BRB No. 12-0558 BLA

VERNON BAILEY Claimant-Respondent v. EASTERN ASSOCIATED COAL COMPANY and PEABODY INVESTMENTS, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/25/2013 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2010-BLA-05790) of Administrative Law Judge Pamela J. Lakes rendered on modification of a subsequent claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] The administrative law judge credited claimant with in excess of 15 years of qualifying coal mine employment[2] and found that the evidence established total respiratory disability at 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to rebut the presumption by showing that claimant does not have clinical or legal pneumoconiosis, or that his disabling impairment did not arise out of, or in connection with, coal dust exposure. Further, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), to this case. Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4). Claimant responds, urging affirmance of

[1] Claimant filed his first claim on January 29, 2001. Director's Exhibit 1. It was finally denied by the district director on May 31, 2002, because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed this claim (a subsequent claim) on May 23, 2007. Director's Exhibit 3. On September 18, 2009, Administrative Law Judge Jeffrey Tureck issued a Decision and Order denying benefits. Director's Exhibit 52. Although Judge Tureck found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 because the evidence established total respiratory disability, he found that claimant failed to establish the existence of clinical or legal pneumoconiosis on the merits. *Id*. Claimant filed a letter dated January 20, 2010 that the Department of Labor (the Department) construed as a request for modification. Director's Exhibits 58-60.

[2] Administrative Law Judge Pamela J. Lakes (the administrative law judge) stated that "the parties stipulated to at least 21 years of coal mine employment, all of which was apparently underground. (DX 1)." Decision and Order at 6.

the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments regarding the operative filing date required at amended Section 411(c)(4) and the use of the preamble to the regulations in evaluating the medical opinion evidence.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we will address employer's contention that amended Section 411(c)(4) does not apply to subsequent claims.[4] Employer argues that the date that the initial claim was filed should be the controlling date for applying the amended statute. Contrary to employer's contention, the plain language of Section 1556(c) of the PPACA mandates the application of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388, 25 BLR 2-65, 2-82-82 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *aff'd sub nom. Union Carbide Corp. v. Richards*, F.3d , BLR , 2013 WL 3358994 (4th Cir. 2013) (holding that the automatic entitlement provisions of amended Section 932(*l*) are

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

[4] Employer's reference to a survivor's claim appears to be a typographical error, based on the context of the language in its brief and the lack of a survivor's claim in the record.

available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA). Thus, we reject employer's assertion that the presumption at amended Section 411(c)(4) does not apply to subsequent claims.

We further affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on her unchallenged findings that claimant established in excess of 15 years of qualifying coal mine employment and total respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Next, we address employer's contention that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) by showing the absence of legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Zaldivar, Crisalli, Forehand, and Rasmussen. While Drs. Zaldivar and Crisalli opined that claimant does not have legal pneumoconiosis,[5] Director's Exhibits 16, 41, 46; Employer's Exhibit 2, Drs. Forehand and Rasmussen opined that claimant has legal pneumoconiosis,[6] Director's Exhibits 1,

[5] In reports dated November 7, 2007 and June 23, 2010, Dr. Zaldivar opined that claimant does not have medical or legal pneumoconiosis and that claimant's pulmonary impairment was caused by emphysema related to cigarette smoking. Director's Exhibit 16; Employer's Exhibit 2.

In a report dated September 5, 2008, Dr. Crisalli opined that claimant does not have coal worker's pneumoconiosis and that claimant's disabling pulmonary impairment was due to emphysema related to cigarette smoking, and not coal dust exposure. Director's Exhibit 41. Further, during a deposition dated September 22, 2008, Dr. Crisalli opined that claimant does not have a lung disease caused by coal dust exposure. Director's Exhibit 46 (Dr. Crisalli's Depo. at 16, 18).

[6] In a report dated March 7, 2001, Dr. Forehand diagnosed chronic bronchitis related to cigarette smoking and opined that this condition was the sole factor contributing to claimant's respiratory impairment. Director's Exhibit 1. In subsequent reports dated June 27, 2007 and February 12, 2008, however, Dr. Forehand diagnosed coal workers' pneumoconiosis related to coal dust exposure and opined that coal dust exposure and cigarette smoking contributed to claimant's totally disabling respiratory impairment. Director's Exhibit 11; Claimant's Exhibit 6. Further, in the June 27, 2007 report, Dr. Forehand opined that claimant's emphysema and obstructive lung disease were related to cigarette

11, 58; Claimant's Exhibits 1, 6. The administrative law judge found that Dr. Zaldivar's opinion was not persuasive because it conflicted with the preamble to the revised regulations. The administrative law judge also found that Dr. Zaldivar's opinion was not persuasive because Dr. Zaldivar did not explain why claimant's coal dust exposure did not contribute to his emphysema. In addition, the administrative law judge found that Dr. Crisalli's opinion was not persuasive because Dr. Crisalli did not explain why claimant's 21 years of underground coal mine employment did not contribute to his emphysema. By contrast, the administrative law judge found that Dr. Forehand's opinion supported a finding of legal pneumoconiosis because "it reasonably suggests that [c]laimant's impairment is significantly related to, or was substantially aggravated by, his coal mine dust exposure." Decision and Order at 15. Further, the administrative law judge found that, although Dr. Rasmussen's opinion was not as well-documented as the opinions of Drs. Forehand and Zaldivar, the opinion of Dr. Rasmussen was well-reasoned and supported a finding of legal pneumoconiosis. Hence, based on her finding that the opinions of Drs. Zaldivar and Crisalli did not outweigh the contrary opinions of Drs. Forehand and Rasmussen, the administrative law judge found that the medical opinion evidence did not disprove the existence of legal pneumoconiosis.

Employer asserts that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Crisalli because they are at odds with the preamble to the revised regulations. The preamble to the revised regulations sets forth how the Department of Labor (the Department) has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may, within his discretion, evaluate medical expert opinions in conjunction with the Department's discussion of sound medical science in the preamble to the revised regulations. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). In this case, the administrative law judge permissibly discounted Dr. Crisalli's opinion because it is inconsistent with the Department's recognition that pneumoconiosis can be latent and progressive.[7] *See Peabody*

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smoking. Director's Exhibit 11.

In a report dated March 18, 2008, Dr. Rasmussen opined that claimant's coal mine dust contributed in a significant manner to his disabling lung disease and, thus, that he has at least legal pneumoconiosis. Director's Exhibit 58; Claimant's Exhibit 1.

[7] In considering that "[Dr. Crisalli] noted that he leaned towards smoking as the cause of [c]laimant's emphysema and asthma because [c]laimant stopped

Coal Co. v. Groves, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *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 (3rd Cir. 2011); 20 C.F.R. §718.201(c) (recognizing that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"); 65 Fed. Reg. 79,971 (Dec. 20, 2000). In addition, the administrative law judge permissibly discounted Dr. Zaldivar's opinion because "[it] is premised on scientific evidence that conflicts with that credited by the Department" in the preamble to the revised regulations, given that "[Dr. Zaldivar] stated, 'coal dust has not been found to indicate the array of harmful enzymes as smoking, nor has it been shown to cause damage in all the different areas where smoking does cause it in the airway.'"[8] Decision and Order at 14; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*], 24 BLR at 1-125-26; 65 Fed. Reg. 79,943 (Dec. 20, 2000). Moreover, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Crisalli because they did not explain why claimant's coal dust exposure could not have contributed to his respiratory condition. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Crisalli.

Employer also asserts that the administrative law judge erred in eliminating its right to rebut the presumption by applying the preamble to the amended regulations as a presumption that claimant's coal dust exposure caused his

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working in the mines in 1987," the administrative law judge found that "[t]he regulations recognize that pneumoconiosis can progress even after cessation of coal mine employment." Decision and Order at 14. The administrative law judge additionally found that the premise that Dr. Crisalli relied on was not accurate because "[c]laimant complained of shortness of breath in his 2001 claim and gave Dr. Forehand a history of dyspnea for over five years. (DX 1)." *Id*.

[8] The administrative law judge noted, "[h]owever, [that] in the preamble to the revised regulations, the Department concluded that medical studies support a finding that 'dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms – namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with a decrease in protective enzymes in the lung.' 65 Fed. Reg. 79,943 (Dec. 20, 2000)." Decision and Order at 14.

obstructive lung disease.[9] Contrary to employer's assertion, the administrative law judge did not treat the preamble as a presumption that all obstructive lung disease is legal pneumoconiosis. Rather, the administrative law judge reasonably consulted the preamble as an authoritative statement of medical principles accepted by the Department, when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment.[10] *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. Thus, we reject employer's assertion that the administrative law judge erred in eliminating its right to rebut the presumption by applying the preamble to the amended regulations in weighing the evidence in this case. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis.[11]

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[9] Employer asserts that the administrative law judge "effectively reversed the burden of proof." Employer's Brief at 29. Specifically, employer asserts that claimant has not met his burden to prove the existence of legal pneumoconiosis. Contrary to employer's assertion, because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Thus, we reject employer's assertion that the administrative law judge erred in failing to require claimant to carry the burden of establishing the existence of legal pneumoconiosis.

[10] In finding that a preponderance of the medical opinion evidence failed to establish that claimant does not have legal pneumoconiosis, the administrative law judge stated: "It is worth noting that [the Department] discussed the strong epidemiological evidence supporting an association between coal dust exposure and obstructive pulmonary disability (65 Fed. Reg. 79937-79945 (Dec. 20, 2000)), but it nevertheless chose to require that each individual claimant establish by a preponderance of the evidence that such an association occurred in the individual's case. *Id.* at 79938. Here, however, the opposite is true: it is [e]mployer's burden to prove that the association did *not* occur in the instant case, by virtue of the presumption." Decision and Order at 14.

[11] Employer also asserts that the administrative law judge erred in crediting the opinions of Drs. Forehand and Rasmussen that claimant has legal pneumoconiosis. In view of our holding that the administrative law judge permissibly discounted the opinions of Drs. Crisalli and Zaldivar, that claimant

Finally, employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) by showing the absence of disability causation. The administrative law judge noted that "[b]oth Drs. Forehand and Rasmussen found a likely connection between [c]laimant's 21 years of coal mine employment and his lung disease, with Dr. Forehand noting that continuous mine operators like [c]laimant develop pneumoconiosis at a higher rate and that the National Institute of Occupational Safety and Health has reported an increase in pneumoconiosis in the coal fields where [c]laimant worked." Decision and Order at 17. By contrast, the administrative law judge noted that "Dr. Zaldivar did not address why [c]laimant's coal mine employment could not have contributed to his disabling impairment; instead, he stated that [c]laimant's smoking history was sufficient to have produced the abnormalities in his lungs, and thus, it was not necessary to invoke another disease simply because [c]laimant was a coal miner. (EX 3)."[12] *Id*. In addition, the administrative law judge concluded that Dr. Crisalli conceded that claimant's coal dust exposure may have contributed to his emphysema, as "Dr. Crisalli noted that [c]laimant's smoking history and the 20 years between when he quit working in the mines and he developed shortness of breath, 'would make me suspicious that any existing lung disease would be more related to the cigarette smoke rather than to coal mine dust, *although that wouldn't be a hundred percent*.' (DX 46)."[13] *Id*. Based on her

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does not have legal pneumoconiosis, because they were inconsistent with the preamble to the revised regulations, *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *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 (3rd Cir. 2011); 65 Fed. Reg. 79,943, 79,971 (Dec. 20, 2000), we need not address employer's assertion that the administrative law judge erred in crediting the opinions of Drs. Forehand and Rasmussen. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[12] In reports dated November 7, 2007 and June 23, 2010, Dr. Zaldivar opined that claimant has a disabling pulmonary impairment caused by emphysema related to smoking. Director's Exhibit 16; Employer's Exhibit 2. During depositions, Dr. Zaldivar opined that claimant's coal dust exposure has not caused or contributed to his totally disabling respiratory impairment. Director's Exhibit 44 (Dr. Zaldivar's September 8, 2008 Depo. at 21-22, 27-28); Employer's Exhibit 3 (Dr. Zaldivar's July 18, 2012 Depo. at 9-10).

[13] In a report dated September 5, 2008, Dr. Crisalli opined that claimant has

finding that the opinions of Drs. Zaldivar and Crisalli were insufficient to rebut the opinions of Drs. Forehand and Rasmussen, the administrative law judge found that employer cannot rule out claimant's coal mine employment as a cause of his totally disabling respiratory impairment.

Employer argues that the administrative law judge erred in applying the wrong standard for establishing that coal mine dust did not contribute to, or cause, claimant's disabling respiratory impairment at amended Section 411(c)(4). Specifically, employer asserts that the administrative law judge "required that [e]mployer completely and entirely rule out coal mine dust as a causative factor." Employer's Brief at 36 (unpaginated). In addressing rebuttal of the presumption at amended Section 411(c)(4), the administrative law judge stated that, "[t]o rebut the presumption under the second method, the party opposing entitlement must 'rule out' any connection between the miner's impairment and his coal mine employment." Decision and Order at 16. Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Thus, we reject employer's assertion that the administrative law judge failed to apply the proper rebuttal standard at amended Section 411(c)(4). Employer raises no additional challenge to the administrative law judge's weighing of the evidence. We, therefore, affirm the administrative law judge's finding that employer failed to establish that coal dust exposure did not contribute to his disabling respiratory impairment. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

In light of our affirmance of the administrative law judge findings that employer failed to establish that claimant does not have pneumoconiosis[14] or that his disability did not arise out of, or in connection with, coal mine employment,

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a disabling pulmonary impairment caused by emphysema related to cigarette smoking. Director's Exhibit 41. During a deposition, Dr. Crisalli opined that coal mine dust exposure did not contribute to claimant's disability. Director's Exhibit 46 (Dr. Crisalli's September 22, 2008 Depo. at 20).

[14] In view of our affirmance of the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis, we need not address employer's assertion regarding the administrative law judge's failure to evaluate CT scan evidence related to the existence of clinical pneumoconiosis.

we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Furthermore, in view of our affirmance of the administrative law judge's finding that claimant is entitled to benefits under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we affirm the administrative law judge's finding that claimant established a mistake in a determination of fact at 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order Granting 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