**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0492 BLA

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| EDWARD S. MORTENSEN | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: 07/12/2017 |
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| Employer-Petitioner | ) | |
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| 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 Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05636) of Administrative Law Judge Paul R. Almanza rendered 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 miner's claim filed on April 4, 2011.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with at least twenty-one years of coal mine employment, including at least fifteen years of underground coal mine employment, as stipulated by the parties. The administrative law judge also found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal. Employer filed a reply, reiterating its arguments on appeal.[3]

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[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant 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) (2012); *see* 20 C.F.R. §718.305.

[2] The administrative law judge also found that the evidence did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. He therefore determined that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment, the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6, 28-30.

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).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[5] or by establishing that "no part of [claimant'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)(i), (ii). The administrative law judge found that employer failed to rebut the presumption by either method.

Relevant to the existence of legal pneumoconiosis,[6] the administrative law judge considered the medical opinions of Drs. Farney and Basheda,[7] that claimant does not

[4] The record indicates that claimant's last coal mine employment was in Utah. Director's Exhibit 3; Hearing Transcript 31-38. Accordingly, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those 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." 20 C.F.R. §718.201(a)(1).

[6] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 31.

[7] The administrative law judge also considered the opinions of Drs. Gagon, Gotschall and Sood, that claimant suffers from legal pneumoconiosis in the form of chronic obstructive pulmonary disease and emphysema due to both cigarette smoking and coal-mine dust exposure. Director's Exhibit 10; Claimant's Exhibits 3, 8; Employer's Exhibits 4, 6. We need not address employer's arguments regarding the weight the administrative law judge accorded to the opinions of Drs. Gagon, Gotschall and Sood,

suffer from legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD) and emphysema due solely to cigarette smoking. Director's Exhibit 28; Employer's Exhibits 1, 2, 5. The administrative law judge discredited the opinions of Drs. Farney and Basheda and found that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 31-36.

Employer initially contends that the administrative law judge imposed the wrong rebuttal standard by requiring employer to "establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment," in order to disprove the existence of legal pneumoconiosis. Employer's Brief at 7-8, *quoting* Decision and Order at 31-32. Employer further asserts that the administrative law judge erred by stating that "rebuttal is accomplished only by strongly persuasive evidence demonstrating the falsity of a presumed fact." *Id.*

Employer's argument fails, however, because the administrative law judge did not find that the opinions of Drs. Farney and Basheda were insufficient to disprove the existence of legal pneumoconiosis on the grounds that they failed to rule out coal dust exposure as a causative factor for claimant's respiratory impairment. Decision and Order 31-36. Rather, the administrative law judge found that their opinions were not credible, taking into consideration the rationale each doctor provided for why claimant did not have the disease. *Id*. Thus, error, if any, in the administrative law judge's recitation of the legal standard for rebuttal is harmless. *See Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 832-33 (10th Cir. 2017); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Consequently, we reject employer's assertion that the case must be remanded for consideration under the proper rebuttal standard. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Employer further contends that the administrative law judge erred in finding that the opinions of Drs. Farney and Basheda failed to disprove the existence of legal pneumoconiosis, arguing that their opinions are fully supported by the evidence of record. We disagree. The administrative law judge correctly observed that while Dr. Farney noted several possible risk factors for claimant's impairment, including coal mine-dust exposure, the physician excluded a diagnosis of legal pneumoconiosis, in part, because "[claimant]'s pulmonary disease 'can be entirely explained' by the [claimant]'s

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however, because the administrative law judge ultimately concluded that whether the opinions are credible is immaterial, as they do not assist employer in meeting its burden on rebuttal. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 35.

smoking history." Decision and Order at 33, *quoting* Director's Exhibit 28 at 8. The administrative law judge also correctly observed, however, that the preamble to the revised regulations acknowledges the prevailing view of the medical community that the risks associated with smoking and coal mine dust exposure are additive. Decision and Order at 33, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000). In light of this premise, the administrative law judge permissibly found that Dr. Farney failed to sufficiently explain why claimant's history of coal mine employment was "not a factor, if not the only factor in the development of [claimant's] disabling emphysema." Decision and Order at 33; *see Blackburn*, 857 F.3d at 827-29; *see Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1261-62, 25 BLR 2-765, 2-775 (10th Cir. 2015); *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993).

Turning to Dr. Basheda's opinion, the administrative law judge noted correctly that Dr. Basheda opined that claimant does not have legal pneumoconiosis based, in part, on studies showing that statistically, only a minority of coal miners will develop airway obstruction.[8] Decision and Order at 33; Employer's Exhibit 2 at 13. The administrative law judge permissibly found Dr. Basheda's opinion unpersuasive, stating that "the fact that, from a purely statistical standpoint, [claimant's] smoking puts him at greater risk for developing airway obstruction than his coal mine dust exposure, does not explain why, in [claimant's] particular circumstances, his coal mine dust exposure could not be a factor in his airway obstruction." Decision and Order at 33; *see* Employer's Exhibit 2 at 13; *Blackburn*, 857 F.3d at 829-30; *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-567-68 (10th Cir. 2014); *see also 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 33. Further, the administrative law judge found that Dr. Basheda

[8] Dr. Basheda opined:

> Statistically, only a minority of coal miners [will] develop airway obstruction, approximately seven to eight percent. The risk of obstruction with cigarette smoking has been described from 15 to 25 percent in various studies.
>
> Therefore, from a purely statistical[] standpoint, [claimant] is at greater risk of developing airway obstruction from smoking than coal dust exposure.

Employer's Exhibit 2 at 13 (footnote omitted).

"did not provide an adequate rationale for his conclusion that reversibility is inconsistent with a coal dust-related lung disease, and that coal dust exposure played no role in causing [claimant's] residual fixed impairment." Decision and Order at 34; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

As the administrative law judge provided valid reasons for discrediting the opinions of Drs. Farney and Basheda, the only opinions supportive of employer's burden,[9] and substantial evidence supports his credibility determinations, we affirm his finding that employer failed to rebut the presumed fact of legal pneumoconiosis and, therefore, did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[10] *See Goodin*, 743 F.3d at 1341, 25 BLR 2-562; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

[9] Employer asserts that claimant's treatment notes constitute relevant evidence, and that they do not contain a diagnosis of legal pneumoconiosis. Employer's Brief at 18-19. Employer contends that because these treatment notes are silent on a diagnosis of legal pneumoconiosis, they support the opinions of Drs. Farney and Basheda that legal pneumoconiosis is not present and aid employer in establishing rebuttal. *Id*. Employer's argument lacks merit. As it is employer's burden on rebuttal to affirmatively disprove the presumed existence of legal pneumoconiosis, treatment notes that are silent on the issue do not establish rebuttal. 30 U.S.C. §921(c)(4); *see Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 822 (10th Cir. 2017); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, 144-45 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155-56 (2015) (Boggs, J., concurring and dissenting).

[10] Employer asserts that the administrative law judge did not adequately explain his basis for finding that the miner had only a twenty-one pack-year smoking history, and that the administrative law judge failed to consider all of the descriptions of claimant's smoking history, as set forth in the medical reports and treatment records. Employer's Brief at 27-31. We need not address this argument, however, as employer has failed to show how any error in the administrative law judge's calculation of claimant's smoking history would impact the weighing of the opinions of its physicians which, as discussed *supra*, were permissibly rejected by the administrative law judge. The administrative law judge did not reject any of the medical opinions in this record on the ground that the physician relied on an inaccurate smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

Because the administrative law judge permissibly determined that the opinions of Drs. Farney and Basheda were not credible to establish that claimant's disabling COPD does not constitute legal pneumoconiosis, we also affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing 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); *see Goodin*, 743 F.3d at 1345, 25 BLR at 2-568; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 268-69, 23 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 36. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.[11]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

[11] In light of our affirmance of the administrative law judge's award of benefits, we need not address claimant's argument regarding the admissibility of Claimant's Exhibit 11. *See* Claimant's Response Brief at 13 n.1; *Larioni*, 6 BLR at 1-1278.