BRB No. 12-0497 BLA

GLENN A. PENNINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EVANS COAL CORPORATION	)	DATE ISSUED: 07/17/2013
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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 on Subsequent Claim Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Christopher L. Wildfire (Pietragallo, Gordon, Alfano, Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Helen H. Cox (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Subsequent Claim Awarding Benefits (2009-BLA-05252) of Administrative Law Judge Robert B. Rae, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Based on the filing date of this subsequent claim,[1] the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge credited claimant with twenty-five years of coal mine employment and found that he established at least fifteen years of surface coal mine work in conditions that were substantially similar to those in an underground mine. Because the evidence also established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Additionally, the administrative law judge determined that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut that presumption. The administrative law judge also found that, even without the benefit of the amended Section 411(c)(4) presumption, claimant established the requisite elements for entitlement under 20 C.F.R. Part 718. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that it did not establish rebuttal of the amended Section 411(c)(4) presumption. Employer asserts that the administrative law judge improperly relied on the preamble to the

[1] Claimant filed an initial claim on August 30, 2001, which was denied by Administrative Law Judge Joseph E. Kane on July 18, 2006. Director's Exhibit 1. The administrative law judge found that, while claimant established total disability, he did not establish the remaining elements of entitlement – the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 1. Claimant appealed, and the Board affirmed the denial of benefits. *Pennington v. Evans Coal Corp.*, BRB No. 06-0813 BLA (Mar. 22, 2007) (unpub.). Claimant took no further action until filing his subsequent claim on March 26, 2008. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

regulations in determining the weight to accord its medical experts and did not base his findings on a review of the entire record. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments regarding the administrative law judge's reliance on the preamble to the regulations. Claimant has not filed a response brief.[3]

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.[4] 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).

I. REBUTTAL OF THE PRESUMPTION

In order to establish rebuttal of the presumption at amended Section 411(c)(4), employer must affirmatively establish either that claimant does not have clinical or legal pneumoconiosis[5] or that his respiratory disability did not arise out of, or in connection

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying surface coal mine employment, a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), invocation of the presumption at amended Section 411(c)(4), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[5] The regulation at 20 C.F.R. §718.201 provides:

> "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of 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." 20 C.F.R. §718.201(a)(2).

with, coal mine employment. *See* 30 U.S.C. §921(c)(4); 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). The administrative law judge determined that claimant established the existence of pneumoconiosis by a preponderance of the x-ray and medical opinion evidence. Decision and Order at 16. We affirm, as unchallenged by employer, the administrative law judge's determination that employer did not establish rebuttal of the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

In considering the etiology of claimant's respiratory disability, the administrative law judge noted that employer relied on the opinions of Drs. Rosenberg and Vuskovich to establish rebuttal. Decision and Order at 17-19. The administrative law judge found that their explanations for eliminating coal dust exposure as a cause of claimant's disabling chronic obstructive pulmonary disease (COPD), were not well reasoned and, thus, found that employer "has not met its burden of proving that pneumoconiosis was not a substantially contributing cause of [c]laimant's disability." *Id*. at 18.

Employer asserts that the administrative law judge did not give proper weight to the opinions of Drs. Rosenberg and Vuskovich. We disagree. Initially, we reject employer's contention that the administrative law judge erred in consulting the preamble in determining the weight to accord employer's experts. The preamble sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Furthermore, contrary to employer's contention, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond and, therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12.

In this case, Dr. Rosenberg attributed claimant's respiratory disability to smoking-induced emphysema. Employer's Exhibits 11, 13. As grounds for his opinion, Dr. Rosenberg explained that claimant's x-rays showed emphysema without associated nodularity, opacities forming in the mid lobes and lower lobes, as opposed to the upper lung, and claimant's pulmonary function studies showed a pattern of obstruction, with a proportionate decrease in the FEV1 and FEV1/FVC ratio and a significant response to bronchodilator, that was inconsistent with an impairment related to coal dust exposure and was more consistent with a smoking-related disability. Employer's Exhibit 13. Dr. Rosenberg specifically stated, "while I agree with the [DOL] that COPD may be detected

by a decrease in the FEV1 and FEV1/FVC ratio, this does not generally apply to patients with legal 'coal workers' pneumoconiosis.'" *Id*.

Contrary to employer's assertion, the administrative law judge permissibly assigned less weight to Dr. Rosenberg's opinion insofar as he determined that Dr. Rosenberg expressed views that were at odds with the preamble. Decision and Order at 18, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000). In the preamble, addressing the amended definition of legal pneumoconiosis, the DOL stated, "epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, *especially FEV1 and the ratio of FEV1/FVC*." 65 Fed. Reg. 79,943 (Dec. 20, 2000) (emphasis added). The administrative law judge observed that DOL has "made clear that smoking and coal dust exposure can cause an obstructive impairment" and acted within his discretion in finding Dr. Rosenberg's opinion, that claimant has an obstructive impairment caused solely by smoking, based on the decreases in his FEV1 and FEV1/FVC ratio, to be inconsistent with the position of the DOL. Decision and Order at 18; *see Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001).

The administrative law judge also permissibly determined that Dr. Rosenberg's reliance upon the reversibility of claimant's obstructive impairment diminished the credibility of his opinion, as he "fails to account for the fact that [c]laimant's pulmonary function remained below the disability thresholds after the administration of bronchodilators."[6] Decision and Order at 18; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Consequently, we affirm the administrative law judge's finding that Dr. Rosenberg's opinion is not well-reasoned and is insufficient to establish that claimant's disability did not arise out of, or in connection, with coal dust exposure.[7]

[6] The administrative law judge found that, "although [c]laimant showed a bronchodilator response in some of his pulmonary function tests, all of his post-bronchodilator values remained qualifying under the total disability standards." Decision and Order at 14; *see* Director's Exhibit 13; Claimant's Exhibit 4; Employer's Exhibits 4, 7.

[7] Employer argues that the administrative law judge did not properly consider Dr. Rosenberg's explanation as to the cause of claimant's fixed obstructive defect. Without citation to the record, employer asserts, "Dr. Rosenberg explained how, over the course of time, remodeling of impaired airways takes place due to smoking-induced damage, causing a permanent obstructive dysfunction." Employer's Brief at 5. However, our

With respect to Dr. Vuskovich, the administrative law judge determined that his opinion is not well-reasoned and is insufficient to establish rebuttal. Dr. Vuscovich opined that claimant's disability was due to a combination of obesity and asthma. Employer's Exhibit 14. Dr. Vuskovich explained that claimant's pulmonary function tests showed "substantially reversible obstructive respiratory impairment" that was "consistent with asthma," and further opined that any fixed obstruction that claimant suffered from was due to remodeling of the airways caused by asthma. *Id*. Dr. Vuskovich also noted that claimant had a normal diffusion capacity, which is consistent with asthma but not with impairment caused by coal dust exposure. *Id*. Dr. Vuskovich further cited claimant's radiological findings as support for his opinion that claimant does not have any respiratory disease or impairment caused by his coal mine employment. *Id*.

We affirm the administrative law judge's determination that Dr. Vuskovich's opinion was "less consistent with the objective medical evidence," insofar as Dr. Vuskovich stated that a preponderance of the x-ray evidence was negative for pneumoconiosis, contrary to the administrative law judge's finding that it was positive for the disease. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc). The administrative law judge also permissibly rejected Dr. Vuskovich's diagnosis of asthma as he found that it was "less consistent" with claimant's medical records, "which reflect a history of COPD and emphysema but do not mention asthma as a component of claimant's COPD."[8] Decision and Order at 18; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Claimant's Exhibit 5; Employer's Exhibits 2, 3, 4. Moreover, we affirm the administrative law judge's decision to accord less weight to Dr. Vuskovich's opinion because he "does not explain

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review of Dr. Rosenberg's reports has not found any reference to airway remodeling; but such a reference was found in Dr. Vuskovich's report, who related the airway remodeling to asthma, not smoking. *See* Employer's Exhibits 6, 11, 12, 13, 14. We, therefore, reject employer's assertion of error.

[8] Employer argues that the administrative law judge erred in discrediting Dr. Vuskovich's diagnosis of asthma, alleging that Dr. Broudy also "diagnosed an asthma condition" in the prior claim. Memorandum in Support of Employer-Carrier's Petition for Review at 6. Contrary to employer's assertion, although Dr. Broudy stated in an April 28, 2004 report that claimant had "some predisposition to asthma or bronchospasm," he specifically noted in the same report that claimant had no medical history of asthma. Director's Exhibit 1. Therefore, the administrative law judge did not misstate the record as employer suggests.

how he could apportion the causes of [c]laimant's impairment to the degree that other causes (namely pneumoconiosis) could not be substantially contributing factors." Decision and Order at 18; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553, *citing Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Thus, we affirm the administrative law judge's finding that Dr. Vuskovich's opinion does not satisfy employer's burden to establish that claimant's respiratory disability did not arise out of, or in connection with, coal mine employment.

Because employer bears the burden of proof on rebuttal, and we have affirmed the administrative law judge's credibility determinations with respect to the weight accorded employer's experts, it is not necessary that we address employer's arguments regarding the weight accorded claimant's experts.[9] *See Morrison*, 644 F.2d at 479, 25 BLR at 2-8. Furthermore, we reject employer's argument that the administrative law judge erred in failing to consider the prior claim evidence, as he specifically stated that he performed "a review of the entire record, including the closed claim," and found that the weight of the evidence supported claimant's entitlement to benefits. Decision and Order at 16. Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal of the amended Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); *Morrison*, 644 F.2d at 479, 25 BLR at 2-8.

[9] The administrative law judge determined that the opinions of Drs. Forehand and Alam were sufficient to establish that coal dust exposure was a substantially aggravating cause of claimant's respiratory impairment. Decision and Order at 19.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge