BRB No. 11-0703 BLA

ALBERT R. LAWSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARKANSAS COALS, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/31/2012
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jonathan P. Rolfe (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5276) of Administrative Law Judge John P. Sellers, III rendered on a

subsequent claim[1] filed 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). The administrative law judge credited the miner with twenty-five years of coal mine employment; determined that employer is the properly designated responsible operator herein; and adjudicated this subsequent claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725.[2] Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[3] the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that the new evidence submitted in support of this subsequent claim outweighed the earlier evidence, and that employer failed to establish rebuttal of the presumption by proving that claimant did not have legal pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. Thus, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and awarded benefits.

On appeal, employer challenges its designation as the responsible operator herein and the administrative law judge's weighing of the medical opinion evidence relevant to

[1] Claimant's initial claim was filed on May 29, 1990, and was denied by Administrative Law Judge Daniel A. Sarno on June 24, 1992, because the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant filed the present claim on February 25, 2009. Director's Exhibit 3.

[2] Claimant waived his right to a hearing and requested a decision on the record. Decision and Order at 2.

[3] 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. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 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)).

rebuttal of the amended Section 411(c)(4) presumption.[4] Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's award of benefits and urges affirmance of the administrative law judge's finding that employer is the properly designated responsible operator herein.[5]

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).

Employer initially contends that because the Black Lung Disability Trust Fund (Trust Fund) was found liable for the payment of benefits in claimant's previous claim, the administrative law judge erred in finding that the doctrine of collateral estoppel was not applicable to bar relitigation of the responsible operator issue in this case.[6] Employer's Brief at 9-12. We disagree.

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[4] We deny, as moot, employer's request to hold this case in abeyance pending resolution of the constitutional challenges to the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-five years of qualifying coal mine employment, and that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b) and invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] In claimant's initial claim, the district director named employer as the responsible operator. Employer filed a motion to dismiss, citing claimant's subsequent employment with Martin T. Mining & Exploration Company (MTM). The Director, Office of Workers' Compensation Programs (the Director) opposed the motion, arguing that MTM was not insured on the date of claimant's last exposure, and had subsequently been dissolved. Judge Sarno denied employer's motion and provided the Director with the opportunity to introduce evidence at the hearing in support of his responsible operator designation. The Director, however, did not attend the hearing or submit evidence. In his Decision and Order issued on June 24, 1992, Judge Sarno determined that because the record evidence was insufficient to support employer's designation as the responsible operator, employer was properly dismissed as a party, and the Black Lung Disability Trust Fund would be liable for the payment of benefits, if awarded. Director's Exhibit 1.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,[7] has held that for collateral estoppel to apply, four elements must be met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
> (2) determination of the issue must have been necessary to the outcome of the prior proceeding;
> (3) the prior proceeding must have resulted in a final judgment on the merits; and
> (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 908 (6th Cir. 2001); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(en banc); *see also Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998). In the present case, as benefits were denied in claimant's original claim, the administrative law judge properly found that the doctrine of collateral estoppel was not applicable because the determination of the responsible operator issue was not necessary to support the judgment. Decision and Order at 5; *see Hughes*, 21 BLR at 1-137. Moreover, in light of the denial of benefits, the Director, as the protector of the Trust Fund, had no incentive to challenge the responsible operator finding made in connection with claimant's initial claim. *See Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n.4 (1979). For these reasons, we affirm the administrative law judge's finding that the doctrine of collateral estoppel is not applicable in this subsequent claim to preclude relitigation of the responsible operator issue.

Employer next contends that the administrative law judge erred in concluding that it is the properly designated responsible operator, arguing that there is undisputed evidence that claimant's last coal mine employment for over one year was with Martin T. Mining & Exploration Company (MTM). Employer asserts that in this situation, where MTM had no insurance or approved self-insurance, liability should rest with the Trust Fund, or with MTM's officers, its general contractor, or any successor company, but not with employer. Employer's Brief at 12-14. Employer's arguments are without merit.

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

In order to meet the regulatory definition of a "potentially liable operator," an operator must have employed the miner for a cumulative period of not less than one year and must also be capable of assuming liability for the payment of continuing benefits. 20 C.F.R. §725.494(c), (e). If a miner worked for more than one operator who meets all the requirements of a potentially liable operator, then the operator for whom the miner worked most recently will be named the responsible operator. If the most recent operator demonstrates an inability to pay benefits, and there is no successor operator, then liability is assessed against the potentially liable operator that next most recently employed the miner for at least one year, and the district director is required to provide a statement explaining the reasons for such a designation. 20 C.F.R. §725.495(a), (d).

The record reflects that claimant's last employment for at least one full year was with MTM, from 1986 through 1988. Claimant previously worked for employer from 1980 to 1982.[8] In accordance with Section 725.494, the district director properly investigated claimant's most recent employer, MTM, and found that the company was no longer in operation and was not capable of assuming liability for continuing benefits. The district director also determined that the company was uninsured during the period of claimant's last exposure, and that it had no authorization to self-insure. Director's Exhibits 22, 34. The administrative law judge found that the district director, in accordance with Section 725.495(d), provided a statement explaining his reasons for designating employer as the responsible operator herein, *i.e.*, that MTM was not a potentially liable operator as defined in Section 725.494, as it failed to meet the conditions of Section 725.494(e),[9] and that employer, as the next most recent operator to employ the miner for a cumulative period of not less than one year, met the requirements of Section 725.494. Decision and Order at 7; 20 C.F.R. §725.495(d); Director's Exhibits 22, 23, 34. The administrative law judge further determined that the district director provided the requisite statement that a specialist with the Department of Labor's Branch of Standards, Regulations and Procedures had searched the files and found no record of

[8] From 1982 through 1989, claimant worked for five different coal companies, but never worked for any one of them for a full year. Director's Exhibits 1, 34.

[9] The regulations provide that "[i]n any case referred to the Office of Administrative Law Judges… in which the operator finally designated as responsible … is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation." 20 C.F.R. §725.495(d). If the reasons include the most recent operator's failure to meet the conditions at Section 725.494(e), that it be capable of assuming liability for benefits, the district director must include in the record a statement that the Office of Workers' Compensation Programs has searched its files pursuant to 20 C.F.R. Part 726 and has no record of insurance or authorization to self-insure for that operator. *Id.*

insurance coverage or authorization to self-insure. Decision and Order at 6-7; Director's Exhibit 22. Noting that such a statement constitutes *prima facie* evidence that the most recent operator is not capable of assuming its liability, *see* 20 C.F.R. §725.495(d), the administrative law judge determined that employer produced no evidence that it was unable to assume liability for the payment of benefits. Decision and Order at 7. Further, the administrative law judge acted within his discretion in finding that the deposition testimony of Wesley A. Gearheart, a part-owner of MTM, was "marred by faulty memory" and did not establish that MTM was a "contract miner" for another company that was responsible for securing federal black lung insurance for MTM. Decision and Order at 6-7; Employer's Exhibit 5; *see generally Kuchwara v. Dirctor, OWCP*, 7 BLR 1-167 (1984)(administrative law judge, as trier-of-fact, has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof). After determining that the record contained no evidence that MTM or any other more recent operator satisfied the regulatory criteria, the administrative law judge properly found that employer failed to meet its burden of proving that it is not the potentially liable operator that most recently employed the miner.[10] 20 C.F.R. §725.495(c); Decision and Order at 7. As substantial evidence supports the administrative law judge's findings, we affirm his determination that employer is the properly designated responsible operator in this case. Decision and Order at 6-7; *see* 20 C.F.R. §725.495(a), (c), (d).

Turning to the merits of entitlement, employer maintains that the administrative law judge applied the wrong standard of proof in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Employer also challenges the administrative law judge's weighing of the medical opinions of record, arguing that the administrative law judge substituted his opinion for those of the experts; selectively analyzed and/or mischaracterized the opinion of Dr. Jarboe; and impermissibly evaluated the credibility of the evidence based on its "consistency with the preamble," thereby violating the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). Employer's Brief at 15-27.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Initially, we find no merit to employer's argument that the administrative law judge applied an incorrect legal standard on rebuttal of the presumption at amended Section 411(c)(4). Contrary to employer's argument, the

[10] We agree with the Director that the record does not support employer's implication that Coker Coal was a successor operator to MTM. *See* 20 C.F.R. §725.492; Director's Brief at 11 n.5; Employer's Brief at 12.

administrative law judge properly recognized that the burden is on employer to establish that claimant does not suffer from pneumoconiosis or that his disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); Decision and Order at 14.

In evaluating the evidence relevant to rebuttal, the administrative law judge accurately summarized the conflicting medical opinions of record, and the underlying documentation and explanations for the physicians' conclusions, and determined that Dr. Ammisetty diagnosed disabling legal pneumoconiosis, whereas Drs. Dahhan and Jarboe opined that claimant does not have pneumoconiosis and that his respiratory disability resulted from cigarette smoking.[11] Decision and Order at 10-13. The administrative law judge accorded greater weight to the opinion of Dr. Ammisetty, finding that the opinions of Drs. Dahhan and Jarboe were "unconvincing in their attempts to rule out coal dust as a significant contributory cause, or exacerbating factor, with regard to claimant's impairment." Decision and Order at 20. In so finding, the administrative law judge discounted Dr. Dahhan's opinion, that claimant does not have pneumoconiosis and his disabling impairment is due to his lengthy smoking habit, on the ground that it was not adequately explained. Decision and Order at 16-17; Director's Exhibit 18; Employer's Exhibits 6, 8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). The administrative law judge found that Dr. Dahhan failed to persuasively explain why claimant's impairment must be due entirely to smoking or coal dust, as opposed to a combination of both. While Dr. Dahhan determined that claimant's significant response to bronchodilators was inconsistent with the permanent and fixed adverse effect of coal dust on the respiratory system, the administrative law judge found that Dr. Dahhan did not address the etiology of the fixed portion of claimant's impairment that was not responsive to bronchodilators, noting that the Department of Labor (DOL) has acknowledged, in the preamble to the revised regulations, that "smokers who mine have additive risk for developing significant obstruction." Decision and Order at 16-17, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Further, although Dr. Dahhan opined that the loss of more than 2000cc of claimant's FEV_1 could not be accounted for by his twenty-five years of coal dust exposure and, therefore, resulted from his forty pack-years of smoking, the administrative law judge found that the doctor failed to address whether coal dust exposure significantly contributed to or aggravated claimant's respiratory impairment. *See* 20 C.F.R. §718.201; *Clark*, 12 BLR 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 17.

[11] No physician diagnosed claimant with clinical pneumoconiosis. Director's Exhibits 16, 18; Employer's Exhibits 4, 6, 7, 8, 10.

Similarly, while Dr. Jarboe found no pneumoconiosis, and attributed the obstructive impairment to smoking and bronchial hyper-responsiveness, the administrative law judge permissibly found that Dr. Jarboe's reasoning did not contemplate the possibility that claimant's chronic obstructive pulmonary disease (COPD) could have multiple causes, and the doctor failed to discuss how he excluded claimant's twenty-five years of coal dust exposure as a contributing or aggravating cause of claimant's obstructive impairment, given his lengthy exposures to both tobacco smoke and coal dust. Employer's Exhibit 10 at 8; Decision and Order at 18; *see Barrett*, 478 F.3d at 350, 23 BLR at 2-472; *Clark*, 12 BLR at 1-155.

By contrast, the administrative law judge determined that Dr. Ammisetty based his diagnosis of COPD/legal pneumoconiosis on claimant's employment and smoking histories, his symptoms, worsening exercise blood gas study results, and pulmonary function study results demonstrating severe COPD. Decision and Order at 10-11; Director's Exhibit 16; Employer's Exhibit 4. Dr. Ammisetty opined that claimant's disabling impairment was attributable to cigarette smoking and coal dust exposure, and explained that it is difficult to differentiate the effects of smoking and coal dust exposure, as both can cause similar emphysematous changes. Decision and Order at 11; Employer's Exhibit 4. While Dr. Ammisetty stated that smoking was the primary cause of claimant's impairment, the administrative law judge found that the physician unequivocally opined that coal dust exposure was a contributing cause that significantly exacerbated claimant's symptoms. Finding that Dr. Ammisetty's opinion was consistent with DOL's recognition in the preamble that dust-induced emphysema and smoking-induced emphysema occur through similar mechanisms and create an additive risk of developing obstructive impairment, the administrative law judge permissibly found Dr. Ammisetty's opinion to be persuasive and entitled to full probative weight. Decision and Order at 20; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

In light of the foregoing, we hold that the administrative law judge properly allocated the burden of proof, and that his evaluation of the medical evidence complied with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1980). Contrary to employer's arguments, an administrative law judge may properly consider whether a medical opinion is based on beliefs that conflict with the prevailing view of medical science underlying the current regulations, as determined by the Department of Labor and set forth in the preamble to the revised regulations. *See Obush*, 650 F.3d at 256-57, 24 BLR at 2-383; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9. Because claimant failed to establish the existence of pneumoconiosis in his earlier claim, we also affirm the administrative law

judge's finding of a change in an applicable condition of entitlement at Section 725.309(d), *see White v. New White Coal Co.*, 23 BLR 1-1 (2004), and affirm his award of benefits.

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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge