BRB No. 12-0596 BLA

JACK D. McPEEK Claimant-Respondent v. SPARTAN MINING COMPANY and DBA MASSEY ENERGY COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/30/2013 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

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-05111) of Administrative Law Judge John P. Sellers, III, with respect to a claim filed on August 15, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). After determining that claimant established thirty-four and a half years of underground coal mine employment,

the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant also established that he is totally disabled at 20 C.F.R. §718.204(b)(2), and, therefore, invoked the presumption at amended Section 411(c)(4).[1] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the rebuttal methods set forth in amended Section 411(c)(4) are not applicable to responsible operators and that the amendments cannot be applied until the Department of Labor has promulgated implementing regulations. In addition, employer asserts that, in evaluating the evidence as to whether employer rebutted the amended Section 411(c)(4) presumption, the administrative law judge improperly discredited the opinions of Drs. Zaldivar and Castle. Claimant responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[2]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1] Section 411(c)(4), which applies to claims filed after January 1, 2005, that were pending on or after March 23, 2010, provides that a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 or pulmonary impairment. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant had thirty-four and a half years of underground coal mine employment, that he is totally disabled under 20 C.F.R. §718.204(b)(2), and that he invoked the rebuttable presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

As an initial matter, we reject employer's argument that the rebuttal provisions at amended Section 411(c)(4) do not apply to a responsible operator for the reasons set forth in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011). *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). We further hold that there is no merit to employer's assertion that application of amended Section 411(c)(4) is barred, pending promulgation of regulations implementing the amendments, for the reasons set forth in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). *See also Rose*, 614 F.2d at 939; 2 BLR at 2-43. Additionally, the Act explicitly identifies the methods by which rebuttal can be established – by proving that the miner does not have pneumoconiosis or that the miner's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). We affirm, therefore, the administrative law judge's application of the amended Section 411(c)(4) presumption to this claim.

In considering rebuttal of the amended presumption, the administrative law judge determined that employer established that claimant did not have clinical pneumoconiosis based on the x-ray and medical opinion evidence.[4] Decision and Order at 21-22. The administrative law judge then considered simultaneously whether employer rebutted either the presumed fact that claimant has legal pneumoconiosis or the presumed fact that he is totally disabled by it.[5] *Id.* at 22-28. The administrative law judge found that the

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[4] Pursuant to 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis is defined as:

> [T]hose 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).

[5] Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as including "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).

opinions of Drs. Zaldivar and Castle, that coal dust exposure was not a contributing cause of claimant's disabling impairment, were insufficient to rebut the presumption. *Id*.

Employer contends that the administrative law judge erred in discrediting Dr. Zaldivar's opinion, asserting that: Dr. Zaldivar explained why claimant's residual impairment is not related to coal dust inhalation; he separately addressed clinical and legal pneumoconiosis; and he provided several reasons, unrelated to the absence of x-ray evidence of pneumoconiosis, for his diagnosis of asthma, a smoking-related impairment and congestive heart failure. Employer also argues that the administrative law judge incorrectly discredited Dr. Castle's opinion, asserting that Dr. Castle relied on multiple factors, independent of his negative x-ray interpretation, in opining that asthma was the cause of claimant's impairment.

Employer's allegations of error lack merit. Contrary to employer's contention, the administrative law judge acted within his discretion in according less weight to Dr. Zaldivar's opinion because he relied on the partial reversibility of claimant's impairment to conclude that coal dust exposure was not the cause, without adequately addressing the fixed component of the impairment that remained after the administration of bronchodilators. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-484 (6th Cir. 2007). As the administrative law judge noted, although Dr. Zaldivar theorized that remodeling of the lungs due to asthma and smoking was responsible for claimant's poor response to bronchodilators, he did not identify specific evidence indicating that remodeling has actually occurred in claimant's lungs. Decision and Order at 23; Employer's Exhibits 4, 9 at 42-43. Further, the administrative law judge rationally discredited Dr. Zaldivar's opinion, based on his reliance on the negative x-ray evidence to exclude coal dust exposure as a contributing cause of claimant's impairment.[6] *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989). The administrative law judge properly determined that the need for x-ray evidence of nodulation or dust retention cannot be reconciled with the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2) or 20 C.F.R. §718.202(a)(4), which provides that "[a] determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds

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[6] In his report, Dr. Zaldivar indicated that "[t]he importance of an x-ray finding of pneumoconiosis is not to completely rule out the presence of pneumoconiosis . . . but rather to estimate the amount of dust that was retained within the lungs." Employer's Exhibit 4. In addition, Dr. Zaldivar testified, in response to how he was able to exclude coal dust as a cause of claimant's impairment, that "there is not enough dust at all in the lungs to potentially cause any problem. And the reason I say that is . . . the chest x-ray reflects the amount of dust retained within the lungs, and this is very well recognized in the medical literature." Employer's Exhibit 9 at 41-41.

that the miner suffers or suffered from pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.202(a)(4); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). In sum, the administrative law judge reasonably determined that Dr. Zaldivar did not persuasively justify his opinion that claimant's thirty-four and one half years of coal mine employment had not had an additive effect on claimant's totally disabling impairment.

The administrative law judge also rationally discredited Dr. Castle's opinion on the ground that it conflicted with the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2), which includes "any chronic restrictive *or* obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2) (emphasis added); 65 Fed. Reg. 79,920, 79,937 (Dec. 20, 2000); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *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). The administrative law judge reasonably concluded that, because Dr. Castle did not acknowledge that coal dust exposure may cause an obstructive impairment in the absence of fibrosis or restriction, "he offer[ed] no persuasive explanation why[,] if emphysema is present[,] coal dust exposure can be excluded as a causal factor along with [claimant's] smoking." Decision and Order at 27; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

In light of the foregoing, we affirm the administrative law judge's determination that the opinions of Drs. Zaldivar and Castle are insufficient to rebut the presumption at amended Section 411(c)(4) that claimant has legal pneumoconiosis and that his disabling respiratory impairment is due, in part, to legal pneumoconiosis. Consequently, we affirm the 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