BRB No. 10-0656 BLA

ESTATE OF ALONZO FRANKS (o/b/o ALONZO FRANKS)	)	
Claimant-Respondent	)	
v.	)	
GOLDEN GLOW COALS, INCORPORATED	)	DATE ISSUED: 06/28/2011
and	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Mark L. Ford, Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2008-BLA-5289) of Administrative Law Judge Alice M. Craft with respect to a

subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited the miner with seventeen and one-half years of coal mine employment, as stipulated by the parties and supported by the record, and adjudicated this claim, filed on October 24, 2007, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge determined that new evidence submitted in support of this subsequent claim was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[2] Because the miner had more than fifteen years of qualifying coal mine employment, his claim was filed after January 1, 2005 and was pending on March 23, 2010, and the weight of the evidence of record established total respiratory disability, the administrative law judge found that the miner was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge further

[1] The miner's initial claim for benefits, filed on February 18, 1970, was finally denied on January 9, 1980. Decision and Order at 3; Director's Exhibit 1 at 2, 108. The miner's second claim, filed on March 21, 1985, was denied on March 10, 1986. The claim was subsequently deemed abandoned and was administratively closed. Decision and Order at 3; *see* Director's Exhibits 1 at 2, 9, 2 at 2, 6, 8, 12, 21, 42, 48-49, 55, 205. The miner filed his current claim on March 14, 2005. Director's Exhibit 4. Following the miner's death on May 18, 2007, the miner's son, as administrator of the miner's estate, indicated that he would pursue this claim on behalf of the estate, claimant herein. Decision and Order at 3, 5; Director's Exhibit 56 at 186.

[2] The regulations provide, for purposes of 20 C.F.R. §725.309, that a denial by reason of abandonment shall be deemed a finding that claimant has not established any applicable condition of entitlement. 20 C.F.R. §725.409(c). Therefore, the miner could meet his burden under Section 725.309(d) by establishing any of the requisite elements of entitlement, based on new evidence. *See White v. New White Coal Corp.*, 23 BLR 1-1 (2004).

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

found that employer failed to establish rebuttal by proving that the miner did not suffer from either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that his total disability was not due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination to credit the medical opinion of Dr. Baker,[4] that the miner suffered from pneumoconiosis and that pneumoconiosis was a contributing cause of his disability, and to discount the contrary opinions of Drs. Dahhan[5] and Rosenberg,[6] in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Employer argues that the administrative law judge's analysis effectively rendered the presumption irrebuttable, and failed to accord with the requirements of 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), and 30 U.S.C. §932(a). Claimant responded in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not submit a substantive response unless requested to do so by the Board.[7]

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[4] Dr. Baker, who is Board-certified in internal medicine and pulmonary disease, and a B reader, examined the miner for the Department of Labor on May 6, 2005, and opined that, while the miner's sixty-five to seventy pack-year smoking history was the "predominate cause" of his disabling obstructive airway disease, his seventeen and one-half years of coal mine employment constituted a "significant" contribution of fifteen to twenty percent of the defect. Decision and Order at 14, 23; Director's Exhibits 17 at 15, 56 at 289-290, 293, 296-297; Claimant's Exhibit 6.

[5] Dr. Dahhan, a Board-certified pulmonologist and B reader, examined the miner on September 5, 2005, and diagnosed a severe and totally disabling obstructive defect due solely to the miner's fifty to sixty pack-year smoking history. He opined that the pulmonary disability was not related to, contributed to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. Decision and Order at 15-16, 21-22; Director's Exhibit 56 at 53, 58-59, 67-68, 131, 133; Employer's Exhibit 7.

[6] Dr. Rosenberg, a Board-certified pulmonologist and B reader, examined the miner on September 13, 2005, and diagnosed a disabling chronic obstructive pulmonary defect related to his fifty-five pack-year smoking history, which was not caused or aggravated by coal dust exposure. Decision and Order at 16-17, 22-23; Director's Exhibit 56 at 152-3, 155; Employer's Exhibit 4.

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding of seventeen and one-half years of qualifying coal mine employment, and her findings that the evidence submitted in support of this subsequent claim established total respiratory

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.[8] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding that employer failed to meet its burden on rebuttal of establishing that the miner did not suffer from either clinical[9] or legal pneumoconiosis, the administrative law judge initially reviewed Dr. Dahhan's statement, that a severe and disabling obstructive defect "is rarely seen secondary to the inhalation of coal dust." Decision and Order at 21-22; Director's Exhibit 56 at 133. The administrative law judge contrasted Dr. Dahhan's premise with the contrary view adopted by the Department of Labor (DOL), namely, that ". . .COPD may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC. . .[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not [clinical] pneumoconiosis is also present." Decision and Order at 21-22, *citing* 65 Fed. Reg. at 79,943 (Dec. 20, 2000). The administrative law judge additionally found that Dr. Dahhan's view, that coal dust exposure would cause only a small decrease in FEV_1, and that no synergistic effect exists between coal dust exposure and cigarette smoke inhalation, was "contrary to [DOL's] findings that coal dust exposure can cause clinically

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disability pursuant to 20 C.F.R. §718.204(b); a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d); and that the miner was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 5; Director's Exhibits 5 at 1, 13 at 6-7.

[9] With respect to clinical pneumoconiosis, employer failed to meet its burden on rebuttal because the administrative law judge found that the x-ray evidence was in equipoise and, therefore, was inconclusive as to the presence or absence of pneumoconiosis. Decision and Order at 21.

significant obstructive disease, and that coal dust and cigarette smoking have additive effects." Decision and Order at 15-16, 22; Director's Exhibit 56 at 62-63, 65-66; *see* 65 Fed. Reg. at 79,940 (Dec. 20, 2000); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001)(it is proper to discount an opinion that is based on medical science which DOL has determined not to be in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature). Finally, the administrative law judge was not persuaded by Dr. Dahhan's opinion, that the inclusion of bronchodilators in the miner's course of treatment was inconsistent with a respiratory condition involving the permanent effects of coal dust on the respiratory system. While the pulmonary function study conducted by Dr. Dahhan demonstrated some reversibility, the administrative law judge noted that it produced qualifying values both before and after bronchodilation. Decision and Order at 22; Director's Exhibit 56 at 57-58. Because the existence of a partially reversible respiratory impairment does not necessarily rule out the presence of a coexisting fixed impairment related to coal dust exposure, and in light of the miner's fully disabling residual impairment, the administrative law judge rationally concluded that Dr. Dahhan failed to sufficiently explain why he believed that smoking was the sole cause of the miner's impairment. *Id.*; *see Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 487 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Contrary to employer's assertions, the administrative law judge, in discrediting Dr. Dahhan's opinion, did not assume that any obstructive impairment constitutes pneumoconiosis, or that pneumoconiosis is always latent and progressive. Rather, she properly evaluated the bases and rationale for Dr. Dahhan's conclusions, and permissibly found that his opinion was not well-reasoned. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the opinion of Dr. Dahhan is insufficient to rebut the Section 411(c)(4) presumption in this case.

Similarly, the administrative law judge rationally concluded that the opinion of Dr. Rosenberg is contrary to the prevailing medical science accepted by DOL. Specifically, the administrative law judge determined that, while Dr. Rosenberg "acknowledged that coal mine dust can cause airflow obstruction, he stated that, in coal miners, the FEV_1% 'does not fall to any clinically significant extent.' " Decision and Order at 23; Director's Exhibits 21 at 4, 56 at 154. Since DOL, in promulgating the revised definition of pneumoconiosis at 20 C.F.R. §718.201(a), found that there was a consensus among medical experts that coal dust-induced COPD is clinically significant, and as the regulations provide that a qualifying FEV_1 value may be utilized to establish total disability due to a coal dust-related condition, the administrative law judge properly found that Dr. Rosenberg failed to adequately explain how the miner's qualifying FEV_1 value indicated only a smoking-related impairment. *Id*; Director's Exhibit 56 at 154. We

reject employer's contention that the administrative law judge improperly interpreted medical evidence, or "misused the comments in the Federal Register, to suggest that coal dust must be considered clinically significant in every case." Employer's Brief at 9-10. Rather, the administrative law judge permissibly found that, because Dr. Rosenberg relied on a faulty premise that was inconsistent with DOL's position, his opinion, that the miner did not have legal pneumoconiosis, was entitled to little weight. Decision and Order at 22-23; *see Freeman*, 272 F.3d at 483, n.7; 22 BLR at 2-281, n.7; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], F.3d , 2011 WL 1366355 (3d Cir. 2011). As substantial evidence supports the administrative law judge's credibility determination, we affirm her finding that Dr. Rosenberg's opinion was insufficient to rebut the Section 411(c)(4) presumption.

As the administrative law judge properly discredited the two opinions supportive of employer's burden, we affirm her finding that the evidence was insufficient to rebut the presumption of pneumoconiosis in this case.[10] Further, because Drs. Dahhan and Rosenberg did not diagnose pneumoconiosis, the administrative law judge acted within her discretion in according little weight to their opinions, that pneumoconiosis played no role in the miner's disability due to smoking. *See generally Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 23. Because the administrative law judge addressed all relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for her credibility determinations, her decision comports with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As substantial evidence supports the administrative law judge's finding, that employer failed to successfully rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), we affirm her award of benefits.

[10] Employer also contends that the administrative law judge erred in finding that Dr. Baker's diagnosis of legal pneumoconiosis was well-reasoned, arguing that the opinion was "equivocal" and "inadequate to establish pneumoconiosis" because Dr. Baker was unable to differentiate the effects of cigarette smoking from coal dust exposure, or to definitively conclude that the effects of both were additive in this miner. Employer's Brief at 10-11. Employer's arguments are without merit. A physician is not required to apportion the relative contributions of smoking and coal dust exposure to a miner's chronic obstructive pulmonary impairment; here, the administrative law judge acted within her discretion in crediting Dr. Baker's diagnosis of legal pneumoconiosis as consistent with the premises underlying the regulations and supported by its underlying documention. *See Barrett*, 478 F.3d at 350, 23 BLR at 2-472; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge