BRB No. 11-0468 BLA

BRICE BARTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRIDE MINING, INCORPORATED	)	DATE ISSUED: 03/28/2012
	)	
and	)	
	)	
COMMERCE & INDUSTRY INSURANCE COMPANY c/o AIG CLAIMS SERVICES, INCORPORATED	)	
	)	
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-Award of Benefits In An Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order-Award of Benefits In An Initial Claim (2009-BLA-5528) of Administrative Law Judge Larry S. Merck rendered on a claim 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 claimant with at least thirty-one years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. Because claimant had more than fifteen years of qualifying coal mine employment, the claim was filed after January 1, 2005,[1] the claim was pending on March 23, 2010, and the weight of the evidence established total respiratory disability, the administrative law judge found that claimant 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).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption by proving that claimant did not suffer from either clinical or legal pneumoconiosis,[3] or that his total disability was not due to pneumoconiosis. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in analyzing the opinions of Drs. Broudy and Baker and erred, therefore, in finding that employer

[1] The claim for benefits was filed on June 17, 2008. Director's Exhibit 2.

[2] 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 a 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.

[3] 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 is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds, contending that the administrative law judge properly considered the evidence and that the award of benefits should, therefore, be affirmed. 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.[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.[6] 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] Dr. Baker, who is Board-certified in internal medicine and pulmonary disease, and a B reader, examined claimant for the Department of Labor and completed a medical report dated June 2, 2009. Dr. Baker diagnosed coal workers' pneumoconiosis caused by coal dust exposure, and chronic obstructive pulmonary disease (COPD), chronic bronchitis, and hypoxemia caused by both coal dust exposure and smoking. Dr. Baker identified a moderately severe obstructive defect and opined that while the miner's smoking was the "primary cause" of his disabling impairment, his coal dust exposure constituted a "significant" factor in the impairment. Decision and Order at 13, 16-18; Director's Exhibit 2. Dr. Broudy, who is Board-certified in internal medicine and pulmonary disease, and a B reader, examined claimant and rendered a medical report dated November 21, 2008. Dr. Broudy was deposed on April 28, 2010. Dr. Broudy diagnosed a disabling severe chronic obstructive airways disease with a significant reversible component, and coronary artery disease. He opined that claimant does not suffer from clinical or legal pneumoconiosis, and that his impairment is typical of smokers and persons with bronchial asthma. Decision and Order at 18-20; Director's Exhibit 13 at 6-8; Employer's Exhibit 1/1A at 12-13, 17, 222-25, 27-28.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least thirty-one years of underground coal mine employment, and that claimant 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); *see* Employer's Brief at 10.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant'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 Exhibit 4 at 2.

Section 411(c)(4) Rebuttal

Employer contends that the administrative law judge mischaracterized the opinion of Dr. Broudy, who found that claimant does not have clinical pneumoconiosis, when the administrative law judge determined that Dr. Broudy's opinion was based solely on a negative x-ray. *See* Employer's Brief at 12; Decision and Order at 20. According to employer, Dr. Broudy's opinion, that claimant does not have clinical pneumoconiosis, was based on a consideration of all the relevant evidence, and not just x-ray evidence.[7] *See* Employer's Brief at 12.

A review of the record, however, shows that Dr. Broudy specifically testified that a diagnosis of clinical pneumoconiosis would require either x-ray evidence or some type of tissue evidence. When asked why he did not diagnose clinical pneumoconiosis, Dr. Broudy replied:

> A. Well, to diagnose pneumoconiosis - - clinical pneumoconiosis[,] one would need either x-ray evidence or some type of tissue evidence, and neither of those were [sic] present in this individual.
>
> Q. You're basing your opinion of clinical pneumoconiosis based on your review of the x-ray film; is that right?
>
> A. Correct.

Employer's Exhibit 1/1A at 14, 16.

Based on the above testimony, the administrative law judge rationally found that Dr. Broudy's opinion, that claimant does not have clinical pneumoconiosis, was merely a restatement of a negative x-ray. The administrative law judge, therefore, properly found that Dr. Broudy's opinion was insufficient to rebut the Section 411(c)(4) presumption by showing that claimant does not have clinical pneumoconiosis, and that finding is affirmed. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, BLR (6th Cir. 2011); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 355, 23 BLR 2-472, 2-481-82 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 20.

Next, employer argues that Dr. Broudy provided a well-reasoned opinion on the issue of legal pneumoconiosis in this case, which was improperly discredited by the

[7] Employer does not, however, identify the other evidence it alleges Dr. Broudy relied upon. Employer's Brief 11-13.

administrative law judge.[8] Specifically, employer contends that the administrative law judge erred in finding that Dr. Broudy's opinion, that claimant's respiratory impairment was due solely to smoking, was based on views that contradicted "the science credited by the Department of Labor [(DOL)]." Employer's Brief at 16.

The administrative law judge determined that Dr. Broudy's statement, that claimant's emphysema was caused by smoking, rather than coal dust exposure, was "based in part on the assertion that [c]laimant did not have focal emphysema[,] which in his opinion is the only type of emphysema caused by coal dust exposure."[9] Decision and Order at 20; Employer's Exhibit 1/1A at 21. Based on this statement, the administrative

[8] Rebuttal of the presumption at Section 411(c)(4) requires the employer to affirmatively rule out the existence of both clinical and legal pneumoconiosis. 30 U.S.C. §921(c)(4). Because the administrative law judge provided a valid basis for according little weight to Dr. Broudy's opinion on the issue of clinical pneumoconiosis, any error in the administrative law judge's disposition of his opinion on the issue of legal pneumoconiosis, would be harmless. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). However, as employer argues, since the administrative law judge's weighing of Dr. Broudy's opinion affected his subsequent analysis respecting the alternate means of establishing rebuttal, *i.e.*, by establishing that claimant's disabling respiratory impairment was unrelated to his coal dust exposure, we will address employer's remaining arguments.

[9] The administrative law judge referenced the following exchange from Dr. Broudy's deposition:

> Q. [Are] there indications that this individual has emphysema?
>
> A. Well, the airtrapping [sic] suggests that he has emphysema.
> Q. Is emphysema caused by coal dust exposure?
>
> A. Well, emphysema – there'[re] different types of emphysema. But there is a focal dust emphysema which is associated with the development of coal workers' pneumoconiosis, but this is not the type of emphysema that causes hyperexpansion of the lungs with the airtrapping [sic] as one sees in this individual.
>
> Q. What generally is the cause of that type of emphysema?
>
> A. Well, that's usually cigarette smoking.

Decision and Order at 20; Employer's Exhibit 1/1A at 21-22.

law judge found that Dr. Broudy believed that only a single type of emphysema was caused by coal dust exposure and, therefore, accorded little weight to his opinion.

The administrative law judge's determination is consistent with the recognition by the DOL that the medical literature documents a causal connection between coal dust exposure and emphysema, without any specification that this causal effect exists only with respect to certain *types* of emphysema. *See* 65 Fed. Reg. 79,923, 79,938-39, 79,941-42 (Dec. 20, 2000); *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); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-25-26 (7th Cir. 2004); Decision and Order at 20, 25. We, therefore, reject employer's argument that the administrative law judge mischaracterized the testimony of Dr. Broudy on the issue of legal pneumoconiosis, and hold that the administrative law judge reasonably inferred that Dr. Broudy's opinion reflected a belief that focal emphysema was the only type of emphysema related to coal dust exposure. Because the administrative law judge's finding regarding Dr. Broudy's opinion is based on a permissible inference, it is affirmed. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-481-82; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Further, the administrative law judge appropriately recognized that the scientific premise underlying the DOL regulations is that both coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms. Decision and Order at 20; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000) (confirming that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms - namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with the decrease in positive enzymes in the lung); *Obush*, 24 BLR at 1-125-26 (2009). Accordingly, the administrative law judge properly found that Dr. Broudy's contrary reasoning, that dust-induced emphysema and smoke-induced emphysema occur through different mechanisms and, therefore, can be distinguished, is at odds with the position of the DOL regarding the medical science. The administrative law judge, therefore, properly rejected Dr. Broudy's opinion on the issue of legal pneumoconiosis. *See Obush*, 24 BLR at 1-125-26; *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Decision and Order at 20. The administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by showing that claimant does not have legal pneumoconiosis is, therefore, affirmed.

Finally, we reject employer's argument that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by showing that claimant's disability was not due to coal mine employment. Because employer concedes

that Dr. Broudy opined that coal mine dust played no part in claimant's disability,[10] the administrative law judge properly found that Dr. Broudy's opinion failed to establish that claimant's disability was not due to coal mine employment. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-481-82; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Based on the foregoing, we conclude that the administrative law judge permissibly concluded that Dr. Broudy's opinion was insufficient to establish rebuttal of the Section 411(c)(4) presumption. *See Barrett*, 478 F.3d at 355, 23 BLR at 2-481-82. In so doing, the administrative law judge properly evaluated the bases and rationale for Dr. Broudy's opinion, and permissibly assigned the doctor's opinion little probative weight. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F3d. 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *see also Cornett v. Benham Coal Co*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1988); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-9-20 (2004); Decision and Order at 20, 23, 25. We, therefore, affirm the administrative law judge's conclusion that the opinion of Dr. Broudy failed to establish that claimant's total respiratory disability is not due to coal mine employment and, therefore, failed to rebut the Section 411(c)(4) presumption on that basis.

Moreover, in view of the fact that it is employer's burden to establish rebuttal, we reject, as inapposite, employer's argument that "total disability due to pneumoconiosis has not been established" and that the administrative law judge improperly relied on the opinion of Dr. Baker "to find total disability due to pneumoconiosis."[11] Employer's Brief at 19-20; *see* 30 U.S.C. §921(c)(4). As we have rejected employer's assignments of error with respect to the medical evidence supportive of employer's burden on rebuttal of the Section 411(c)(4) presumption, we need not further address employer's remaining arguments with respect to the weighing of the opinion of Dr. Baker. *See* 30 U.S.C. §921(c)(4); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Having successfully invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4),

[10] The administrative law judge stated that "Dr. Broudy opined that within a degree of medical probability and/or certainty the [c]laimant's exposure to coal mine dust had no part whatsoever in the detriment of [c]laimant's lung function." Decision and Order at 20; *see* Employer's Exhibit 1/1A at 28-29.

[11] Employer's argument that Dr. Baker's medical report is inadequate to support a "finding of legal pneumoconiosis" or "to find total disability due to pneumoconiosis," Employer's Brief at 13, 19, is unavailing. The Sixth Circuit has held that "it is not enough to simply show that the medical evidence does not include a well documented opinion of pneumoconiosis." *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 479, 480, BLR at (6th Cir. 2011). To effectively rebut the presumption, the record must contain an affirmative showing the miner does not suffer from pneumoconiosis, or that his disease is not related to coal mine work. *Id*.

claimant need not establish the existence of pneumoconiosis or disability causation. *See* 30 U.S.C. §921(c)(4). Because claimant established invocation of the Section 411(c)(4) presumption, namely that he is totally disabled due to pneumoconiosis, and because substantial evidence supports the administrative law judge's determination that employer did not rebut the presumption at Section 411(c)(4), we affirm the award of benefits. 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 480, BLR at .

Accordingly, the Decision and Order-Award of Benefits In An Initial Claim is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge