BRB No. 13-0473 BLA

STEVIE ALLEN BOGGS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAUREL COAL CORPORATION	)	DATE ISSUED: 06/24/2014
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE 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 Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Helen H. Cox (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 Granting Benefits (2011-BLA-05084) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent claim filed on December 9, 2009,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant worked 23.03 years in coal mine employment. Based on the filing date of the subsequent claim, and his determinations that claimant established at least fifteen years of underground coal mine employment and a totally disabling pulmonary impairment, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Therefore, the administrative law judge found that claimant satisfied his burden to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut the amended Section 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in determining the length of claimant's smoking history. Employer contends that the rebuttal provisions of amended Section 411(c)(4) are not applicable to responsible operators, and that the administrative law judge erred in applying the "rule out" standard in considering whether employer's evidence was sufficient to rebut the presumption. Employer further challenges the weight accorded the opinions of its physicians regarding the issues of the existence of pneumoconiosis and total disability due to pneumoconiosis.[3] Claimant has not filed a brief in response to employer's appeal. The Director, Office of Workers' Compensation Programs, filed a limited response, asserting that the administrative law judge applied the proper rebuttal standard.

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[1] Claimant filed an initial claim for benefits on January 27, 1997, which was denied by the district director on April 23, 1997, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until he filed his current subsequent claim. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 impairment. *See* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

I. SMOKING HISTORY

Employer argues that the administrative law judge erred in relying on claimant's testimony to find that he had a twenty pack-year smoking history. Employer asserts that the administrative law judge "ignored conflicting facts," which indicate that claimant smoked for thirty-four pack-years. Employer's Brief in Support of Petition for Review at 7. Employer maintains that the administrative law judge's determination regarding the length of claimant's smoking history does not satisfy the Administrative Procedure Act (APA).[5] *Id*. Employer's arguments are without merit.

Contrary to employer's assertion, the administrative law judge considered all of the relevant evidence, as he specifically outlined the smoking histories obtained by Drs. Rasmussen, Rosenberg and Jarboe, as well as those listed in the treatment records, the interrogatories of February 2010, and claimant's hearing testimony.[6] Decision and Order

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[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

[5] 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[6] The administrative law judge noted that Dr. Rasmussen reported that claimant smoked one pack a day for thirty-four years, between 1975 and September 2009; Dr. Rosenberg reported a history of one-half to three-fourths a pack a day for thirty-four years; Dr. Jarboe reported a history of one pack a day for twenty years. Decision and Order at 4 n 2.; *see* Director's Exhibit 12, Employer's Exhibits 10, 27. The administrative law judge observed that treatment records report varying histories of one pack a day for twenty years, one-half a pack per day for approximately thirty years, and "about" one pack a day as of September 2009. Decision and Order at 4 n.2; *see* Employer's Exhibits 1, 2. The administrative law judge further noted that claimant stated in the February 2010 interrogatories that he smoked for twenty years, and also testified at

at 4 n. 2. Taking into consideration all of the conflicting evidence, the administrative law judge concluded: "[t]he smoking histories of record vary widely, from 10 to 34 pack-years, but generally, [c]laimant admitted to beginning to smoke at age 17 and smoking up to a pack per day for roughly 20 years." Decision and Order at 4. As the credibility of the witnesses and the weight to be accorded the evidence are matters within the sound discretion of the administrative law judge, we affirm the administrative law judge's decision to rely on claimant's hearing testimony in determining the average length and amount of claimant's smoking habit. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-167 (1986). Moreover, as it is supported by substantial evidence in the record, we affirm the administrative law judge's determination that "20 pack years is a fair estimate of [c]laimant's smoking history." Decision and Order at 4; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark*, 12 BLR at 151.

II. REBUTTAL OF THE AMENDED SECTION 411(C)(4) PRESUMPTION

A. Applicability of Rebuttal Provisions

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief in Support of Petition for Review at 8-13. This argument is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Moreover, the Department of Labor (DOL) has promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. *See* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)).

B. Rebuttal Standard

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer either to

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the hearing that he smoked "on and off" for a maximum of twenty years. Decision and Order at 4 n.2; *see* Director's Exhibit 21 at 18; Hearing Transcript at 17-18.

disprove that claimant suffers from both clinical and legal pneumoconiosis,[7] or establish that claimant's disability did not arise out of, or in connection with, coal dust exposure. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The administrative law judge found that employer did not rebut the presumption because it failed to disprove the existence of legal pneumoconiosis and did not rule out coal dust exposure as a causative factor for claimant's disability.

Employer contends that the administrative law judge erred in applying "the rule-out standard" in considering whether it rebutted the amended Section 411(c)(4) presumption. Employer's Brief in Support of Petition for Review at 13. Employer maintains that "the standard of proof required for [rebuttal] can be no greater than that required for the claimant to prove his case where the 15-year presumption does not apply." *Id*. at 14. Employer therefore asserts that it is required to show only that pneumoconiosis was not a "contributing cause" of claimant's respiratory disease and/or disability. *Id*. at 15.

Contrary to employer's assertion, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that, to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that the party opposing entitlement must 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." 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(ii)). The DOL has explained that the "no part" standard recognizes that the courts have interpreted amended Section 411(c)(4) "as requiring the party opposing entitlement to 'rule out' coal mine employment as a cause of the miner's disabling respiratory or pulmonary impairment." 78 Fed. Reg. 59,105 (Sept. 25, 2013); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The

[7] 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 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).

DOL also explicitly chose not to use the "contributing cause" standard set forth in 20 C.F.R. §718.204(c), and stated that the application of a different standard on rebuttal "is warranted by the statutory section's underlying intent and purpose," which "effectively singled out" totally disabled miners who had fifteen years of qualifying coal mine employment "for special treatment." 78 Fed. Reg. 59,106-07 (Sept. 25, 2013). Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

C. Legal Pneumoconiosis

In considering whether employer disproved the existence of legal pneumoconiosis,[8] the administrative law judge noted that "all of the physicians of record agreed that claimant has a disabling obstructive respiratory impairment." Decision and Order at 19. The administrative law judge observed correctly that employer's physicians, Drs. Rosenberg and Jarboe, opined that "[c]laimant's lung impairment presented with five characteristics that were not typical of coal dust-induced lung disease: decreased FEV1/FVC ratio, reduced diffusing capacity without radiographic changes of [coal workers' pneumoconiosis (CWP)], air trapping (emphysema) without radiographic changes of CWP, bullae and cyst formation without [pulmonary massive fibrosis] and a partially bronchoreversible obstructive impairment." *Id*. The administrative law judge concluded that the reasons provided by employer's physicians for ruling out coal dust exposure as a cause of claimant's disabling chronic obstructive pulmonary disease (COPD) were either inconsistent with the science credited in the preamble or otherwise unpersuasive. *Id*.

Employer contends that the administrative law judge erred in relying on the preamble in evaluating the credibility of the medical opinion evidence. Contrary to employer's contention, the preamble to the 2001 amended regulations sets forth how the DOL has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). The Fourth Circuit has specifically held that an administrative law judge may, within his discretion, evaluate medical expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble to these regulations. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, BLR (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012).

[8] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis by a preponderance of the negative x-ray, CT scan, and medical opinion evidence. Decision and Order at 19.

Employer also contends that the administrative law judge "mechanically" cited to the preamble but did not actually explain why the opinions of Drs. Rosenberg and Jarboe were discredited. We disagree. The administrative law judge observed correctly that Dr. Rosenberg eliminated coal dust exposure as a causative factor for claimant's disabling COPD, in part, because claimant had a decreased FEV1/FVC ratio, a pattern he believed was uncharacteristic of a respiratory impairment caused by coal dust exposure. *See* Decision and Order at 19; Employer's Exhibit 13. Dr. Rosenberg specifically cited studies that, in his view, demonstrated that the ratio is reduced when COPD is due to smoking, but preserved when COPD is due to coal mine dust exposure. Employer's Exhibit 13. Contrary to employer's contention, the administrative law judge properly determined that Dr. Rosenberg's view is inconsistent with the position of DOL that "coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio."[9] Decision and Order at 19 *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

The administrative law judge also observed correctly that Drs. Rosenberg and Jarboe each eliminated coal dust exposure as a causative factor for claimant's pulmonary function study results, based on "the supposition that coal dust cannot cause reduced diffusing capacity or emphysematous air trapping if it does not cause radiographic changes of pneumoconiosis." Decision and Order at 20. We affirm the administrative law judge's rational finding that "[t]hese suppositions are also inconsistent with the preamble which states that COPD, in the form of emphysema, can be caused by coal dust and constitutes 'legal pneumoconiosis' even if 'clinical pneumoconiosis' is not appreciable by x-ray." *Id.*, *see* 65 Fed. Reg. 79,939-40 (Dec. 20, 2000); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Additionally, Dr. Jarboe relied on the partial reversibility of claimant's respiratory impairment as a basis to rule out coal dust exposure as a causative factor for claimant's

[9] Dr. Rosenberg criticized the science relied upon by the Department of Labor (DOL) when he stated, "while I agree with the [DOL] that [chronic obstructive pulmonary disease] may be detected by a decrease in the FEV1 and FEV1/FVC ratio, this does not generally apply to patients with legal [coal workers' pneumoconiosis]." Employer's Exhibit 13.

respiratory condition. The administrative law judge, however, observed correctly that "even though there is a reversible component to [c]laimant's impairment, and even if I assume that this component is not coal-dust related, there is still a fixed, disabling, obstructive impairment remaining which *could* have been caused by coal dust exposure." Decision and Order at 20; *see 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 (4th Cir. 2004) (unpub.). Because the administrative law judge permissibly exercised his discretion in determining the weight to accord the opinions of Drs. Rosenberg and Jarboe, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

D. Disability Causation

Employer contends that the case must be remanded because the administrative law judge failed to make a specific finding as to whether employer rebutted the amended Section 411(c)(4) presumption by establishing that claimant's disability did not arise out of, or in connection with, his coal mine employment. Employer's Brief in Support of Petition for Review at 18. We disagree. Although the administrative law judge did not make a specific finding regarding the second method of rebuttal,[10] this error is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."). For the reasons discussed *supra*, to the extent that the administrative law judge rationally explained why he rejected the opinions of employer's physicians, that claimant's legal pneumoconiosis in the form of disabling COPD was not due to coal dust exposure, employer is unable to rebut the presumed fact of disability causation. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 at 441, 21 BLR at 2-274. Thus, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption.

[10] The administrative law judge stated that he would "not make a separate inquiry as to the etiology of [c]laimant's disease, as the legal pneumoconiosis inquiry necessarily subsumes that inquiry." Decision and Order at 20. The administrative law judge, however, confused the issues of disease causation and disability causation. The etiology of claimant's respiratory disability, not his disease, is the relevant issue for establishing the second prong of rebuttal at amended Section 411(c)(4).

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

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