BRB No. 12-0329 BLA

FRANK BARKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOST MOUNTAIN COAL COMPANY	)	
	)	
and	)	
	)	
RAG AMERICAN COAL	)	DATE ISSUED: 03/26/2013
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05228) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on November 5, 2007, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] The administrative law judge accepted employer's stipulation that claimant established a total of twenty-five years of coal mine employment. The administrative law judge further found that claimant established that at least fifteen of those years were in a combination of underground coal mine employment and surface coal mining in conditions substantially similar to those of underground mining. The administrative law judge also found the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that, based on the fact that he established at least fifteen years of qualifying coal mine employment and total respiratory disability, claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). Considering the evidence relevant to rebuttal of the Section 411(c)(4) presumption, the administrative law judge found that the presumption was not rebutted because the evidence failed to show that claimant did not have pneumoconiosis or that his totally disabling respiratory impairment did not arise out of, or in connection with, 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 claimant's surface coal mine employment occurred in conditions substantially similar to those of underground mining. Employer argues, therefore, that claimant failed to establish the at least fifteen years of coal mine employment required to invoke the Section 411(c)(4) presumption.[3] Employer also challenges the administrative law judge's

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[1] Claimant's previous three claims were denied for failure to establish the existence of pneumoconiosis or total respiratory disability. The Board affirmed the most recent denial of benefits in *Barker v. Lost Mountain Coal Co.*, BRB No. 06-0295 BLA (Aug. 30, 2006)(unpub.).

[2] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is 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] The administrative law judge's findings, that a totally disabling respiratory impairment was established pursuant to 20 C.F.R. §718.204(b), and that a change in an applicable condition was, therefore, established, are affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

finding that the presumption was not rebutted. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Program, has not filed a substantive response to this appeal.

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 applicable law, they are binding upon this Board and may not be disturbed.[4] 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).

Qualifying Coal Mine Employment

Employer contends that the administrative law judge erred in finding that the conditions of claimant's surface coal mine employment were similar to the conditions in an underground mine because he failed to consider that claimant worked in a closed cab and wore face masks in the course of his surface coal mine employment.

The Section 411(c)(4) presumption benefits surface coal miners whose working conditions are determined to be substantially similar to those in underground mining. *Wagahoff v. Freeman United Coal Mining Co.*, 10 BLR 1-100, 1-101 (1987)(citing *Luker v. Old Ben Coal Co.*, 2 BLR 1-304 (1979)). The burden of proof in establishing the substantial similarity of the conditions is on claimant. *Luker*, 2 BLR at 1-312 (rejecting a burden-shifting rule where the party opposing entitlement would be required to show that the conditions were not substantially similar). Claimant is not, however, required to demonstrate that environmental conditions at the surface mine were substantially similar to those in the *dustiest* area of an underground coal mine. *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4, 1-7 (1987)(citing *Luker*, 2 BLR at 1-310). Rather, claimant must establish that he was exposed to coal mine dust in the course of his surface mine employment. *Luker*, 2 BLR at 1-312; *accord Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). Then, the administrative law judge, as the trier-of-fact, must make a specific finding, with supporting rationale, as to whether the environmental conditions of the miner's surface coal mine employment were substantially similar to those in an underground mine. *Spese v. Peabody Coal Co.*, 19 BLR 1-47, 1-54 (1995); *Luker*, 2 BLR at 1-312; *accord Leachman*, 855 F.2d at 512.

[4] 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.

In this case, the administrative law judge noted that claimant, in describing his surface coal mine employment with employer, explained:

> 'you had to clean your coal… [and] stir it up from the bottom and scoop it up in your bucket and dump it over in your truck. When you did you just had a big cluster of dust that's coming right back in your face.' (Tr. 18).

Decision and Order at 17. The administrative law judge further found:

> because … claimant worked in the pit, near a dragline, he was in dust continuously. (*Id.*). [He] testified that twice a month he would also operate a truck and dump coal or rock, and when he did so he would be exposed to a lot of dust. (Tr. 19). 'It's dusty all the time, because your trucks [are] continuously running that road and making dust.' (Tr. 20). [He] further testified that when coal was shot, it created a big cloud of dust. (*Id.*). Further, while working for the [e]mployer, [he] confirmed he was exposed to a lot of airborne coal dust, to the point that it was under his clothes and up his nose. (Tr. 21). [He] stated, 'you['re] real dirty when you'd get home. It was all over your body. The shower would be plumb black, the water running off of you, when you get in the shower.' (*Id.*). [He] would even cough up dust. (Tr. 22). [He] concluded that while working for … employer, it was always dusty. (*Id.*).

Decision and Order at 17.

The administrative law judge also noted that, although claimant testified that employer's equipment had closed cabs, he testified that they did not prevent coal dust inhalation:

> [T]he dust was so bad they had a big filter on them and that filter would stop up pretty quick from that dust and you'd just – you'd burn up in there. You had to open your doors, because they just had one service man to take care of them and they had too much equipment for him to keep up. (Tr. 39).

Decision and Order at 18.

Additionally, regarding the use of face masks, the administrative law judge noted:

> [c]laimant testified that he also wore ventilator masks but they became clogged with dust within an hour and had to be removed. (*Id.*). He usually did not replace the ventilator mask he removed. (Tr. 40). Prior to working

> for … employer … [he] did not wear ventilator masks, as they were not used in the industry. (*Id*.)

Decision and Order at 18.

Considering the conditions of claimant's surface coal mine employment, the administrative law judge found that claimant's testimony regarding those conditions, where he "indicated that [claimant] was exposed to not just some level of dust, but big clouds of dust, which blanketed his clothes and skin," was credible, and was "consistent with the typical testimony of underground coal miners, who complain of breathing heavy volumes [of] dusty air on a continual basis with only occasional respite." Decision and Order at 18. Consequently the administrative law judge properly found that claimant established that the conditions in his surface coal mine employment were substantially similar to those of underground coal mine employment, *Leachman*, 855 F.3d at 512, and that the length of claimant's underground coal mine employment and comparably similar surface coal mine employment combined to establish at least fifteen years of qualifying coal mine employment. *See* 30 U.S.C. §921(c)(4).

Because the administrative law judge properly found that claimant established both the requisite fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, he properly found that claimant was entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Section 411(c)(4) Rebuttal

Employer next contends that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 411(c)(4) presumption by showing that claimant did not have legal pneumoconiosis[5] or that his disabling respiratory or pulmonary

[5] Employer notes that Dr. Broudy, the only physician who found that claimant did not have clinical pneumoconiosis, stated that claimant's chest x-ray indicated enlarged lungs consistent with smoking-induced emphysema. Claimant's Exhibit 1-7. Employer does not contend, however, that this evidence, or the x-ray evidence, is sufficient to rebut the Section 411(c)(4) presumption by disproving the existence of clinical pneumoconiosis. The administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of clinical pneumoconiosis is, therefore, affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

Moreover, because employer has not challenged the administrative law judge's finding that it failed to show that claimant did not have clinical pneumoconiosis, we need not consider employer's argument that the administrative law judge erred in finding that

impairment did not arise out of, or in connection with, coal mine employment. Specifically, employer challenges the administrative law judge's consideration of Dr. Broudy's opinion.[6]

Because the miner invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's totally disabling 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 25.

In considering the opinion of Dr. Broudy, the administrative law judge permissibly found that Dr. Broudy's opinion is equivocal based on Dr. Broudy's "use of the phrase 'more likely'" to attribute claimant's disabling respiratory impairment to cigarette smoking, rather than coal mine employment. Consequently, the administrative law judge permissibly concluded that Dr. Broudy's opinion, that claimant's disabling respiratory impairment is due to coal mine employment, is not "adequately reasoned to carry … [e]mployer's burden of proof in establishing Section 411(c)(4) rebuttal." *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); Decision and Order at 25.

The administrative law judge also properly accorded less weight to Dr. Broudy's opinion, concerning the cause of disability, because he found the doctor's statement, that claimant's disabling respiratory impairment is "more likely due to cigarette smoking than coal dust exposure[,] … would seem to imply that [respiratory] impairment caused by

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claimant did not have legal pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

[6] Dr. Broudy examined claimant on July 28, 2008, conducting an x-ray, pulmonary function study, blood gas study, and history. Dr. Broudy found that claimant did not have clinical or legal pneumoconiosis, or a disabling respiratory impairment due to coal mine employment. Director's Exhibit 41.

Drs. Forehand, Chaney and Baker diagnosed the existence of both clinical and legal pneumoconiosis and opined that claimant's totally disabling respiratory impairment was due to coal mine employment. Although employer challenges the administrative law judge's evaluation of these opinions, because claimant is entitled to a presumption that he has pneumoconiosis and that his total disability is due to coal mine employment, and employer's evidence is insufficient to rebut that presumption, we need not consider employer's arguments concerning these opinions favorable to claimant. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).

smoking is distinct from that caused by coal mine dust exposure, or at least occurs at greater incidence." Decision and Order at 25. The administrative law judge permissibly concluded that such a "premise contradicts the Department's finding, that the two causes may be additive to one another and impair the lungs similarly[.]" *Id*; 20 C.F.R. 65 Fed. Reg. 79,920 79,940 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-104 (7th Cir. 2008).

Further, the administrative law judge properly found that Dr. Broudy's opinion, as to the cause of claimant's disabling respiratory impairment, is deficient because the doctor relied, in part, on the fact that claimant's "pulmonary function study results showed improvement after a bronchodilator." Decision and Order at 26. Specifically, the administrative law judge noted that Dr. Broudy opined that reversibility is not a feature of the fixed respiratory impairment that is due to coal mine employment and did not explain "why coal dust did not contribute to that component of the [c]laimant's impairment that was fixed and did not show improvement or return to normal after the administration of bronchodilators." Decision and Order at 26. The administrative law judge, therefore, permissibly found that Dr. Broudy's opinion is unreasoned. *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, 237 (4th Cir. 2004); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); Decision and Order at 26.

Based on the foregoing, therefore, the administrative law judge properly found that employer failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing either that claimant does not have pneumoconiosis, or that claimant's totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment.

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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BETTY JEAN HALL
Administrative Appeals Judge