BRB No. 11-0656 BLA

DONALD E. NAPIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINE BRANCH COAL SALES, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 06/20/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-05101) of Administrative Law Judge Theresa C. Timlin rendered on a miner's claim filed on October 11, 2007, 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). Director's Exhibit 2. The administrative law judge accepted the parties' stipulations that claimant[1] established thirty-three years of qualifying coal mine employment, and that employer was the properly identified responsible operator. Finding that claimant established the requisite years of coal mine employment, and that a totally disabling respiratory impairment was established, the administrative law judge found that claimant was entitled to the Section 411(c)(4) presumption of the Act, 30 U.S.C. §921(c)(4), which provides that a miner's total disability is due to pneumoconiosis.[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption by establishing that claimant did not suffer from pneumoconiosis, or that his disabling pneumoconiosis did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal employer challenges the administrative law judge's finding that the conditions in claimant's surface coal mine employment were "substantially similar to [the conditions in] underground coal mine employment," a finding necessary to invoke the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption by showing that claimant did not have legal pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's Decision and Order Awarding Benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in response to the appeal.

---

[1] Claimant died on October 11, 2010, while his claim was pending. His widow is pursuing his claim on behalf of his estate. Decision and Order at 2.

[2] On March 23, 2010, amendments to the Act, applicable to claims filed after January 1, 2005, that were pending on March 23, 2010, were enacted. With respect to living miners' claims and survivors' claims, Section 1556 of Public Law No. 111-148 reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner is found to have at least fifteen years of qualifying coal mine employment, and a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that the miner's death was due to pneumoconiosis, or that at the time of the miner's death he or she was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)). In order to rebut the presumption, employer must disprove the existence of clinical and legal pneumoconiosis or that the miner's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, BLR (6th Cir. 2011).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(4) Invocation
Coal Mine Employment

Employer asserts that the administrative law judge did not discuss the evidence sufficiently in finding that the conditions in claimant's surface coal mine employment were "substantially similar" to the conditions in underground coal mine employment. In particular, employer contends that the administrative law judge's "findings do not permit meaningful review by this Board on appeal and do not purport with the Administrative Procedures [sic] Act."[4] Employer's Brief at 19. Employer contends therefore that the administrative law judge erred in finding that the Section 411(c)(4) presumption of total disability due to pneumoconiosis was invoked.[5]

In finding that claimant's thirty-three years of surface coal mine employment, performed in strip mines,[6] occurred in conditions "substantially similar" to those in underground coal mine employment, the administrative law judge noted:

---

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 4.

[4] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented…." 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).

[5] As the administrative law judge's finding that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b)(2) is not challenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The administrative law judge noted that claimant worked in the strip mines for his entire coal mine employment career and never worked in underground coal mines. The administrative law judge noted that claimant's duties in the strip mines included running a tipple, blasting, running a drill, and running a loader, and that claimant testified that he could operate most types of above-ground equipment. The administrative law

> [Claimant] testified that he was exposed to a great deal of dust. The equipment he used early in his career did not have protective cabs. (Tr. p. 22). He also worked outside in the coal pit and testified that the wind created very dusty conditions. (Tr. p. 23). [Claimant] did run equipment with air-conditioned cabs later in his career, but he testified that the radiators often clogged such that the air conditioner would not work. (Id.) He testified that driving trucks was less dusty, but that the trucks would develop cracks from hauling heavy rocks which allowed enough dust inside that he could write his name in the dust accumulated on the dashboard (Tr. p. 24). Dr. Baker concurred that drilling, [claimant's] job for twelve years, [was] very dusty and said his other exposures were also significant. (Claimant's Exhibit 5 at 15).

Decision and Order at 19.

The administrative law judge concluded therefore that:

> Comparing [claimant's] testimony of the conditions he worked in to my own knowledge of the conditions which prevail in underground mines, I find that he has established substantial similarity.

Id.

Contrary to employer's assertion, the administrative law judge properly compared claimant's coal mine employment to known underground conditions, consistent with case law. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). Consequently, we conclude, contrary to employer's contention, that the administrative law judge properly compared claimant's *unrefuted* testimony regarding surface mining conditions with her knowledge of the conditions which prevail in underground coal mine employment, a finding consistent with *Leachman*. Further, we conclude, contrary to employer's assertion, that the administrative law judge sufficiently discussed claimant's coal mine employment. *Leachman*, 855 F.2d at 512; Decision and Order at 19. Therefore, we affirm the administrative law judge's finding that the conditions in claimant's surface coal mine employment were substantially similar to those in underground coal mine employment. Consequently, we affirm the administrative law judge's finding that the Section 411(c)(4) presumption of total disability due to pneumoconiosis was properly invoked, based on her finding that

---

judge further noted that claimant drove a rock truck for four or five years at the end of his career. Decision and Order at 3; Director's Exhibit 27 at 5-6; Hr. Tr. at 21.

claimant established the requisite number of years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).

Section 411(c)(4) Rebuttal

Employer next argues that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption by showing that claimant did not have pneumoconiosis or that his disabling respiratory impairment did not arise out of coal mine employment.[7] Specifically employer argues:

> [it] does not have to de-establish (sic) the existence of legal pneumoconiosis in order for its physicians' opinions to be considered on causation of impairment. In other words, it should not be impossible for [claimant] to be found to have a form of legal pneumoconiosis with respiratory impairment, a separate prong of the entitlement analysis, that is wholly unrelated to legal pneumoconiosis.

Employer's Brief at 20.

This contention is incomprehensible. Nevertheless, we will assume it is intended to challenge the administrative law judge's finding that employer has not established that claimant did not have legal pneumoconiosis or that his disabling respiratory impairment did not arise out of coal mine employment.

In finding that employer did not rebut the Section 411(c)(4) presumption, the administrative law judge stated that "[e]mployer's evidence was not sufficient to rule out coal mine dust as a causal or contributing factor in [claimant's] disease" and employer "failed to show that coal mine dust did not contribute in any way" to claimant's disabling respiratory impairment. Decision and Order at 24.

Reviewing the evidence, the administrative law judge properly accorded little weight to the opinion of Dr. Broudy, who did not believe that claimant's pulmonary disease was caused by, related to, or aggravated by, coal mine dust, because Dr. Broudy had not considered the possibility of whether claimant's pulmonary disease was caused by a mixed etiology, namely both coal mine employment and smoking. *See Tennessee*

[7] Prior to finding claimant entitled to the Section 411(c)(4) presumption, the administrative law judge found that the x-ray and medical opinion evidence failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), but that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Consol. Coal Co. v. Crisp, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Regarding Dr. Vuskovich's opinion, that claimant's respiratory impairment was "mainly due to alpha-1 antitrypsin deficiency, which exacerbated his "chronic, acute [sic] lung disease and emphysema," the administrative law judge properly found the opinion undocumented and unreasoned because the blood testing done on claimant was unreliable.[8] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1986)(en banc). The administrative law judge therefore permissibly concluded that Dr. Vuskovich's opinion did not disprove the existence of legal pneumoconiosis because it was speculative. *See Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Consequently, the administrative law judge reasonably found that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. Similarly, the administrative law judge properly found that employer did not rebut the Section 411(c)(4) presumption, that claimant's disabling respiratory impairment was due to coal mine employment, because the opinions of Drs. Broudy and Vuskovich were unreasoned for the foregoing reasons. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, the administrative law judge reasonably found that employer failed to rebut the Section 411(c)(4) presumption by showing that claimant's disabling respiratory impairment did not arise out of coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge therefore properly found that employer failed to rebut the Section 411(c)(4) presumption by either of the methods provided. 30 U.S.C. §921(c)(4).

---

[8] Specifically, the administrative law judge found that Dr. Vuskovich opined that,

> even though [claimant's] blood levels were normal, the fact his blood test showed he had an MZ allele meant a significant amount of the alpha-1 antitrypsin in his blood was defective. He acknowledged, though, that the testing performed on [claimant] only measured alpha-1 antitrypsin levels and did not measure the functionality of the enzyme. Without the benefit of any objective, reliable testing to determine whether [claimant's] alpha-1 antitrypsin functioned properly, Dr. Vuskovich could only speculate as to the level of deficiency [claimant] may have suffered. While I do not find his reasoning undermined by Dr. R. Alam's statement that [claimant's] blood levels were within normal range, as he adequately explained why a person could have a normal blood level but still have a functional deficiency, he did not have a sufficient data to properly apply that conclusion in this particular case. I thus accord Dr. Vuskovich's opinion little weight.

Decision and Order at 18.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge