BRB No. 13-0568 BLA

JESSIE W. DYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAMBLIN COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/11/2014
	)	
and	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
	)	
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 of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

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

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Jonathan P. Rolfe (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 (2012-BLA-5155) of Administrative Law Judge Stephen R. Henley awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on December 17, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with fifteen years and ten months of qualifying coal mine employment,[2] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that the administrative law judge applied an improper rebuttal standard. In a reply brief, employer reiterates its previous contentions.[3]

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[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

[2] The record reflects that the miner'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).

[3] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. 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).

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. It is employer's contention that the administrative law judge's finding is erroneous in two respects: first, in finding that claimant's coal mine employment covered fifteen years; and second, in finding that all of claimant's coal mine employment was underground.

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Neither the Act, nor the regulations, provides specific guidelines for the computation of the number of years of coal mine employment. However, as long as a computation of time is based on a reasonable method and supported by substantial evidence, it will be upheld. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In determining the length of claimant's coal mine employment, the administrative law judge relied, in part, on the Form CM-911[4] submitted by claimant, stating:

> Claimant testified that he started working in the mines when he was 18 (since [c]laimant was born in 1953 this would have been 1971), and he worked until he left in 1993. Based on [c]laimant's CM-911, I find Claimant worked continuously from January 1984 to January 1993, taking only two months off between December 1986 and February 1987. Therefore, between 1984 and 1993, I credit Claimant with 8 years and 10 months of coal mine employment. Between September 1981 and January 1984, Claimant's CM-911 shows he worked an additional 12 months, so I credit him with one more year, bringing the total to 9 years and 10 months.

Decision and Order at 4 (footnote and exhibit number omitted).

[4] Form CM-911 is entitled "Employment History." *See* Director's Exhibit 3.

Based upon claimant's Social Security records, the administrative law judge credited claimant with an additional six years of coal mine employment from 1971 to 1977. Decision and Order at 4-5. The administrative law judge, therefore, credited claimant with a total of fifteen years and ten months of coal mine employment. *Id.*

Employer challenges the administrative law judge's decision to credit claimant with eight years and ten months of coal mine employment from 1984 to 1993.[5] Employer specifically argues that the administrative law judge erred in relying upon claimant's Form CM-911 to credit him with one year of coal mine employment with Ramblin Coal Company in 1992, without addressing the significance of the fact that claimant's Social Security records do not list any reported earnings for that year.[6] Employer's Brief at 7. Employer also contends that the administrative law judge erred in crediting the coal mine history provided by claimant without addressing the significance of claimant's testimony regarding his difficulty in accurately remembering the dates of his coal mine employment.[7] *Id.* at 9. We agree with employer. The administrative law judge failed to discuss the weight he accorded claimant's Social Security records, showing no documented earnings for 1992, as well as claimant's testimony regarding his ability to accurately recall the dates of his employment.[8] Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a),

[5] Employer does not challenge the administrative law judge's finding that claimant worked in coal mine employment for six years from 1971 to 1977, or his decision to credit claimant with an additional year of coal mine employment from September 1981 to January 1984. We, therefore, affirm the administrative law judge's determination that claimant established a total of seven years of coal mine employment during this time period. *Skrack*, 6 BLR at 1-711.

[6] Claimant's Social Security records reveal earnings with Ramblin Coal Company from 1990 to 1991, and in 1993, but not in 1992. Director's Exhibit 5.

[7] During the hearing, claimant acknowledged that he "can't remember dates too good." Hearing Transcript at 14. Claimant also indicated that he did not remember all of the specific dates of his coal mine employment. *Id.* at 16-17, 24.

[8] Employer also argues that the administrative law judge should have applied the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) to calculate claimant's 1989 coal mine employment by using his reported Social Security Administration earnings. We disagree. Contrary to employer's contention, the administrative law judge was not required to use the calculation method set forth in Section 725.101(a)(32)(iii). The regulation provides only that an administrative law judge "may" use this method. 20 C.F.R. §725.101(a)(32)(iii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

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 Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with employer that the administrative law judge's finding, that all of claimant's coal mine employment took place underground, Decision and Order at 3, fails to satisfy the requirements of the APA. 5 U.S.C. §557(c)(3)(A). The administrative law judge failed to provide any explanation for his determination that all of claimant's coal mine employment took place underground. 30 U.S.C. §921(c)(4).

We, therefore, vacate the administrative law judge's finding of fifteen years and ten months of qualifying coal mine employment, and remand the case for the administrative law judge to reconsider the length and location of claimant's coal mine employment, and to explain fully his weighing of the evidence in making these findings.[9] *Wojtowicz*, 12 BLR at 1-165. Because we have vacated the administrative law judge's finding of fifteen years of qualifying coal mine employment, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. The Department of Labor's (DOL's) regulations provide that if claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts 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); 20 C.F.R. §718.305(d)(1). The

[9] In light of his initial determination that claimant was entitled to a total of fifteen years and ten months of coal mine employment from 1971 to 1977 and from 1981 to 1993, the administrative law found that it was "unnecessary to resolve precisely how much coal mine employment [c]laimant engaged in between 1978 and 1981." Decision and Order at 3 n.4. However, should the administrative law judge, on remand, determine that claimant has had less than fifteen years of coal mine employment from 1971 to 1977 and from 1981 to 1993, he is instructed to determine the length of coal mine employment established by claimant from 1978 to 1981.

administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 17-19.

Employer asserts that the administrative law judge applied an improper rebuttal standard under Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 16-18. Contrary to employer's argument, the administrative law judge correctly explained that, because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish rebuttal by establishing that claimant did not suffer from pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 9-10. Moreover, the implementing regulation that was promulgated after 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 [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Thus, we reject employer's argument that the administrative law judge applied an improper rebuttal standard.

Employer also asserts that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Fino, when weighing the medical evidence relevant to the existence of legal pneumoconiosis. Employer's Brief at 18-19. We disagree. The administrative law judge found that Dr. Rosenberg's opinion, that claimant's disabling obstructive impairment is unrelated to coal mine dust exposure, is inconsistent with scientific studies approved by the Department of Labor in the preamble to the amended regulations. Dr. Rosenberg eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC, a characteristic that he found inconsistent with a coal mine dust-induced lung disease.[10] The administrative law judge noted, however, that scientific evidence endorsed by the DOL recognizes that coal dust exposure can cause a significant decrease in a miner's FEV1/FVC ratio. Decision and Order at 17; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) ("coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio."). Consequently, the administrative law judge permissibly discounted Dr. Rosenberg's opinion, as to the cause of claimant's disabling obstructive pulmonary impairment, because the doctor relied on an assumption that is contrary to the medical science credited by the DOL. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-

[10] Dr. Rosenberg opine that "the preservation of the FEV1/FVC ratio is the 'norm' in patients with coal mine induced obstructive lung disease," while "[t]he opposite is true with respect to smoking-related COPD where the ratio is decreased." Director's Exhibit 17.

125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012).

Further, the administrative law judge permissibly gave less weight to Dr. Fino's opinion because he found that the doctor applied generalized statistical conclusions that did not adequately address claimant's specific condition.[11] *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 17-18. Because the administrative law judge rationally found that Dr. Fino did not adequately explain the basis for his opinion, in light of the specifics of claimant's case, he permissibly discounted his opinion that claimant's coal mine dust exposure was not a causative factor in his disabling obstructive lung disease.[12] *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

We, therefore, affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. The failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Accordingly, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

The administrative law judge next addressed whether employer established rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). The administrative law judge reasonably determined that the same reasons he provided for discrediting the opinions of Drs. Rosenberg and Fino, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's

[11] Dr. Fino relied on studies showing that "only 6-8% of miners exposed to coal mine dust at the present dust standards for 35 years will develop clinically important losses in FEV1," meaning that "92-94% of miners will have average losses that are not clinically important." Employer's Exhibit 1.

[12] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Rosenberg and Fino, we need not address employer's remaining arguments regarding the weight that the administrative law judge accorded to the opinions of Drs. Rosenberg and Fino. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

impairment is unrelated to his coal mine employment. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Therefore, we 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. Consequently, we affirm the administrative law judge's finding that employer cannot satisfy its burden to establish rebuttal. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

In summary, if the administrative law judge, on remand, credits claimant with less than fifteen years of qualifying coal mine employment, and, therefore, determines that claimant is not entitled to invoke the Section 411(c)(4) presumption, he must address whether claimant has satisfied his burden to establish all elements of entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). However, if the administrative law judge, on remand, credits claimant with fifteen years of qualifying coal mine employment, claimant is entitled to invocation of the Section 411(c)(4) presumption. In light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, claimant will be entitled to benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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