BRB No. 12-0439 BLA

WAYNE P. DEEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 03/27/2013
	)	
and	)	
	)	
PITTSTON 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 - Award of Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits in a Subsequent Claim (2009-BLA-5873) of Administrative Law Judge Larry S. Merck, rendered 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 credited claimant with nineteen years of coal mine employment, as stipulated by the parties, and adjudicated this subsequent claim, filed on October 10, 2008, under the regulations at 20 C.F.R. Part 718. Because the administrative law judge determined that the newly submitted evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2), he found that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge determined that, because claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, claimant is entitled to the 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 that presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's decision to credit the opinion of Dr. Forehand, relevant to rebuttal of the amended Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[3]

[1] Claimant filed an initial claim for benefits on September 11, 1986, which was denied by Administrative Law Judge Charles W. Campbell on August 13, 1990 for failure to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant filed a second claim on July 3, 1997, which was denied by the district director on October 24, 1998, because claimant failed to establish any element of entitlement. *Id*. Claimant filed a third claim for benefits on June 20, 2000, which was denied by Administrative Law Judge Thomas F. Phalen, Jr., on January 31, 2006, because claimant failed to establish any element of entitlement. *Id*. Claimant took no further action until he filed his current subsequent claim. Director's Exhibit 3.

[2] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 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, total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not have either clinical or legal pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305). The administrative law judge found that employer failed to disprove that claimant has clinical pneumoconiosis[5] because he credited the positive biopsy evidence and medical opinions of Drs. Jarboe and Rosenberg, who diagnosed the disease. Decision and Order at 50-51. In considering whether claimant has legal pneumoconiosis,[6] the administrative law judge weighed the opinions of Drs. Forehand,

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entitlement pursuant to 20 C.F.R. §725.309, and invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[5] 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).

[6] "'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).

Jarboe and Rosenberg, relevant to the etiology of claimant's disabling chronic obstructive pulmonary disease (COPD). *Id*. at 36-51. The administrative law judge determined that the opinions of Drs. Jarboe and Rosenberg, that claimant's COPD was not due to coal dust exposure, were not well-reasoned and, therefore, assigned their opinions less weight. *Id*. at 41-43, 47-49. Additionally, the administrative law judge found that Dr. Forehand's opinion, that claimant's COPD is due to coal dust exposure, was reasoned and documented and entitled to weight. *Id*. at 37. Accordingly, the administrative law judge concluded that employer failed to rebut the presumption by disproving the existence of legal pneumoconiosis. *Id*. at 51.

With regard to the issue of disability causation, the administrative law judge found that the opinions of Drs. Jarboe and Rosenberg were insufficient to disprove a causal relationship between claimant's coal mine employment and his disability, as neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 55. The administrative law judge also noted that Dr. Forehand provided a reasoned and documented opinion that claimant's disabling COPD was due to coal dust exposure. *Id*. Thus, the administrative law judge concluded that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's disability did not arise out of, or in connection with, coal mine employment. *Id*. at 55-56.

Initially, we affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, as it is not challenged by employer. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Employer's sole contention with respect to rebuttal of the amended Section 411(c)(4) presumption is that the administrative law judge erred in crediting Dr. Forehand's opinion, as reasoned and documented on the issues of the existence of legal pneumoconiosis and disability causation. Although employer alleges error in the weight accorded claimant's evidence, employer does not identify specific errors made by the administrative law judge in according little weight to the opinions of employer's experts, Drs. Jarboe and Rosenberg, that claimant does not have legal pneumoconiosis and that his respiratory disability is not related to coal mine employment. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Because employer bears the burden of proof on rebuttal, the sufficiency of claimant's evidence is not at issue. *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, 2-43-44 (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).

Since employer makes no specific argument as to why the administrative law judge erred in rejecting the opinions of Drs. Jarboe and Rosenberg, we affirm the administrative law judge's credibility determinations with respect to these physicians.

See Sarf, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. We, therefore, affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing either that claimant does not have pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. Decision and Order at 56.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge