BRB No. 12-0380 BLA

WALTER A. DELP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAIN SPRINGS COAL COMPANY	)	
	)	DATE ISSUED: 03/27/2013
and	)	
	)	
OLD REPUBLIC 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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Richard A. Seid (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:

Employer/carrier (employer) appeals the Decision and Order (10-BLA-5859) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on November 3, 2009.

Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Congress reinstated the presumption of Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 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). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge credited claimant with eighteen and one-half years of underground coal mine employment,[1] and found that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting that the Board reject employer's contentions that the administrative law judge applied an improper rebuttal standard, and erred in weighing employer's medical opinions in light of the scientific views endorsed by the Department of Labor (DOL) in the preamble to the revised regulations. In a reply brief, employer reiterates its previous contentions.[2]

[1] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeal for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to

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).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge found that employer failed to establish rebuttal by a preponderance of the evidence under either method. Decision and Order at 11-15.

In evaluating whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, the administrative law judge considered the opinions of Drs. Renn and Rosenberg. Dr. Renn opined that claimant's obstructive pulmonary impairment is due to asthma, Employer's Exhibits 1, 9, while Dr. Rosenberg attributed claimant's obstructive pulmonary impairment to asthma and smoking. Employer's Exhibits 2, 10. Drs. Renn and Rosenberg each opined that claimant's obstructive pulmonary impairment is not due to his coal mine dust exposure. Employer's Exhibits 1, 2, 9, 10.

The administrative law judge discounted the opinions of Drs. Renn and Rosenberg because they failed to adequately explain how they eliminated claimant's eighteen and one-half years of coal mine dust exposure as a contributor to claimant's disabling obstructive impairment. Decision and Order at 12-13. The administrative law judge also discounted the opinions of Drs. Renn and Rosenberg because he found that they were each premised on assumptions that were contrary to the scientific views endorsed by the DOL in the preamble to the revised regulations. *Id.* The administrative law judge, therefore, found that employer failed to prove that claimant's pulmonary impairment "did not arise out of, or in connection with," coal mine employment. *Id.* at 13.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Renn and Rosenberg. Employer's contention has no merit. The administrative law judge noted that both Drs. Renn and Rosenberg relied, in part, on the

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pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

partial reversibility of claimant's impairment after bronchodilator administration, to exclude coal mine dust exposure as a cause of claimant's obstructive impairment. Decision and Order at 12-13. The administrative law judge found, as was within his discretion, that neither Dr. Renn nor Dr. Rosenberg adequately explained why the irreversible portion of claimant's pulmonary impairment[3] was not due, in part, to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling obstructive impairment. *See* 20 C.F.R. §718.201(a)(2); *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); Decision and Order at 12-13.

The administrative law judge also determined that the opinions of Drs. Renn and Rosenberg, that claimant's disabling obstructive impairment is unrelated to coal mine dust exposure, are inconsistent with scientific studies approved by the DOL in the preamble to the amended regulations. Drs. Renn and Rosenberg each eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to the his FVC, a characteristic that each explained is characteristic of a cigarette smoke-induced lung disease, but not one caused by coal mine dust. The administrative law judge, however, noted that scientific evidence endorsed by the DOL recognizes 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 12, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). We reject employer's assertion that the administrative law judge erred in referring to the preamble to the amended regulations, when weighing the medical opinions relevant to rebuttal of the Section 411(c)(4) presumption. Contrary to employer's assertion, it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles accepted by DOL, and to consider the preamble to the revised regulations in assessing the credibility of the medical experts' opinions in this case. *See 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); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Consolidation Coal Co. v.*

[3] Dr. Renn acknowledged that claimant has "severe obstructive lung disease both pre- and post-bronchodilator." Employer's Exhibit 9 at 45. Dr. Renn further characterized the degree of reversibility as "small but significant." *Id.* at 53. Dr. Rosenberg acknowledged that claimant's pulmonary function did not improve to a normal level after the administration of a bronchodilator. Employer's Exhibit 10 at 36-37.

Director, OWCP [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004). Consequently, the administrative law judge permissibly discounted the opinions of Drs. Renn and Rosenberg, as to the cause of claimant's disabling obstructive pulmonary impairment, because the doctors relied on an assumption that is contrary to the DOL's position regarding the medical science. *Id.* As the administrative law judge's basis for discrediting the opinions of Drs. Renn and Rosenberg is rational and supported by substantial evidence, it is affirmed.

Contrary to employer's additional argument, the administrative law judge properly required employer, on rebuttal at Section 411(c)(4), to rule out a causal connection between claimant's pulmonary impairment and his coal mine employment, and to satisfy that standard by a "preponderance of the evidence." *See* 30 U.S.C. §921(c)(4); *Plesh v. Director, OWCP*, 71 F.3d 103, 113, 20 BLR 2-30, 2-49 (3d Cir. 1995); Decision and Order at 13. There is no merit to employer's contention that the administrative law judge improperly imposed a heightened burden on employer to prove rebuttal of the Section 411(c)(4) presumption.

Because the administrative law judge permissibly exercised his discretion in weighing the evidence, we affirm his finding that employer failed to prove that claimant'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 Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Employer next argues that the administrative law judge erred in finding that employer did not establish rebuttal by disproving the existence of legal pneumoconiosis.[4] 30 U.S.C. §921(c)(4). We disagree. Contrary to employer's contention, the administrative law judge permissibly concluded that the same reasons he gave for discounting the opinions of Drs. Renn and Rosenberg that claimant's impairment is unrelated to his coal mine employment also undercut their opinions that claimant does not suffer from legal pneumoconiosis. *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order at 24; Employer's Brief at 24-25. Therefore, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal by showing that claimant does not have pneumoconiosis. 30 U.S.C. §921(c)(4). Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled

[4] 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).

due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits.

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