BRB No. 12-0374 BLA

CARL H. CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 03/27/2013
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Benefits (2011-BLA-05215) of Administrative Law Judge Richard A Morgan, rendered on a subsequent claim filed on June 30, 2009,[1]

[1] Claimant filed an initial claim for benefits on January 7, 1997, which was denied by the district director because the evidence was insufficient to establish any of the

pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act). In a Decision and Order dated March 19, 2012, the administrative law judge credited claimant with at least twenty-nine years of coal mine employment and further found that claimant worked in underground mines for fifteen years or more. The administrative law judge found that the newly submitted evidence failed to prove the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). However, he found that claimant established total disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Because claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] However, applying his findings at 20 C.F.R. §718.202(a), the administrative law judge concluded that employer rebutted the presumption by establishing that claimant does not have pneumoconiosis. Accordingly, benefits were denied.

On appeal, the Director contends that the administrative law judge did not properly consider whether employer satisfied its burden to rebut the amended Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. The Director argues that the administrative law judge did not properly consider whether Dr. Zaldivar provided a reasoned and documented opinion that claimant does not have legal pneumoconiosis. Employer responds, asserting that the Director does not have standing to pursue this appeal. Employer urges affirmance of the administrative law judge's denial of benefits. Claimant has not filed a response brief.[3]

---

elements of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 2.

[2] On March 23, 2010, amendments to the Act, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010). Relevant to this case, the amendments revive 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 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment, a

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.[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).

Initially, we reject employer's assertion that the Director lacks standing to challenge the administrative law judge's denial of benefits. The regulations specifically provide that the Director is a party to all black lung claims, and that the Secretary of Labor may, as appropriate, exercise subrogation rights in any case where benefit payments have been made by the Black Lung Disability Trust Fund.[5] *See* 20 C.F.R. §§725.360(a), 725.602(b); *Boggs v. Falcon Coal Co.*, 17 BLR 1-62 (1992). Moreover, the Board has held that the Director has standing to ensure the proper enforcement and lawful administration of the Black Lung program. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994).

The Director asserts on appeal that the administrative law judge did not apply the correct burden of proof in finding that employer established rebuttal of the amended Section 411(c)(4) presumption. To aid in the disposition of this issue, we will first summarize the administrative law judge's findings.

The administrative law judge initially considered whether claimant demonstrated a change in an applicable condition of entitlement by establishing any one of the requisite elements of entitlement. Decision and Order at 15-26. Pursuant to 20 C.F.R. §718.202(a), the administrative law judge concluded that "claimant has not met his burden of proof in establishing the existence of pneumoconiosis." *Id*. at 23. However, because the administrative law judge found that the newly submitted evidence established

---

totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that claimant invoked the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 17, 26, 28-29.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4.

[5] In the instant case, claimant received interim benefits from the Black Lung Disability Trust Fund following a Proposed Decision and Order Awarding Benefits issued on September 23, 2010. Director's Exhibit 28.

a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), the administrative law judge determined that claimant invoked the amended Section 411(c)(4) presumption and satisfied the requirements of 20 C.F.R. §725.309. *Id*. at 24-31. With respect to rebuttal, the administrative law judge observed that employer was required to establish either that claimant does not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. *Id*. at 28. The administrative law judge also noted, however, that "[t]he revised regulations, 20 C.F.R. §718.204(c)(1), require [that] a claimant establish [that] his pneumoconiosis is a 'substantially contributing cause' of his totally disabling respiratory or pulmonary disability." *Id*. at 29 (footnotes omitted). After outlining circuit court law relevant to 20 C.F.R. §718.204(c), the administrative law judge summarily stated: "[f]or the reasons stated above, the employer established that [c]laimant had neither legal nor clinical coal workers' pneumoconiosis. Therefore, the presumption that [c]laimant's total disability was due to pneumoconiosis has been rebutted." *Id*. at 32.

We agree with the Director that the administrative law judge's rebuttal finding must be vacated. The administrative law judge has conflated his discussion of claimant's burden of proof under 20 C.F.R. §§718.202(a) and 718.204(c), with employer's burden to affirmatively establish either that claimant does not have clinical or legal pneumoconiosis[6] or that claimant's disability did not arise out of coal mine employment. As a result, it is unclear whether the administrative law judge actually gave claimant the benefit of the statutory presumption. Furthermore, although the administrative law judge stated that employer had rebutted the statutory presumption, the administrative law judge

[6] The regulation at 20 C.F.R. §718.201(a) provides:

> "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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of 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. 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).

did not identify the evidence he relied upon to support that finding. Accordingly, we must remand this case to the administrative law judge: first, to place the burden of proof on employer to establish rebuttal; and second, to weigh appropriately all relevant evidence when determining whether employer has successfully rebutted the presumption.

In the interest of judicial economy, we will also address the Director's arguments regarding Dr. Zaldivar's opinion. Dr. Zaldivar examined claimant on March 10, 2010, and diagnosed that claimant has mild resting hypoxemia, severe irreversible airway obstruction, hyperinflation of the lungs, air trapping by lung volumes and severe diffusion impairment. Director's Exhibit 26. He opined that claimant "has severe emphysema which reasonably was caused by his lifelong history of smoking." *Id*. He indicated that claimant also suffers from bronchospasms, which are a "complication of both asthma and smoking due to chronic inflammation of the lungs." *Id*. In a deposition taken on October 12, 2011, Dr. Zaldivar testified that claimant does not suffer from clinical or legal pneumoconiosis. Employer's Exhibit 3. The administrative law judge found that Dr. Zaldivar's opinion is well-reasoned and documented. Decision and Order at 23.

The Director contends that the administrative law judge erred in failing to consider that Dr. Zaldivar provided flawed bases for his opinion that claimant does not have legal pneumoconiosis. The Director argues that the administrative law judge should reconsider Dr. Zaldivar's opinion in its entirety, prior to relying on it as reasoned and documented and sufficient to establish rebuttal of the amended Section 411(c)(4) presumption. We agree.

Dr. Zaldivar acknowledged that claimant's coal dust exposure was "sufficient to have caused a totally disabling respiratory impairment in a susceptible individual." Employer's Exhibit 3 at 36. However, Dr. Zaldivar excluded coal dust exposure as a contributing or aggravating factor in claimant's respiratory or pulmonary impairment, and explained:

> Even just looking at the smoking history in itself and seeing the consequences of what smoking has done to him, not only his lungs but his legs and his vascular system, that in itself means that he is very susceptible to smoking, the effect of smoking, that really explains his case. Then when we go back to the history showing that, yes, he was a coal miner, but his exposure to dust by history anyway doesn't appear to be as severe as one would expect to find on someone else. He was using the mask. His exposure was blowing, you know, the motors off . . . with air. *He was not working inside the mines. He was not working where coal was being mined or there was silica or anything else.* And then the chest x-ray showing nothing but destruction of lung tissue, which is the same thing the breathing

> tests show, all of these are very much compatible with the problems related to smoking. Really there is no room for coal mining or any other occupation to have caused any other damage. So in my opinion[,] the problem he has is exclusively due to smoking.

Id. at 31-32 (emphasis added).[7] Dr. Zaldivar testified that, even if claimant's coal dust exposure was "tremendous," it still does not indicate that the coal dust particles that claimant was exposed to "were small enough to be inhaled." *Id*. at 34. He explained that "[y]ou don't see the small particles of coal dust that are the ones that get deep into your lungs and they are the ones that cause the damage. The ones that you do see are too large to get into the lungs to cause damage." *Id*. at 34. In discussing claimant's objective testing and symptoms, Dr. Zaldivar opined that the asthma-related bronchospasms are "never a manifestation of coal mining." *Id*. He further stated that claimant's x-ray and pulmonary function testing revealed hyperinflation, meaning that "lung markings are gone." *Id*. at 33. He testified that this pattern is not found in coal workers' pneumoconiosis, where "there is a reaction to dust in the lungs," and is "compatible with emphysema from smoking." *Id*. at 33-34.

The Director maintains that Dr. Zaldivar did not take into consideration that claimant "spent at least some time in underground mining." Director's Brief at 6, *citing* Director's Exhibit 1 at 46. The Director further asserts that there is nothing in the record to support Dr. Zaldivar's "belief that [c]laimant was not exposed to dust 'particles . . . small enough to be inhaled' or the proposition that only small particles cause damage." Director's Brief at 6, *quoting* Employer's Exhibit 3 at 35. The Director notes that there is "nothing in the [Act] or the implementing regulations that makes the size of the dust particles significant in determining disease or disability causation – even if it could be assumed that [Dr. Zaldivar] had a correct understanding concerning [c]laimant's coal dust exposure." Director's Brief at 6.

On remand, we instruct the administrative law judge to address whether Dr. Zaldivar had an accurate understanding of the nature of claimant's coal dust exposure, particularly in light of the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment, and to consider the underlying rationales Dr. Zaldivar provided for his opinion that claimant does not have legal pneumoconiosis. The administrative law judge should specifically consider whether Dr. Zaldivar has adequately explained why claimant's twenty-nine years of coal dust

[7] Dr. Zaldivar indicated that claimant informed him that "his exposure to sand or dust was by blowing it with air, air hoses, blowing it from the equipment that he was working on. He was working outside the shop he said. He said that he wore a respirator doing those jobs." Employer's Exhibit 3 at 17-18.

exposure did not have a material adverse effect on claimant's disabling respiratory condition, even if he believes that claimant's "smoking habit itself explains all of his problems." Employer's Exhibit 3 at 25-26; *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000). The administrative law judge should further determine whether Dr. Zaldivar's opinion is sufficient to affirmatively prove that claimant does not have pneumoconiosis or that his disability is not related to his twenty-nine years of coal mine employment. *Id*.

In summary, on remand the administrative law judge must consider whether employer has met its burden of establishing rebuttal of the amended Section 411(c)(4) presumption by affirmatively proving that claimant does not have clinical or legal pneumoconiosis or that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge should determine the weight to accord the medical opinion evidence in light of the physicians' qualifications and explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions.[8] *See 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). In reconsidering whether employer has rebutted the amended Section 411(c)(4) presumption on remand, the administrative law judge must set forth his findings in detail, including the underlying

[8] Contrary to employer's argument, the administrative law judge did not err in rejecting Dr. Rosenberg's opinion relevant to the existence of legal pneumoconiosis. The administrative law judge noted correctly that Dr. Rosenberg cited claimant's reduced FEV1/FVC ratio as a basis for excluding coal dust exposure as a cause of claimant's disabling chronic obstructive pulmonary disease. Decision and Order at 23; Employer's Exhibits 1, 4. The administrative law judge rationally found that Dr. Rosenberg's reasoning was inconsistent with "the preamble to the Regulations, which recognize[s] that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio." Decision and Order at 23 (internal quotations omitted); *see* 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000). We therefore affirm the administrative law judge's decision to assign Dr. Rosenberg's opinion little weight. *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).

rationale, in accordance with the Administrative Procedure Act.[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[9] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

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.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge