BRB No. 12-0391 BLA

DENVER R. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McCOY CANEY COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 03/28/2013
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Sarah M. Hurley (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:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2008-BLA-5137) of Administrative Law Judge Linda S. Chapman, rendered on a claim filed on January 22, 2007 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge found that, although claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he established invocation of the amended Section 411(c)(4) presumption, 30 US.C. §921(c)(4), by proving that he had more than fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[1] The administrative law judge further found that employer did not rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in finding that the medical opinions submitted by employer were insufficient to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in relying on the preamble to the amended regulations to assess the credibility of the medical opinions. Employer filed a reply brief reiterating its arguments on appeal.[2]

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,

[1] Section 1556 of Public Law No. 111-148, §1556, 124 Stat. 119, 260 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)), reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims, like the present one, filed after January 1, 2005, that were pending on or after March 23, 2010. In order to invoke the amended Section 411(c)(4) presumption, a miner must establish at least fifteen years of employment in an underground mine, or in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory or pulmonary impairment.

[2] We affirm, as unchallenged, the administrative law judge's findings that claimant "established twenty-four years of coal mine employment" with more than fifteen years underground, total disability pursuant to 20 C.F.R. §718.204(b)(2), and that claimant invoked the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 23.

and in accordance with applicable law.[3] 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).

Employer asserts that, in weighing the medical opinions relevant to the existence of legal pneumoconiosis and the cause of claimant's totally disabling respiratory impairment, the administrative law judge erroneously required employer "to rule out the possibility of coal mine dust inhalation as a contributing factor." Employer's Brief at 11. Employer also asserts that the opinions of Drs. Rosenberg and Fino, that claimant does not have pneumoconiosis and that his chronic obstructive pulmonary disease (COPD) was not caused by coal dust exposure, "suppl[y] the affirmative showing necessary to rebut the presumption."[4] *Id.* Employer further contends that the administrative law judge erred in her analysis of the preamble to the amended definition of legal pneumoconiosis, and in relying on the Board's unpublished decision in *M.A.* [*Amburgey*] v. *Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009) (unpub.) in discrediting Dr. Rosenberg's analysis of the disproportionate reduction of the FEV1/FVC ratio. Employer further alleges that "[a]s applied by the administrative law judge, the preamble, which was not subject to notice and comment, has been effectively treated as a legislative rule," violates the Administrative Procedure Act (APA), 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), and the decision of the United States Supreme Court in *Wyeth v. Levine*, 129 S.Ct. 1187, 1201-02 (2009) (The preamble to a proposed regulation is not entitled to deference when there were flaws in the rulemaking process). *Id.* at 15-16. Employer's allegations of error are without merit.

With respect to the appropriate rebuttal standard, the administrative law judge correctly found that, once claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer to affirmatively establish either that claimant does not have pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. *See*

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer cannot establish the absence of clinical pneumoconiosis, as the x-ray evidence is in equipoise, and his finding that the opinions of Drs. Baker, Forehand and Agarwal do not assist employer in establishing rebuttal, as these physicians indicated that claimant's obstructive impairment is related to coal dust exposure. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24; Director's Exhibit 8; Claimant's Exhibits 1, 2.

Morrison v. Tenn. Consol. Coal Co., 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). Regarding the administrative law judge's references to the preamble, the United States Court of Appeals for the Sixth Circuit recently acknowledged that the preamble sets forth the resolution, by the Department of Labor (DOL), of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). The court further held that the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond and, therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12.

In this case, Dr. Rosenberg indicated that he agreed with the DOL's view that COPD "may be diagnosed based on a decrease in the FEV1 and FEV1/FVC ratio." Employer's Exhibit 4 at 3. However, Dr. Rosenberg also stated that "this does not generally apply to patients with legal [coal workers' pneumoconiosis]," whose "obstruction is characterized by a preservation of the FEV1/FVC ratio" while the ratio is decreased in "smoking-related COPD." *Id*. Dr. Rosenberg further noted that claimant's FEV1 is "severely reduced with a marked reduction of his FEV1/FVC ratio to around 42 [percent]" and opined that this "pattern . . . is not considered the general physiologic pattern of obstruction developing in relationship to past coal mine dust exposure. Rather, it is classic for a smoking-related form of obstructive disease." Employer's Exhibit 4. at 4. Dr. Rosenberg also opined that claimant's significantly reduced diffusing capacity is diagnostic of a diffuse form of emphysema, related to smoking history and not to coal dust exposure. *Id*. In support of this view, Dr. Rosenberg acknowledged that coal mine dust exposure can cause emphysema, but stated that generally, in relationship to advancing simple pneumoconiosis, the diffusing capacity is preserved, while in smoking-related forms of emphysema, it is reduced. *Id*.; Employer's Exhibit 7.

Contrary to employer's argument, the administrative law judge correctly determined that "Dr. Rosenberg's premise that coal dust exposure causes only a minimal decrease in FEV1/FVC ratio is flawed in that it contradicts legislative fact, as found by the [DOL]." Decision and Order at 26. In the preamble to the amended regulations, the DOL stated:

> Epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, *especially FEV_1 and the ratio of FEV_1/FVC*. Decrements in lung function *associated with exposure to coal mine dust* are

> severe enough to be disabling . . . whether or not pneumoconiosis is also present.

65 Fed. Reg. 79,943 (Dec. 20, 2000) (emphasis added). Similarly, the administrative law judge noted correctly that Dr. Rosenberg's opinion, that claimant's severely reduced diffusing capacity establishes that his emphysema is not related to coal dust exposure, is at odds with the DOL's statement, in the preamble, that sound medical science establishes that emphysema due to coal dust exposure can occur independently of clinical coal workers' pneumoconiosis[5] and that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." 65 Fed. Reg. 79,943 (Dec. 20, 2000). Thus, the administrative law judge rationally found that Dr. Rosenberg's opinion, that claimant's FEV1/FVC ratio and severe reduction in diffusing capacity rule out coal dust exposure as a cause of his COPD/emphysema, is entitled to little weight. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *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).

The administrative law judge also permissibly determined that Dr. Rosenberg's reliance upon the significant reversibility in claimant's obstructive impairment diminished the credibility of his opinion, as he did not adequately explain why coal dust exposure could not be a contributing cause of the irreversible component of claimant's disabling impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 27. Thus, the administrative law judge acted within her discretion in concluding that Dr. Rosenberg's opinion regarding the cause of claimant's disabling obstructive impairment was insufficient to affirmatively establish the absence of legal pneumoconiosis or that claimant's impairment did not arise out of, or in connection with, his coal mine employment.[6] *See Morrison*, 644 F.3d at 479-80, 25 BLR

[5] 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 to that deposition caused by dust exposure in 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." 20 C.F.R. §718.201(a)(2).

[6] We reject employer's assertion that the administrative law judge improperly relied on the Board's unpublished decision in *M.A.* [*Amburgey*] *v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009) (unpub.), as support for his credibility determination. The administrative law judge properly evaluated the physicians' opinions based on the facts in this case and permissibly cited to *Amburgey* in support of her findings. *See Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 929 (6th

at 2-8-9; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 27.

We also reject employer's argument that the administrative law judge did not properly weigh Dr. Fino's opinion. Dr. Fino acknowledged that claimant has a disabling impairment, both before and after the administration of bronchodilators, and assumed the presence of legal pneumoconiosis. Employer's Exhibit 5. Dr. Fino indicated that, to assess the contribution to emphysema from coal mine dust inhalation, it is very helpful to estimate the extent of clinical pneumoconiosis, as the severity of any coal dust-induced emphysema correlates directly to the amount of clinical pneumoconiosis. *Id*. Although Dr. Fino agreed that an individual may have legal pneumoconiosis without a positive x-ray, he concluded, based on Dr. Wiot's 0/0 x-ray interpretations, that claimant did not have enough dust retention to identify coal dust exposure as a clinically significant cause of his disability. *Id*. Based on his interpretation of relevant medical literature, Dr. Fino opined that, absent moderate or profuse clinical pneumoconiosis, coal dust inhalation does not cause clinically significant obstruction. *Id*.

The administrative law judge acted within her discretion in finding that Dr. Fino's opinion is insufficient to rebut the presumption by affirmatively establishing that claimant does not have legal pneumoconiosis or that claimant's totally disabling COPD did not arise out of, or in connection with, his coal mine employment. *See Morrison*, 644 F.3d 478, 25 BLR 2-1; Decision and Order at 27. The administrative law judge rationally found that Dr. Fino relied on the concept that disability due to coal dust exposure cannot occur in the absence of an x-ray finding of clinical pneumoconiosis, which conflicts with the DOL's view as expressed in the preamble. *See* 65 Fed. Reg. 79,939, 79,971 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; Decision and Order at 28. Moreover, the administrative law judge permissibly determined that the credibility of Dr. Fino's opinion was undermined by his citation to the absence of clinically significant losses in FEV1 in coal miners in general, and his agreement with Dr. Rosenberg's premise that coal dust exposure is not generally reflected by a decrease in the FEV1 /FVC ratio. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Summers*, 272 F.3d at 483 n.7; 22 BLR at 2-281 n.7; Decision and Order at 29. Thus, the administrative law judge acted within her discretion in concluding that Dr. Fino's opinion, that claimant's impairment is due to cigarette smoking, was not well-reasoned, and was insufficient to establish the absence of either legal

---

Cir. 2000) (holding that the court is permitted to consider the persuasive reasoning of unpublished opinions).

pneumoconiosis or a causal connection between claimant's disabling obstructive impairment and his coal mine employment. *See Morrison*, 644 F.3d 478, 25 BLR 2-1.

Consequently, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. *See* 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d 479-80, 25 BLR 2-8-9.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge