BRB No. 11-0727 BLA

FRANK E. SNIDER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/30/2012
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits (10-BLA-5309) of Administrative Law Judge Michael P. Lesniak rendered on a claim 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). This case involves a claim filed on January 7, 2009. Director's Exhibit 2.

In his decision, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law

No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be 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(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that claimant established thirty-five years of underground coal mine employment[1] and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption. Turning to rebuttal, the administrative law judge found that employer disproved the existence of clinical pneumoconiosis, but did not disprove the existence of legal pneumoconiosis.[2] The administrative law judge also found that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer failed to rebut the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in weighing the medical opinion evidence in finding that claimant is totally disabled, and therefore

[1] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 9. 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).

[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). "Legal pneumoconiosis" includes "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).

erred in determining that claimant invoked the Section 411(c)(4) presumption. Additionally, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that employer failed to rebut the presumption that claimant is totally disabled due to pneumoconiosis.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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).

Invocation of Amended Section 411(c)(4)

In determining that claimant invoked the amended Section 411(c)(4) presumption,[4] the administrative law judge considered the medical opinions of Drs. Rasmussen, Saludes, Bellotte, and Castle. The administrative law judge found that Drs. Rasmussen, Saludes, and Bellotte opined that claimant has a totally disabling respiratory impairment. Director's Exhibit 15 at 4, 7; Claimant's Exhibit 3 at 16. In contrast, the administrative law judge found that Dr. Castle diagnosed mild to moderate obstructive lung disease that is not disabling. Employer's Exhibit 4 at 6-7; Employer's Exhibit 10 at 16, 22.

Having considered the qualifications of the physicians, and the bases for their opinions, the administrative law judge found that as three of the four physicians stated that claimant is totally disabled from performing his usual coal mine employment, the medical opinion evidence established total respiratory disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 4-5, 7. Weighing all the relevant probative evidence together, both like and unlike, the administrative law judge determined that the evidence "overall" established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that, therefore, claimant invoked the rebuttable presumption of total

[3] Employer does not challenge the administrative law judge's finding of thirty-five years of underground coal mine employment. Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Employer notes its rejection of the notion that amended Section 411(c)(4) applies to responsible operators, but acknowledges the Board's holding in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), that amended Section 411(c)(4) does apply to responsible operators. Employer's Brief at 2 n.1.

disability due to pneumoconiosis, pursuant to amended Section 411(c)(4). Decision and Order at 7.

Employer contends that the administrative law judge erred in invoking the amended Section 411(c)(4) presumption. Employer's Brief at 15-18. Specifically, employer contends that Dr. Bellotte did not make a conclusive diagnosis of total *respiratory* disability, as required by 20 C.F.R. §718.204(b)(2)(iv), but rather opined that claimant is disabled "as a whole man," taking into account his history of chest pain on exertion and his crippling hand injury. Employer's Brief at 15-16. Employer's contention lacks merit.

While Dr. Bellotte opined that claimant is certainly disabled as a whole man, the administrative law judge accurately noted that Dr. Bellotte further testified that, from a pulmonary standpoint, claimant's degree of disability is "borderline," as he could perform a job requiring "moderate [exertion] or less." Decision and Order at 4; Employer's Exhibit 9 at 27. Comparing Dr. Bellotte's opinion, that claimant has the respiratory capacity to perform moderate work or less, with the exertional requirements of claimant's job, which the administrative law judge found to "include[e] frequent heavy manual labor," a finding employer does not contest, the administrative law judge rationally concluded that Dr. Bellotte's opinion supports a finding of total respiratory disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 7.

As substantial evidence supports the administrative law judge's determination that the preponderance of the medical opinion evidence establishes total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), we affirm it. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). As employer raises no further challenge to the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment, we further affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4).

Rebuttal of Amended Section 411(c)(4)

Because the miner invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of

pneumoconiosis, or by proving that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 7.

Relevant to the issue of whether employer rebutted the amended Section 411(c)(4) presumption, the record contains the medical opinions of Drs. Rasmussen, Saludes, Castle, and Bellotte. Drs. Rasmussen and Saludes opined that claimant has legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema, due in part to coal mine dust exposure, and that claimant's respiratory impairment is due to both coal mine dust exposure and smoking. Director's Exhibit 15 at 4, 7-8; Claimant's Exhibit 1 at 2; Claimant's Exhibit 3 at 15-18. In contrast, Drs. Castle and Bellotte opined that claimant does not have legal pneumoconiosis, and attributed claimant's respiratory impairment to cigarette smoke-induced obstructive airways disease and emphysema. Employer's Exhibit 2 at 8-9; Employer's Exhibit 4 at 6-7; Employer's Exhibit 9 at 27, 30-31, 37; Employer's Exhibit 10 at 11, 15-17, 19, 30-31. The administrative law judge found that the opinions of employer's physicians, Drs. Castle and Bellotte, were insufficient to establish either method of rebuttal.[5] Decision and Order at 7-8.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis or prove that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Specifically, employer contends that the administrative law judge applied an incorrect rebuttal standard. Employer's Brief at 18. Employer argues further that the administrative law judge erred at rebuttal by failing to determine claimant's precise smoking history. Employer's Brief at 5-9. Moreover, employer argues that the administrative law judge erred in failing to provide valid reasons for finding the opinions of Drs. Castle and Bellotte to be insufficient to establish rebuttal. Employer's Brief at 21, 23.

Initially, we reject employer's contention that the administrative law judge applied an incorrect rebuttal standard. Contrary to employer's argument, the administrative law judge correctly stated that employer bore the burden to establish "by a preponderance of the evidence" that claimant does not have pneumoconiosis or that his impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 7-8;

[5] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge appears to have combined his discussion of whether employer disproved the existence of legal pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 7-8.

see Barber v. Director, OWCP, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

We further reject employer's assertion that the administrative law judge erred in finding it unnecessary to make a specific finding as to the number of pack-years claimant smoked. Decision and Order at 7; Employer's Brief at 5-9. The administrative law judge accurately summarized the smoking histories relied upon by each physician,[6] together with claimant's testimony, and rationally concluded that, while claimant's reported smoking history varied, the record established that claimant's smoking history is "significant" and that he "may [still] be smoking." Decision and Order at 7. As this finding is supported by substantial evidence, and as employer, who bears the burden to rule out a link between claimant's impairment and his coal mine dust exposure, has not explained how it was prejudiced by the administrative law judge's finding that claimant's smoking history is "significant," and likely ongoing, we reject employer's allegation of error. *See Compton*, 211 F.3d at 207-08, 22 BLR at 2-168; *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Lane*, 105 F.2d at 174, 21 BLR at 2-48; *see also Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We find merit, however, in employer's contentions that the administrative law judge erred in his consideration of the opinions of Drs. Castle and Bellotte. First, as employer asserts, the administrative law judge did not adequately address Dr. Castle's opinion, that claimant does not have legal pneumoconiosis, and that his respiratory

[6] The administrative law judge noted that Dr. Rasmussen stated that claimant smoked one-half to one pack per day from 1968, and currently smokes three cigarettes a day. Decision and Order at 5; Director's Exhibit 15 at 2. The administrative law judge noted that Dr. Saludes indicated that claimant smoked one and one-half packs per day for twenty-six years, from ages twenty to thirty-two, and from ages forty-two to fifty-eight, equaling approximately forty-nine pack-years. Decision and Order at 4-5; Claimant's Exhibit 1 at 1; Claimant's Exhibit 3 at 12. The administrative law judge noted that Dr. Castle recorded that claimant began smoking at age eighteen and smoked one-half to one pack per day until now, smoked for at least forty years, and now smokes three cigarettes a day. Decision and Order at 5; Employer's Exhibit 4 at 5; Employer's Exhibit 10 at 10, 31, 33. The administrative law judge noted that Dr. Bellotte stated that claimant began smoking in his twenties, quit once for ten years and resumed, and has a smoking history of at least forty-one years. Decision and Order at 4; Employer's Exhibit 2 at 3, 5; Employer's Exhibit 9 at 14, 32-33, 35. Finally, the administrative law judge considered claimant's testimony that he started smoking in his twenties, and smoked at a rate of one pack per day or less for ten years, quit for ten years, and then resumed smoking, and now smokes one pack per week. Decision and Order at 2; Hearing Transcript at 13-14; Claimant's Brief at 2.

impairment is due entirely to smoking. Employer's Brief at 23. While the administrative law judge noted that employer relies on the opinions of Drs. Castle and Bellotte, and stated that "for the reasons stated above, I find that [e]mployer has not provided sufficient evidence to establish that [claimant's] COPD and emphysema were in no way caused by his coal mine employment," a review of the administrative law judge's decision does not reveal any further discussion of Dr. Castle's opinion, as it pertains to either method of rebuttal pursuant to amended Section 411(c)(4). Decision and Order at 7-8. As the administrative law judge did not provide any reasons for discounting Dr. Castle's opinion, the administrative law judge's decision does not comport with 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). We must therefore vacate the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. On remand, the administrative law judge must consider Dr. Castle's opinion, together with the other relevant medical opinions of record, and determine whether Dr. Castle's opinion is sufficient to establish rebuttal under either method. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Employer further argues that the administrative law judge erred in discrediting Dr. Bellotte's opinion, that claimant does not have legal pneumoconiosis, and that his respiratory impairment is due to cigarette smoke-induced obstructive airways disease and emphysema. In finding that Dr. Bellotte's opinion did not establish rebuttal under either method set forth at amended Section 411(c)(4), the administrative law judge observed:

> Dr. Bellotte states that [claimant's] emphysema is bullous emphysema, which is generally caused by tobacco exposure. However, he acknowledges that emphysema can be caused by coal dust exposure in instances of miners experiencing a "heavy dust burden," which he feels this miner does not have. I note that the miner was exposed to underground coal dust for [thirty-five] years, which is a significant exposure.

Decision and Order at 7.

Employer contends that the administrative law judge impermissibly substituted his opinion for that of the physician in finding that thirty-five years of coal mine dust exposure is significant. Employer's Brief at 9. Upon consideration of this argument, we conclude that the administrative law judge mischaracterized Dr. Bellotte's opinion. Contrary to the administrative law judge's finding, Dr. Bellotte agreed that thirty-five years of coal mine dust exposure is sufficient to cause a coal mine dust-induced pulmonary disease in a susceptible individual. Employer's Exhibit 9 at 10, 28. Dr. Bellotte opined, however, that coal mine dust only induces bullous emphysema, such as diagnosed in claimant, in individuals who have a heavy coal mine dust burden in their

lungs. Employer's Exhibit 2 at 8-9; Employer's Exhibit 9 at 28. Dr. Bellotte concluded, in part, that claimant's bullous emphysema was not due to coal mine dust exposure because claimant's chest x-rays revealed a low dust burden, not because claimant lacked sufficient coal mine dust exposure. Employer's Exhibit 9 at 18-19. In reconsidering whether employer established rebuttal of the amended Section 411(c)(4) presumption, on remand, the administrative law judge should accurately characterize Dr. Bellotte's opinion.

In sum, we affirm the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption, but vacate the administrative law judge's finding that employer did not establish rebuttal of that presumption. On remand, in reconsidering whether the opinions of Drs. Castle and Bellotte are sufficient to establish rebuttal, the administrative law judge must consider the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Harman Mining Co. v. Director, OWCP* [*Looney*], F.3d , Nos. 05-1620, 11-1450, 2012 WL 1680838 (4th Cir. May 15, 2012) (holding that an administrative law judge may evaluate expert opinions in light of the scientific views endorsed by the Department of Labor in the preamble to the revised regulations); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____

ROY P. SMITH
Administrative Appeals Judge

I concur:

_____

BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully disagree with my colleagues regarding the standard to be applied for purposes of rebutting the presumption established by amended Section 411(c)(4). The United States Supreme Court made clear in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), that in the absence of properly established regulations, the limitation on rebuttal provision set forth in the statute does not apply to employers; it applies only to the Secretary of Labor. *Id.*

Since there are no regulations in force with respect to the rebuttal standard employers must meet, employer's arguments in this case regarding the applicable rebuttal standard, and the need for a specific determination as to claimant's smoking history (for purposes of assessing the reliability of the physicians' opinions) have merit.

I concur in all other respects with the majority's decision.

_____

JUDITH S. BOGGS
Administrative Appeals Judge