BRB No. 12-0607 BLA

MORRIS E. BLACKBURN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ENERGY WEST MINING COMPANY	)	
	)	
and	)	
	)	
WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 07/24/2013
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (2011-BLA-5845) of Administrative Law Judge Richard K. Malamphy rendered on a claim

filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with twenty-three years of underground coal mine employment, and adjudicated this claim, filed on November 5, 2009, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish 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 under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further determined, however, that employer had successfully rebutted the presumption by establishing that claimant does not have pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge failed to adequately explain his rationale in finding that employer established rebuttal of the amended Section 411(c)(4) presumption of legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has declined to file a substantive response. Claimant has filed a reply brief in support of his position.[3]

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[1] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that 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 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. 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).

[2] In the event that the Board does not affirm the administrative law judge's denial of benefits, employer argues that the supplemental reports of Dr. James, contained at Claimant's Exhibits 1 and 4, should be stricken from the record or, alternatively, that employer should be dismissed as a party to this action. Employer's Response Brief at 13-17. However, these arguments are not properly before the Board, as employer may not seek to expand its rights by raising an issue on appeal in a response brief. *See generally Barnes v. Director, OWCP*, 19 BLR 1-73 (1995); 20 C.F.R. §802.212.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment, that the evidence was sufficient to establish total respiratory disability at 20 C.F.R.

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).

Claimant contends that the administrative law judge erred in finding that employer established rebuttal of the amended Section 411(c)(4) presumption, arguing that the opinions of Drs. Farney and Tuteur are insufficient to support a finding that claimant does not have legal pneumoconiosis or that his disabling respiratory impairment did not arise out of employment in a coal mine. Claimant also asserts that the administrative law judge failed to satisfy the duty of rational explanation imposed by 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), 30 U.S.C. §932(a), as he did not explain how he resolved the conflicts in the medical opinions of record or provide a rationale for crediting the opinions of Drs. Farney and Tuteur over that of Dr. James. Claimant's Brief at 26-35. Some of claimant's arguments have merit.

In evaluating the conflicting evidence relevant to rebuttal, the administrative law judge summarized the opinion of Dr. James,[5] who opined that coal dust was a significant contributing factor to claimant's chronic obstructive pulmonary disease, and the opinions of Drs. Farney,[6] and Tuteur,[7] who opined that claimant's obstructive lung disease is due

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§718.204(b), and that claimant invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The law of the United States Court of Appeals for the Tenth Circuit is applicable, as claimant was last employed in the coal mining industry in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[5] Dr. James performed the Department of Labor evaluation on April 13, 2010, provided a deposition on December 1, 2010, and issued supplemental reports on February 15, 2012 and March 8, 2012. Dr. James diagnosed totally disabling chronic obstructive pulmonary disease (COPD), and concluded that coal dust exposure was a significant contributing factor in claimant's impairment. Claimant's Exhibits 1, 2, 4.

[6] Dr. Farney performed an examination on April 8, 2011, and provided a deposition on January 27, 2012. Dr. Farney diagnosed totally disabling COPD due solely to chronic tobacco smoke exposure. Employer's Exhibits 1, 9.

entirely to tobacco smoke and not the inhalation of coal dust.[8] The administrative law judge stated that:

> Drs. James, Farney, and Tuteur have given detailed reasoning for their opinions. Each party has relied on published treatises for their positions. The miner's history of smoking is clearly more extensive than he acknowledged at the hearing.[9]
>
> I find that employer has rebutted the 15 year presumption by showing that the claimant does not have pneumoconiosis. All of the claimant's x-ray readings and his CT scan readings are negative for pneumoconiosis. Further, the medical opinion evidence does not support a finding of legal pneumoconiosis.
>
> Therefore, I find that evidence does not support a finding that claimant has pneumoconiosis.

Decision and Order at 15.

We agree with claimant's assertion that the administrative law judge failed to provide a clear and reasoned explanation of the basis for his determination that the medical opinion evidence was sufficient to support rebuttal of the Section 411(c)(4) presumption. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 24 BLR 2-297 (10th Cir. 2010). The APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C.

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[7] Dr. Tuteur provided a consulting opinion on May 20, 2011, a deposition on February 21, 2012, and a supplemental opinion on March 27, 2012. He opined that claimant's pulmonary impairment is due to the chronic inhalation of tobacco smoke and is not attributable to coal dust exposure or coal workers' pneumoconiosis. Employer's Exhibits 4, 10, 12.

[8] The administrative law judge determined that Dr. Al-Shuquairat did not express an opinion as to the etiology of claimant's pulmonary impairment. Decision and Order at 8, 15. Dr. Al-Shuquairat treated claimant at the Central Utah Clinic, and diagnosed moderately severe chronic obstructive pulmonary disease, secondary to emphysema. Employer's Exhibit 3; Claimant's Exhibit 3.

[9] At the hearing, claimant acknowledged smoking over a span of fifty years, averaging a half a pack of cigarettes a days and quitting for three years. Hearing Transcript at 53-56.

§932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, we are unable to discern how the administrative law judge determined the relative weight to be accorded the conflicting medical opinions. Rather, the administrative law judge merely summarized the opinions and noted that Drs. James, Farney and Tuteur gave detailed reasoning for their opinions and relied on published treatises for their positions. Decision and Order at 7-15. The administrative law judge neither addressed whether the opinions were adequately reasoned, nor weighed the opinions against each other. The administrative law judge's conclusory assessment, that rebuttal has been established by showing that that claimant does not have pneumoconiosis, does not comply with the APA, which requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see Gunderson*, 601 F.3d at 1021-26, 24 BLR at 2-311-17; *Wojtowicz*, 12 BLR at 1-165. Consequently, we must vacate the administrative law judge's finding that employer established rebuttal of the amended Section 411(c)(4) presumption, and remand the case for further consideration. We find no merit, however, to claimant's contention that the opinions of Drs. Farney and Tuteur are insufficient to support a finding of rebuttal, as both doctors opined that claimant's respiratory impairment was not due, in whole or in part, to his coal mine employment. Employer's Exhibits 1, 4, 9, 10, 12.

On remand, the administrative law judge must discuss and weigh all of the relevant evidence, resolve any scientific dispute on scientific grounds, and set forth the specific bases for his findings. *Gunderson*, 601 F.3d at 1021-26, 24 BLR at 2-311-17. The administrative law judge is reminded that it is employer's burden on rebuttal to either disprove the existence of pneumoconiosis or affirmatively establish that claimant's respiratory or pulmonary impairment "did not arise out of, or in connection with," employment in a coal mine.[10] 30 U.S.C. §921(c)(4); *see Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1481, 13 BLR 2-196, 2-213 (10th Cir. 1989)(holding that on rebuttal, employer must "affirmatively establish[] the lack of either pneumoconiosis or a link with [the miner's] mine employment").

[10] Employer contends that the rebuttal provisions of Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the reasons set forth in that decision. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

For the reasons set forth by the United States Supreme Court in *Usury v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), since there are no regulations currently in force applying the limitations on rebuttal set forth in 30 U.S.C. §921(c)(4) to employers, I would not instruct the administrative law judge to apply those limitations to the instant case. However, because the Board has adopted precedent to the contrary, *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed,* No. 11-2418 (4th Cir. Dec. 29, 2010), I concur with my colleagues in all respects.

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JUDITH S. BOGGS
Administrative Appeals Judge