BRB No. 13-0515 BLA

LARRY C. LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUESTONE COAL CORPORATION	)	DATE ISSUED: 07/15/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for claimant.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Maia S. Fisher (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-06169) of Administrative Law Judge Adele Higgins Odegard, rendered on a subsequent claim filed on October 12, 2010,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 19.21 years of underground coal mine employment and determined that he established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).[2] The administrative law judge further found, therefore, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 (2013),[3] and invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[4] The administrative law judge determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer asserts that the administrative law judge erred in applying amended Section 411(c)(4) in this case, arguing that the limitations on rebuttable

[1] Claimant's prior claim was finally denied by the district director on January 24, 1994, because claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1.

[2] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the 2010 amendments to the Black Lung Benefits Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. *See* 78 Fed. Reg. 59,102 (Sept. 25, 2013). The revised regulations became effective on October 25, 2013, and appear in the 2014 edition of Title 20 of the Code of Federal Regulations. If a regulation cited by the administrative law judge was revised subsequent to her Decision and Order, we will cite the prior version of the regulation and accompany it with a reference to the 2013 edition of Title 20 of the Code of Federal Regulations.

[3] When revising the regulations at 20 C.F.R. Parts 718 and 725, the Department of Labor moved the language set forth in 20 C.F.R. §725.309(d) (2013) to 20 C.F.R. §725.309(c).

[4] 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. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

evidence apply only to the Secretary of Labor. Employer also contends that the administrative law judge incorrectly required employer to "rule out" any causal connection between claimant's total disability and his coal mine employment, and erred in finding that employer failed to rebut the presumption of disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asking the Board to reject employer's arguments regarding the administrative law judge's application of amended Section 411(c)(4), and the correct rebuttal standard.[5]

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.[6] 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).

I. Application of Amended Section 411(c)(4)

Employer initially contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer argues that revised 20 C.F.R. §718.305(d), which sets forth the methods by which the party opposing entitlement can rebut the presumption, cannot overrule the holding of the United States Supreme Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), that the limitations on rebuttal in Section 411(c)(4) do not apply to responsible operators. Employer's assertion is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *aff'd on other grounds sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *see also Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the amended Section 411(c)(4) presumption, and established 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); Decision and Order at 17.

[6] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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 (1989) (en banc); Decision and Order at 4.

II. Rebuttal of the Amended Section 411(c)(4) Presumption

A. The Proper Standard

We hold that there is no merit in employer's contention that the administrative law judge did not apply the proper standard on rebuttal. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption that the miner's total disability was due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis, or by establishing that the miner's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 15-16; *see* 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Furthermore, the United States Court of Appeals for the Fourth Circuit has held that an employer must "effectively . . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure in order to meet its rebuttal burden.[7] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

B. The Administrative Law Judge's Consideration of Rebuttal

In determining whether employer rebutted the amended Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis, the administrative law judge gave "substantial weight" to the opinions of Drs. Fino, Rosenberg and Rasmussen. Decision and Order at 28-30. Dr. Fino examined claimant on April 21, 2011, and obtained an x-ray, a pulmonary function study and a blood gas study. Director's Exhibit 22. Dr. Fino diagnosed idiopathic pulmonary fibrosis, or nonspecific interstitial pneumonitis, and stated that claimant does not have clinical pneumoconiosis, based on the shape and location of the irregularities viewed on his x-ray, and his normal pulmonary function test. *Id*. Dr. Fino noted that the medical literature has not adequately established that coal dust causes interstitial pulmonary fibrosis, but rather that it modifies pulmonary fibrosis. *Id*. Dr. Fino concluded that, even

[7] Similarly, the implementing regulation that was promulgated subsequent to the administrative law judge's decision requires the party opposing entitlement in a miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (holding that there is no meaningful difference between the "play[ed] no part" standard and the "rule-out" standard).

assuming that claimant has coal workers' pneumoconiosis, it has not contributed to his disability. *Id*. At his deposition, Dr. Fino explained that claimant suffers from impairment in oxygen transfer based on his reduced diffusion capacity and his room air blood gas test. Employer's Exhibit 15 at 7-8. Dr. Fino stated that idiopathic pulmonary fibrosis and nonspecific interstitial pneumonitis caused oxygen transfer impairments. *Id.* at 10. He reiterated that he based his diagnosis on claimant's chest x-ray, and stated that the primary reason he diagnosed idiopathic pulmonary fibrosis or nonspecific interstitial pneumonitis was the chest x-ray. *Id*.

Dr. Rosenberg examined claimant on December 6, 2011, and obtained a pulmonary function test and an arterial blood gas study, recorded claimant's work and medical history and reviewed records. Employer's Exhibit 1. Dr. Rosenberg determined that claimant does not have clinical pneumoconiosis, based on x-rays showing linear interstitial changes in the middle and lower lungs. *Id*. Dr. Rosenberg further found that the oxygenation abnormality seen on claimant's blood gas study relates to his linear interstitial lung disease and explained that, "[w]hile there are various medical references purporting to demonstrate that linear interstitial lung disease occurs in relationship to coal mine dust exposure, the studies have not controlled for . . . disorders known to cause interstitial scarring" and, therefore, do not support the conclusion that coal mine dust exposure causes linear interstitial lung disease. *Id*. at 5. At his deposition, Dr. Rosenberg stated that claimant does not have restriction or micronodular changes, and opined that the linear scarring in claimant's middle and lower lung zones is related to his decreased diffusing capacity with oxygenation abnormality. Employer's Exhibit 14 at 9. When asked how confident he was that claimant's linear scarring was not "coal workers' pneumoconiosis," Dr. Rosenberg stated, "very confident . . . coal workers' pneumoconiosis is characterized by micronodular changes . . . in the upper lung zones to start." *Id.* In addition, Dr. Rosenberg opined that obesity did not cause claimant's respiratory disability and concluded that claimant's smoking probably did not play a role in his impairment. *Id*. at 10-11, 16-17.

Dr. Rasmussen examined claimant on December 20, 2011, and performed a chest x-ray, pulmonary function study and a blood gas study. Claimant's Exhibit 1. Dr. Rasmussen diagnosed coal workers' pneumoconiosis, based on claimant's x-ray, and hypoxia, based on claimant's blood gas study. *Id*. Dr. Rasmussen further opined that coal dust exposure was a contributing cause of claimant's gas exchange impairment. *Id*. At his deposition, Dr. Rasmussen indicated that, even if claimant had a longer smoking history than reported, he would identify coal dust exposure as a significant contributing cause of claimant's hypoxia. Employer's Exhibit 13 at 16-17.

The administrative law judge found that "on balance, the physician opinion evidence supports a finding that [c]laimant does not have clinical pneumoconiosis," but

the opinions "do not rule out the presence of legal pneumoconiosis."[8] Decision and Order at 30. The administrative law judge determined that the opinions of Drs. Fino and Rosenberg were insufficient to establish the absence of legal pneumoconiosis, as "neither physician was able to offer an etiology for [c]laimant's oxygenation abnormality, other than to say that it is not coal dust[-]related." *Id*. The administrative law judge further found that Dr. Rasmussen "persuasively explained why he finds that [c]laimant's oxygenation abnormality is due to coal dust inhalation." *Id*. The administrative law judge concluded, "[b]ecause the regulation specifically states that the presumption cannot be rebutted on the basis of evidence demonstrating the existence of a totally disabling pulmonary disease of unknown origin, I find that [e]mployer has failed to rebut the presumption." *Id*., *citing* 20 C.F.R. §718.305(d) (2013).

Employer alleges that the administrative law judge selectively analyzed the medical opinion evidence in crediting Dr. Rasmussen's opinion, and in finding that Drs. Fino and Rosenberg did not rule out the existence of legal pneumoconiosis. Employer also contends that the administrative law judge erred in applying 20 C.F.R. §718.305(d) (2013), as she had overlooked the regulation's limitation to obstructive respiratory and pulmonary disease, and no physician diagnosed claimant with an obstructive impairment.

Although employer is correct in maintaining that the administrative law judge misstated the terms of 20 C.F.R. §718.305(d),[9] and misapplied the regulation, we hold

[8] "Clinical pneumoconiosis" is comprised of the diseases recognized as pneumoconioses, *i.e.*, conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue. 20 C.F.R. §718.201(a)(1). 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." *Id*. "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "[T]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. For the purposes of both definitions, "arising out of coal mine employment" means "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] The version of 20 C.F.R. §718.305(d) cited by the administrative law judge provided that "in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d) (2013) (emphasis added). When the Department of Labor revised the regulations to implement amended Section 411(c)(4), this language was moved to 20 C.F.R. §718.305(d)(3), which provides that

that her finding that the opinions of Drs. Fino and Rosenberg were insufficient to rebut the presumed existence of legal pneumoconiosis is rational and supported by substantial evidence. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Dr. Fino stated explicitly that he excluded coal dust exposure as a cause of claimant's oxygen transfer abnormality because the chest x-ray showed irregular opacities in the middle and lower lung zones, and the reduction in claimant's diffusing capacity was moderate, rather than mild. Director's Exhibit 22; Employer's Exhibit 15 at 7-9. Dr. Rosenberg also cited the x-ray findings in support of his determination that the lung condition that he observed is not related to coal dust exposure. Employer's Exhibits 1, 14 (at 8-9, 11, 17, 18, 23-24). As noted by the administrative law judge, both physicians identified the fibrotic disease that they saw on x-ray as the cause of claimant's oxygen transfer abnormality, and indicated that it was of unknown origin. Director's Exhibit 22; Employer's Exhibits 14 (at 11, 23-24), 15 (at 7-9). Because neither physician explained why coal dust exposure did not substantially aggravate the linear lung fibrosis seen on claimant's x-ray, and the accompanying gas exchange abnormality, the administrative law judge acted within her discretion as fact-finder in concluding that their opinions were insufficient to affirmatively disprove the existence of legal pneumoconiosis.[10] *See* 20 C.F.R. §718.201(a)(2), (b); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

We affirm, therefore, the administrative law judge's finding that employer did not establish the first method of rebuttal of the amended Section 411(c)(4) presumption.[11]

"[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added).

[10] The presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) includes a presumption of both clinical and legal pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65 (4th Cir. 1995). Thus, to rebut the presumed existence of pneumoconiosis, employer was required to prove that the miner did not have either form of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A), (B); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Because we have affirmed the administrative law judge's finding that employer did not affirmatively establish the absence of legal pneumoconiosis, we decline to address employer's allegations of error regarding the administrative law judge's consideration of whether employer disproved the existence of clinical pneumoconiosis.

[11] Because employer bears the burden of proof on rebuttal, and we have held that the administrative law judge permissibly discredited the opinions of its experts, we need not reach employer's arguments that the administrative law judge erred in crediting Dr.

We further affirm the administrative law judge's determination that employer did not establish the second method of rebuttal, as her finding on the issue of the existence of legal pneumoconiosis precluded a finding that employer established that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, as defined in 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d)(1)(ii); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

Rasmussen's opinion. *See Defore v. Alabama By-Products*, 12 BLR 1-27 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).