Repsher. Employer's Exhibit 1. Dr. Fino similarly opined that claimant is totally disabled by COPD, which he attributed entirely to claimant's smoking history. *Id*. Dr. Fino also relied on medical literature to support his conclusion that because coal dust exposure does not cause a significant reduction in the FEV1, claimant's respiratory impairment is due to smoking. Employer's Exhibits 1, 5.

The administrative law judge observed that "[b]oth Drs. Repsher and Fino take the position that they can distinguish between the effects from smoking and from mining and vociferously allege that their opinions are consistent with medical literature and regulatory materials." Decision and Order on Remand at 4. The administrative law judge, however, found that while Dr. Repsher alleged that the Attfield and Hodous article supported his opinion, he also specifically testified that he disagreed with the major tenet of that same article, which tenet was adopted by the DOL in promulgating the revised regulations, that "smokers who mine have an additive risk for developing significant airway obstruction." Decision and Order on Remand at 4, 5. n.4, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Employer's Exhibit 4 at 17-18. The administrative law judge further found that neither physician adequately addressed whether coal dust exposure was an "aggravating factor" in claimant's respiratory disability, even if it was not the direct cause. Decision and Order on Remand at 5. The administrative law judge explained:

> The allegation that cigarette smoking causes drops in [pulmonary function test] values that are typically far greater than [those caused by] coal dust, may be true, but preclusion of pneumoconiosis is not substantiated by a fair reading of the cited literature. Moreover, if there is a residuum that can be attributed to other sources, in this record, the amount has not been quantified to permit evaluation.

Id. at 5-6. The administrative law judge concluded that, because Drs. Repsher and Fino did not provide a reasoned opinion, addressing whether claimant's respiratory condition was aggravated by his coal dust exposure, employer failed to disprove that claimant has legal pneumoconiosis and, thus, failed to rebut the presumption at amended Section 411(c)(4).

Although employer asserts that the administrative law judge erred in rejecting the opinions of Drs. Repsher and Fino, employer's arguments on appeal amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge, as the trier-of-fact, has discretion to assess the credibility of the medical evidence, and the Board will defer to the

administrative law judge's credibility determinations, unless they are inherently incredible or patently unreasonable. *See* 33 U.S.C. 921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §§725.351(b), 725.477; *Martin v. Ligon Preparation Co*., 400 F.3d 302, 306-08, 23 BLR 2-261, 2-284-87 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

In this case, we see no error in the administrative law judge's rational finding that the opinions of Drs. Repsher and Fino are not well-reasoned and are unpersuasive. *See Martin*, 400 F.3d at 306-308, 23 BLR at 2-284-87; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989) (en banc); Decision and Order on Remand at 5. A medical opinion that fails to address whether a miner's coal dust exposure was an aggravating, contributing or exacerbating cause of his pulmonary impairment, or to sufficiently explain a conclusion that cigarette smoking was the sole and exclusive cause of impairment, may be discounted. *See Cornett*, 227 F.3d at 567-77, 22 BLR at 2-121-22; *Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-19-20 (2004). The administrative law judge also rationally found that the opinions of Drs. Repsher and Fino were not credible, in light of the medical literature they cited.[5] S*ee Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; *see generally J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

We hold that the administrative law judge properly allocated the burden of proof, and that he explained his finding in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-705 (1985). Because substantial evidence supports the administrative law judge's finding that employer failed

[5] We reject employer's argument that the administrative law judge was required to accept the *unrefuted* testimony of Drs. Repsher and Fino that their opinions are *consistent* with studies contained in the preamble. Employer's Brief in Support of Petition for Review at 10. The administrative law judge properly compared the medical literature cited in the medical reports with the conclusions of the Department of Labor and found that Drs. Repsher and Fino did not adequately explain the basis for their conclusions. S*ee Martin v. Ligon Preparation Co*., 400 F.3d 302, 306-08, 23 BLR 2-261, 2-284-87 (6th Cir. 2005). The administrative law judge also properly exercised his discretion in resolving apparent conflicts in the evidence. *Id*.

to disprove that claimant has pneumoconiosis,[6] we affirm the administrative law judge's conclusions that employer failed to rebut the amended Section 411(c)(4) presumption and, therefore, that claimant is entitled to benefits. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[6] Because we affirm the administrative law judge's finding that employer's evidence is insufficient to establish rebuttal, we decline to address employer's remaining arguments on appeal with respect to the opinion of Dr. Simpao and the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(c).