BRB No. 13-0548 BLA

CARL J. TINNEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	
	)	DATE ISSUED: 07/28/2014
Employer-Petitioner	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (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 appeals the Decision and Order Awarding Benefits (2011-BLA-5487) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on March 29, 2010, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C.

§§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least fifteen years of underground coal mine employment, and found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge further determined, therefore, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309,[2] 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).[3] 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 evidence apply only to the Secretary of Labor and that the revised regulations adopted by the Department of Labor (DOL) to implement the amended presumption are invalid. 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 application of amended Section 411(c)(4), and the correct rebuttal standard.[4]

[1] Claimant filed his initial claim on September 22, 2005, which was finally denied by the district director on May 11, 2006, because he failed to establish any element of entitlement. Director's Exhibit 1.

[2] The Department of Labor (DOL) revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. The revised regulations became effective on October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c).

[3] Amended Section 411(c)(4) 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), as implemented 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant fulfilled the prerequisites for invocation of the amended Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement at 20

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.[5] 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 contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators and, therefore, the revised 20 C.F.R. §718.305(d)(1) imposing the rebuttal limitations on employer is invalid. Employer's challenge to the application of the rebuttal provisions set forth in amended Section 411(c)(4), as implemented by 20 C.F.R. §718.305(d), to responsible operators is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). Accordingly, we reject it for the reasons set forth in that decision, and affirm the administrative law judge's application of the rebuttal provisions of amended Section 411(c)(4) in this case. *See Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

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

The administrative law judge initially found that the preponderance of the relevant evidence was negative for clinical pneumoconiosis.[6] Decision and Order at 26-27. With

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C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

[5] The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibit 4. Therefore, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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

> [T]hose diseases recognized by the medical community as pneumoconiosis, *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'

respect to the presumed existence of legal pneumoconiosis,[7] the administrative law judge determined that all the physicians of record agreed that claimant was totally disabled from a respiratory impairment. *Id*. at 32. The administrative law judge found that the opinions of Drs. Zaldivar and Basheda, who diagnosed chronic obstructive pulmonary disease (COPD) caused solely by cigarette smoking, were entitled to little weight, as they did not provide valid rationales for ruling out coal dust exposure as a significant contributing cause of claimant's lung disease. *Id*. at 28-29; Employer's Exhibits 2, 7, 9, 10. The administrative law judge also concluded that Dr. Walker's opinion, submitted with claimant's prior claim, was entitled to little weight because he did not explain why he eliminated coal mine dust exposure as a cause of the miner's severe obstructive ventilatory impairment. Decision and Order at 29; Director's Exhibit 1.

Employer asserts that the administrative law judge erred in "addressing several arguments individually, and finding none alone dispositive," rather than considering the opinions of Drs. Zaldivar and Basheda as a whole. Employer's Petition for Review and Brief at 40. Employer further contends that the administrative law judge erred in "setting his diagnostic knowledge against that of the physician" in finding that Dr. Zaldivar's reliance on bronchoreversibility "is misplaced," and erred in failing to consider that Dr. Zaldivar explained that the residual impairment was not due to coal mine dust exposure, but due to claimant's need for more medication and the remodeling of his lungs. *Id*. at 28, 32. Employer also maintains that, contrary to the administrative law judge's analysis, Dr. Basheda did not rely solely on the reversibility of claimant's obstructive impairment to exclude coal dust inhalation as a cause of claimant's COPD. In addition, employer argues that the administrative law judge erred in finding that Dr. Basheda relied on generalities to render his opinion.

Employer's allegations of error lack merit. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Zaldivar's opinion, that "[t]he

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> pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[7] 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).

combination of asthma and smoking itself is sufficient to cause severe airway obstruction; [therefore, miner] has plenty of excellent reasons to have developed the crippling respiratory disease which he now has without having to invoke any specific occupation," was flawed. Decision and Order at 28, *quoting* Employer's Exhibit 2; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 536, 21 BLR 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge rationally determined that, "even if [claimant's] smoking history and asthma (unrelated to coal dust exposure) are sufficient to cause his obstruction, it does not necessarily follow these were the sole causes of the impairment, considering [claimant's] significant history of coal dust exposure." Decision and Order at 28; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Hicks*, 138 F.3d at 532, 21 BLR 2-334; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Further, the administrative law judge rationally determined that Dr. Zaldivar's reliance, at least in part, on the absence of "evidence clinically or radiographically" that claimant '"had retained any dust [] or that dust caused him any problem," was inconsistent with the regulatory definition of pneumoconiosis.[8] Decision and Order at 29, *quoting* Employer's Exhibit 6; *see* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). We hold, therefore, that the administrative law judge acted within his discretion in according less weight to Dr. Zaldivar's opinion. *See Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; *Hicks*, 138 F.3d at 532, 21 BLR at 2-334.

Similarly, the administrative law judge permissibly discredited Dr. Basheda's opinion because he relied on the partial reversibility of claimant's impairment to conclude that coal dust exposure was not the cause of claimant's COPD. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-484; *Swiger*, 98 F. App'x at 237. The administrative law judge further noted that Dr. Basheda relied, in part, on his understanding that the "[d]ecline in FEV1 [of coal miners] has been estimated at five to nine cc's per year" before reductions in the dust limits were imposed in the early 1970s, and "at two to three cc's per year" after the new dust limits went into effect. Decision and Order at 29, *quoting* Employer's Exhibit 7 at 20. The administrative law judge reasonably found that

[8] Contrary to employer's contention, the administrative law judge considered that Dr. Zaldivar explained that the claimant's residual impairment after bronchodilators might be due to the need for more medication or to the remodeling of his lungs. Decision and Order at 16; Employer's Exhibit 9 at 27-28, 32. The administrative law judge observed, however, that Dr. Zaldivar admitted that he did not know claimant's medication dose and, other than his own opinion, he could not identify specific evidence to support claimant's need for more medication, or that remodeling has actually occurred in claimant's lungs. Decision and Order at 16; Employer's Exhibit 9 at 28.

reliance on this statistic[9] is problematic, as physicians cannot rely on generalities in the medical literature, but rather they must address the specifics of a particular miner's condition. Decision and Order at 29 n.42; s*ee* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,939, 79,940-45 (Dec. 20, 2000); *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

In sum, the administrative law judge rationally determined that Drs. Zaldivar and Basheda did not provide adequate rationales for their opinions that claimant's twenty-four years of coal mine employment did not have an additive effect on his totally disabling COPD. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Moreover, because employer did not challenge the administrative law judge's analysis of the medical opinions of Drs. Gaziano, Rasmussen and Walker, we affirm his finding that they do not assist employer in establishing rebuttal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We affirm, therefore, the administrative law judge's determination that employer failed to rebut the presumption at amended 411(c)(4) that claimant has pneumoconiosis.

With respect to whether employer established rebuttal by the second method, i.e., by proving that no part of claimant's respiratory or pulmonary total disability was caused

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[9] The administrative law judge found that Dr. Basheda attributed the miner's chronic obstructive pulmonary disease (COPD) to tobacco abuse, because of its prevalence in the United States, the partial reversibility of claimant's impairment, and claimant's response to respiratory medicine. Decision and Order at 17. The administrative law judge observed that Dr. Basheda stated, "statistically, tobacco users are at higher risk of developing airway obstruction than coal miners [and] . . . the loss of FEV1 is greater in tobacco users than coal miners." *Id*. at 19, *quoting* Employer's Exhibit 11. The administrative law judge also noted that, in reaching his conclusion, Dr. Basheda asserted:

> Obstructive lung disease related to coal dust exposure can occur in six to eight percent of coal miners. This airway obstruction is due to coal dust deposition in the respiratory bronchioles with subsequent airway dilation and fibrosis. The fibrosis produces a fixed, and at times progressive airway obstruction. This airway obstruction does not demonstrate reversibility on pulmonary function tests.

Decision and Order at 17, *quoting* Employer's Exhibit 7 at 19. The administrative law judge further acknowledged Dr. Basheda's statement that "[t]here are cases of severe airway obstruction resulting in respiratory impairment and disability. This usually occurs in young coal miners initially exposed to coal dust . . . ." *Id*.

by pneumoconiosis, the administrative law judge determined that, because employer could not disprove the presumed existence of legal pneumoconiosis, it could not "'rule out' any causal relationship between [claimant's] disability and his coal mine employment by a preponderance of the evidence." Decision and Order at 35. Employer argues that the administrative law judge did not adequately address the second method of rebuttal and erred in applying a "rule out" standard.

Employer's allegations of error have no merit. The administrative law judge rationally found that the reasons he provided for discrediting the opinions of Drs. Zaldivar and Basheda, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's totally disabling impairment is unrelated to his coal mine employment. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). In addition, the "rule out" standard applied by the administrative law judge is consistent with the regulation implementing amended Section 411(c)(4), and provides that the party opposing entitlement must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R. §]718.201."[10] 20 C.F.R. §718.305(d)(ii)). We, therefore, affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

[10] The DOL has explained that the "no part" standard recognizes that the courts have interpreted Section 411(c)(4) "as requiring the party opposing entitlement to 'rule out' coal mine employment as a cause of the miner's disabling respiratory or pulmonary impairment." 78 Fed. Reg. 59,105 (Sept. 25, 2013). The DOL also rejected applying the "substantially contributing cause" standard for disability causation set forth at 20 C.F.R. §718.204(c)(1) to the 20 C.F.R. §718.305(d) rebuttal standard. *Id.* at 59,106.

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

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge