BRB No. 11-0420 BLA

JENNIFER HARDISON (o/b/o the Estate of JACKIE M. COBB) Claimant-Petitioner v. PITTSBURG & MIDWAY COAL MINING Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/29/2012 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

John C. Morton and Keith A. Utley (Morton Law LLC), Henderson, Kentucky, for employer.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order Denying Benefits (08-BLA-5914) of Administrative Law Judge Joseph E. Kane rendered on a miner's claim filed on October 15, 2007, pursuant to 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). Based on employer's stipulation and the miner's testimony, the administrative law judge credited the miner with twenty-two years of coal mine employment, nineteen years of which took place in underground coal mines.[2] The administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or 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, BLR (6th Cir. 2011).

Applying amended Section 411(c)(4),[3] the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to

[1] Claimant is Jennifer Hardison, the miner's daughter, who is pursuing the miner's claim on behalf of his estate. By Order dated March 5, 2010, the administrative law judge designated Ms. Hardison as a party to the claim.

[2] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 8. Accordingly, this case 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).

[3] In an April 7, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case, and set a schedule for the parties to submit additional evidence and argument. Claimant, employer, and the Director, Office of Workers' Compensation Programs, each submitted briefs in response to the administrative law judge's Order. No party submitted additional evidence.

20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. Turning to rebuttal, the administrative law judge found that employer failed to establish that the miner did not have pneumoconiosis,[4] but determined that employer rebutted the presumption by establishing that the miner's total disability was unrelated to coal mine dust exposure. Decision and Order at 28. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer rebutted the Section 411(c)(4) presumption. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant that the administrative law judge did not adequately consider whether Dr. Selby's opinion was reasoned before he credited it to find rebuttal established. Claimant has filed a reply brief, reiterating her arguments.[5]

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).

[4] Specifically, the administrative law judge found that employer did not disprove the existence of clinical pneumoconiosis, which 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). On that issue, the administrative law judge found that all four x-rays of record were positive for clinical pneumoconiosis, that a biopsy submitted by employer was silent as to the presence or absence of clinical pneumoconiosis, and that a negative CT scan reading submitted by employer was not sufficient to disprove the existence of clinical pneumoconiosis, in light of the positive x-ray evidence. Decision and Order at 21-24.

[5] The administrative law judge's findings of twenty-two years of coal mine employment, that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), and that employer did not rebut the presumption by establishing that the miner did not have pneumoconiosis, are not challenged on appeal. We therefore affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In evaluating whether employer rebutted the amended Section 411(c)(4) presumption by proving that the miner's impairment did not arise out of, or in connection with, coal mine employment,[6] the administrative law judge considered the medical opinions of Drs. Houser, Rasmussen, Simpao, and Selby. Drs. Houser, Rasmussen, and Simpao diagnosed the miner with disabling chronic obstructive pulmonary disease (COPD) and emphysema, due to both smoking and coal mine dust exposure. Director's Exhibit 12; Claimant's Exhibits 1, 3. In contrast, Dr. Selby opined that the miner did not have clinical or legal pneumoconiosis, but was disabled by obstructive lung disease that was due solely to smoking and to the effects of smoking-related lung cancer. Employer's Exhibits 1, 5.

The administrative law judge discounted the opinions of Drs. Houser and Simpao because he found that, although both doctors noted the miner's history of lung cancer, they did not discuss the effect of his lung cancer, or of its treatment, in as much detail as did Drs. Rasmussen and Selby.[7] With respect to Drs. Rasmussen and Selby, the administrative law judge found that both physicians were well-qualified,[8] but determined that Dr. Selby's opinion as to the cause of the miner's COPD was more persuasive, in that it was detailed and well-reasoned. Specifically, the administrative law judge found that Dr. Rasmussen did not address the latent and progressive nature of the miner's lung disease, whereas Dr. Selby explained in detail that the miner's breathing problems arose

[6] In considering rebuttal, the administrative law judge discussed both whether employer disproved the existence of legal pneumoconiosis, and whether it disproved a causal connection between the miner's disabling respiratory impairment and coal mine dust exposure, because he found that "legal pneumoconiosis is relevant to the corollary issue of disability causation . . . ." Decision and Order at 24. Legal pneumoconiosis is defined as "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).

[7] The administrative law judge was referring to a dispute between Drs. Rasmussen and Selby regarding what type of impairment the miner's lung cancer and the treatments for it could produce (obstructive or restrictive), and the extent to which the miner had those types of impairments. Claimant's Exhibit 3; Employer's Exhibits 1, 5.

[8] The administrative law judge found that "Dr. Rasmussen has extensive medical experience in the black lung area and is well-qualified to render an opinion, despite the fact that he is not Board Certified in pulmonary disease. Dr. Selby also has extensive clinical experience with coal miners and is Board Certified in pulmonary disease." Decision and Order at 26.

years after he left coal mining but continued to smoke.[9] Decision and Order at 26. Accordingly, the administrative law judge found that employer established both that "the miner's obstructive lung disease was not significantly related to, or substantially aggravated by[,] coal dust," and that "coal dust did not contribute to the miner's disabling obstructive lung disease." Decision and Order at 26, 28. Based on those findings, the administrative law judge determined that employer rebutted the presumption by establishing that the miner's disability "was not caused in whole or in part by [coal mine] dust exposure." Decision and Order at 29.

Claimant and the Director argue that the administrative law judge did not adequately examine the reasoning underlying Dr. Selby's opinion. Specifically, they contend that the administrative law judge erred in not addressing whether Dr. Selby's reasoning for excluding coal mine dust exposure as a cause of the miner's disabling obstructive impairment was consistent with the regulations. Claimant's Reply at 4; Director's Brief at 2-3. We agree.

The record reflects that Dr. Selby excluded coal mine dust exposure as a cause of the miner's impairment, in part, because the impairment arose after the miner left coal mine employment, when, in Dr. Selby's view, pneumoconiosis "does not stay latent for years and years and then suddenly drop [the miner's FVC value] ten years after exposure or whatever it's been." Employer's Exhibit 5 at 22. As claimant and the Director note, in finding that this aspect of Dr. Selby's reasoning was persuasive, the administrative law judge did not address Dr. Selby's opinion in light of the regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009). Consequently, the Board is unable to determine whether substantial evidence supports the administrative law judge's determination that Dr. Selby's opinion is persuasive, and sufficient to carry employer's burden to rebut the presumption of total disability due to pneumoconiosis. *See Morrison*, 644 F.3d at 479; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, we must vacate the administrative law judge's finding that employer rebutted the presumption, and remand this case to the administrative law judge for further consideration of that issue.

The Director argues further that the administrative law judge did not consider whether other aspects of Dr. Selby's opinion were well-reasoned and supported by accepted medical science, as determined by the Department of Labor in the preamble to the regulations when it revised the definition of legal pneumoconiosis to include

[9] The administrative law judge reiterated that he had found that the miner had a smoking history in excess of 100 pack years. Decision and Order at 26.

obstructive lung diseases arising out of coal mine employment.[10] On remand, the administrative law judge must assess the reasoning of Dr. Selby's opinion in light of the credibility issues raised by the Director. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. Nov. 29, 2007); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Further, in determining whether Dr. Selby's opinion is sufficient to carry employer's rebuttal burden, the administrative law judge should assess the doctor's opinion eliminating coal mine dust exposure as a cause of the miner's impairment, in light of the contrary conclusions of Drs. Houser, Simpao, and Rasmussen, to the extent the administrative law judge finds their opinions to be reasoned and documented. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Additionally, claimant contends that the administrative law judge did not adequately explain why he credited Dr. Selby's opinion that the miner's total disability was unrelated to coal mine employment, when Dr. Selby opined, contrary to the administrative law judge's finding, that the miner did not have clinical pneumoconiosis. Claimant's Brief at 7, 15. The administrative law judge found that it would be "an error" for him to discount Dr. Selby's disability causation opinion even though the doctor did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding, because Dr. Selby stated that his opinion would not change even if the miner had clinical pneumoconiosis. Decision and Order 28, *citing Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(en banc).

Contrary to the administrative law judge's analysis, the Board in *Abshire* reiterated that "an administrative law judge may permissibly accord less weight to an opinion regarding causation where it is based on a faulty underlying premise regarding the presence or absence of pneumoconiosis."[11] *Abshire*, 22 BLR at 1-214 n.15. Because we

[10] The Director highlights portions of Dr. Selby's opinion wherein, he argues, the doctor (1) relied on a negative x-ray reading to eliminate coal mine dust exposure as a cause of the miner's impairment; (2) opined that the miner had "classic emphysema" that stems from smoking, not the "focal" type of emphysema that is caused by coal dust; and (3) emphasized that the miner's smoking was sufficient to cause his lung disease, without explaining why his years of coal mine dust exposure did not also contribute. Director's Brief at 2; Employer's Exhibit 5 at 15, 22-23. The Director argues that Dr. Selby's reasoning is undermined by the Department of Labor's findings as to the prevailing medical science on those issues, as set forth in the preamble to the revised regulations. Director's Brief at 2-3.

[11] The error identified by the Board in *Abshire* was that the administrative law judge did not consider the portion of a doctor's disability causation opinion wherein the

are remanding this case for the administrative law judge to reconsider the reasoning of Dr. Selby's opinion, we instruct the administrative law judge that he has the discretion to accord less weight to a disability causation opinion if he finds that it is based on a faulty underlying premise as to the existence of pneumoconiosis. [12] *See Skukan v. Consol. Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated sub nom., Consol. Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consol. Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Abshire*, 22 BLR at 1-214 n.15; *see also Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

Finally, claimant alleges bias regarding Dr. Selby's opinion, arguing that the physician routinely works for insurance carriers, and rarely writes reports that favor claimants. Claimant's Brief at 6. The identity of the party who hires a medical expert does not, by itself, demonstrate partiality or partisanship on the part of the physician. *See Greene*, 575 F.3d at 637 n.6, 24 BLR at 2-214 n.6; *Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992). Further, claimant points to no specific evidence that Dr. Selby is biased. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991)(en banc). Therefore, we reject claimant's unsupported allegation of bias.

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doctor stated that his opinion would remain the same even if the miner suffered from coal workers' pneumoconiosis, before the administrative law judge discredited that doctor's opinion for failure to diagnose pneumoconiosis. *Abshire v. D&L Coal Co*., 22 BLR 1-202, 1-214-15 (2002)(en banc). Thus, the Board remanded the case for the administrative law judge to consider the entirety of the doctor's opinion, while recognizing that the administrative law judge had the discretion to discredit the doctor's disability causation opinion if he found that it was based on premises contrary to the administrative law judge's findings as to the existence of pneumoconiosis. *Abshire*, 22 BLR at 1-214-15 and n.15.

[12] Claimant further asserts that the administrative law judge did not consider the "learned treatises which the claimant supplied" in support of the opinions of Drs. Houser, Simpao, and Rasmussen that coal mine dust exposure contributed to the miner's impairment. Claimant's Brief at 12; *see* Claimant's Exhibit 6. The administrative law judge, on remand, should consider claimant's assertions and evidence, where relevant to determining whether employer has rebutted the Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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