BRB No. 12-0602 BLA

RAYMOND E. DOTSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY CARBON CORPORATION	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	DATE ISSUED: 06/25/2013
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-5394) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (Supp. 2011) (the Act). This case involves a miner's claim filed on March 3, 2008. Director's Exhibit 2.

In his Decision and Order issued on July 26, 2012, the administrative law judge credited claimant with twenty-five years of underground coal mine employment,[1] and found that the evidence established that claimant is totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3]

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).

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[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this cases arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] 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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[3] Employer does not challenge the administrative law judge's findings of twenty-five years of underground coal mine employment, that claimant has a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2), and that he invoked the Section 411(c)(4) presumption. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 19-29.

To rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, employer must disprove the existence of both clinical and legal pneumoconiosis.[4] *See* 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, based on negative x-ray and biopsy evidence.[5] Decision and Order at 21-28.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Dahhan and Fino, submitted by employer.[6] Dr. Dahhan examined claimant and opined that he does not

[4] Clinical pneumoconiosis is defined as "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). 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[5] Employer argues that the administrative law judge erred in discrediting Dr. Agarwal's medical opinion that claimant does not have clinical pneumoconiosis. Employer's Brief at 14. Given the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis, any such error, if established, would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985). Therefore, we need not address employer's argument.

[6] The administrative law judge also considered the medical opinions of Drs. Agarwal, Baker, and Mettu, that claimant has legal pneumoconiosis. Director's Exhibit

have legal pneumoconiosis, but suffers from a severe obstructive ventilatory impairment that is due solely to smoking. Employer's Exhibit 1. Dr. Fino examined claimant and reviewed additional medical evidence; he diagnosed claimant with "[s]evere chronic obstructive pulmonary disease (COPD) with emphysema, and chronic obstructive bronchitis." Employer's Exhibits 2, 3. Dr. Fino concluded that he "[could] not exclude a coal dust-related etiology along with smoking contributing to" claimant's impairment, and therefore, could not "exclude a component of legal pneumoconiosis . . . as contributing to [claimant's] disability. . . ."[7] Employer's Exhibits 1 at 9; 2 at 6.

The administrative law judge found that Dr. Dahhan's reasoning for excluding coal mine dust exposure as a cause of claimant's obstructive impairment was not persuasive, and that Dr. Fino's opinion did not support employer's rebuttal burden. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.[8] Decision and Order at 28.

Employer argues that the administrative law judge erred in discrediting Dr. Dahhan's opinion. Employer's Brief at 18-19. This argument lacks merit. The administrative law judge noted that Dr. Dahhan relied, in part, on his observation that claimant "has not had any exposure to coal dust since 1991, a duration of absence sufficient to cause cessation of any industrial bronchitis that he might have had." Employer's Exhibit 1 at 3. The administrative law judge permissibly discredited Dr. Dahhan's explanation, as contrary to the recognition of pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488, 25 BLR 2-135, 2-151 (6th Cir. 2012).

9; Director's Exhibit 10 at 26-29; Claimant's Exhibits 3, 4. The administrative law judge found the opinions of Drs. Agarwal and Baker, submitted by claimant, to be well-reasoned and documented and he afforded them "full probative weight." Decision and Order at 26, 28. He discounted Dr. Mettu's opinion, submitted by the Department of Labor as part of claimant's complete pulmonary evaluation, because he found that it was based on "an inflated coal mine employment history." Decision and Order at 25.

[7] In reaching his conclusion, Dr. Fino noted that claimant's "[s]moking histories . . . indicate only one half the number of pack years compared to the number of years [claimant was] employed in the mines." Employer's Exhibit 2 at 6.

[8] The administrative law judge further found that the medical opinions of Drs. Agarwal and Baker established the existence of legal pneumoconiosis. Decision and Order at 28.

In addition, the administrative law judge noted that Dr. Dahhan relied, in part, on the responsiveness of claimant's impairment to bronchodilator medication, to exclude coal mine dust exposure as a cause of claimant's COPD. Employer's Exhibit 1 at 3. The administrative law judge found, as was within his discretion, that Dr. Dahhan did not adequately explain why the irreversible portion of claimant's pulmonary impairment was unrelated to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling COPD. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Further, Dr. Dahhan eliminated coal dust exposure as a source of claimant's COPD, in part, because he found that the loss in claimant's FEV1 was too large to "be accounted for" by coal dust exposure. Employer's Exhibit 1 at 3. The administrative law judge permissibly found this aspect of Dr. Dahhan's opinion to be unpersuasive, noting that, under the definition of legal pneumoconiosis, "[c]laimant need not show that the entirety of his loss of FEV1 was caused by coal mine dust exposure." Decision and Order at 27; *see* 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). We therefore conclude that, contrary to employer's contention, the administrative law judge provided valid reasons for discounting Dr. Dahhan's opinion that claimant's disabling COPD is unrelated to his years of coal mine dust exposure.[9]

Employer also argues that the administrative law judge erred in finding that Dr. Fino's opinion did not support employer's rebuttal burden, noting that Dr. Fino "never made a finding that legal pneumoconiosis was present." Employer's Brief at 19. Contrary to employer's argument, "[r]ebuttal requires an affirmative showing . . . that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work." *Morrison*, 644 F.3d at 480, 25 BLR at 2-9 (internal quotation marks and citations omitted). Because Dr. Fino stated that he could not exclude legal pneumoconiosis, the administrative law judge properly concluded that his opinion did not support employer's burden to affirmatively show that claimant does not have pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; Decision and Order at 28.

Finally, employer argues that the administrative law judge erred in finding that employer failed to rebut the presumption of legal pneumoconiosis because, according to employer, the negative biopsy evidence for clinical pneumoconiosis "proves coal dust is not present in any significant amount in the [c]laimant's lungs [and that] therefore it

[9] Thus, we need not address employer's other arguments regarding the weight that the administrative law judge accorded Dr. Dahhan's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

couldn't significantly contribute to or aggravate his smoking related breathing disorder." Employer's Brief at 19. This argument lacks merit, because the "regulations make clear that the absence of clinical pneumoconiosis cannot be used to rule out legal pneumoconiosis." *Westmoreland Coal Co. v. Cochran*, F.3d , 2013 WL 2418396 at *5 (4th Cir. 2013) (Traxler, C.J., dissenting); *see also* 20 C.F.R. §718.106(c) ("A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis."). Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis.

The administrative law judge also found that employer failed to establish 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); Decision and Order at 29. In so finding, the administrative law judge determined that the same reasons for which he discredited Dr. Dahhan's opinion that claimant does not have legal pneumoconiosis also undermined Dr. Dahhan's opinion that claimant's disability is unrelated to coal mine employment.[10] Decision and Order at 29 ("Dr. Dahhan agreed that [c]laimant [is] totally disabled, but believed his disability [is] due . . . entirely to smoking for reasons I have already discredited.").

Employer contends that the administrative law judge failed to conduct a proper inquiry into whether claimant's disability is due to pneumoconiosis, or provide a sufficient rationale for his conclusion. Employer's Brief at 20-21. We disagree. As explained above, the administrative law judge reasonably discounted Dr. Dahhan's opinion excluding coal mine dust exposure as a cause of claimant's severe obstructive impairment. It follows that the administrative law judge also reasonably discounted, for the same reasons, Dr. Dahhan's resulting conclusion that claimant's total respiratory disability is due solely to smoking. *See Banks*, 690 F.3d at 488, 25 BLR at 2-151; *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 214, 22 BLR 2-162, 2-179 (4th Cir. 2000) (holding that discrediting of a physician's disability causation opinion was proper where "the short-coming identified by the [administrative law judge] with regard to the physician's opinion regarding the existence of pneumoconiosis also undermined the physician's opinion regarding causation"). Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment. Because claimant invoked

[10] As noted earlier, in the other medical opinion submitted by employer, Dr. Fino stated that he could "not exclude a component of legal pneumoconiosis . . . as contributing to [claimant's] disability. . . ." Employer's Exhibit 2 at 6.

the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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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REGINA C. McGRANERY
Administrative Appeals Judge