BRB No. 13-0306 BLA

GARY K. LOWERY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	DATE ISSUED: 03/12/2014
	)	
Employer-Petitioner	)	
	)	
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 on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Maia S. Fisher (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 appeals the Decision and Order - Awarding Benefits on Remand (2009-BLA-05331) of Administrative Law Judge Lystra A. Harris rendered on a subsequent claim filed on August 23, 2007,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the second time. In the initial decision on this subsequent claim, Administrative Law Judge Janice K. Bullard credited claimant with at least eighteen years of coal mine employment, of which at least fifteen were in underground coal mine employment. She further found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against him. She therefore found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). Further, based on her length of coal mine employment finding and her finding of total respiratory disability, she found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] 30 U.S.C. §921(c)(4) (2012). However, she found that employer rebutted the presumption. Accordingly, she denied benefits.

Pursuant to claimant's appeal, the Board affirmed Judge Bullard's application of the presumption at amended Section 411(c)(4) to this case, affirming, *inter alia*, her findings that claimant had at least fifteen years of qualifying coal mine employment, that the evidence established total respiratory disability pursuant to Section 718.204(b), that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d), and that the presumption at amended Section 411(c)(4) was invoked. *Lowery v. Cannelton Industries, Inc.*, BRB No. 11-0115 BLA (Aug. 3, 2011)(unpub.). The Board, however, vacated Judge Bullard's finding that the presumption was rebutted because Judge Bullard found that claimant did not establish the existence of

[1] Claimant filed a previous claim for benefits on March 24, 1994. Director's Exhibit 1. The district director denied the claim on March 13, 1995, because claimant failed to establish any of the elements of entitlement. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. In pertinent part, amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes at least fifteen years of underground, or substantially similar, coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4) (2012).

pneumoconiosis, instead of requiring employer to rebut the presumption by disproving the existence of pneumoconiosis. *Id*. Consequently, the Board vacated Judge Bullard's decision denying benefits and remanded the case for Judge Bullard to determine whether employer satisfied its burden of establishing rebuttal of the presumption at amended Section 411(c)(4).

On remand, because Judge Bullard was no longer with the Office of Administrative Law Judges, the case was reassigned to Judge Harris (the administrative law judge). The administrative law judge found that employer failed to rebut the presumption at amended Section 411(c)(4) because it failed to disprove the existence of legal pneumoconiosis[3] or to establish that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying the rebuttal provisions of amended Section 411(c)(4) to this claim and erred in applying an improper rebuttal standard. Employer also contends that the administrative law judge erred in her evaluation of the relevant rebuttal evidence. In response, claimant urges affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal, urging that the Board reject employer's argument that the administrative law judge applied an improper standard on rebuttal. Employer has filed separate reply briefs in response to the briefs of claimant and the Director, reiterating its arguments on appeal.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[3] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 12.

[4] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Applicability of the Amended Section 411(c)(4) Rebuttal Provisions

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 7-14, *citing Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976). This argument is, however, identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision.[5] *See Owens*, 25 BLR at 1-4; *see also Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Employer also contends that the administrative law judge applied an improper rebuttal standard by requiring employer to *rule out* coal mine dust exposure as a cause of the miner's disabling respiratory impairment. Employer's Brief at 15-22. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, however, has held that in order to rebut the presumption, by establishing that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment, an employer must "effectively . . . rule out" any contribution to a miner's respiratory impairment by coal mine dust exposure. *See* 30 U.S.C. §921(c)(4); 77 Fed. Reg. 19,456, 19,457 (proposed Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 3. Thus, we reject employer's argument that the administrative law judge applied an incorrect rebuttal standard in this case.

Analysis of the Amended Section 411(c)(4) Rebuttal Evidence

Employer asserts that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis or to establish that claimant's disability was not related to coal mine employment. Specifically, employer asserts that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and

[5] The Department of Labor (DOL) dismissed this same argument in the comments to the regulations implementing amended Section 411(c)(4). 78 Fed. Reg. 59,101, 59,109 (Sept. 25, 2013). The DOL explained that the 1978 revision of the definition of pneumoconiosis, to include any chronic lung disease or impairment arising out of coal mine employment, eliminated the concern regarding the application of the statutory limitations on rebuttal to responsible operators expressed by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976). *Id*.

Crisalli[6] on these issues because their opinions conflict with the medical science adopted by the Department of Labor (DOL) in the preamble to the 2001 revised regulations, linking respiratory impairment to coal mine employment.

The preamble to the 2001 revised regulations sets forth how the DOL has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may discount the opinions of medical experts, that conflict with the medical science adopted by the DOL in the preamble. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012). Thus, the administrative law judge acted properly in discounting the opinions of Drs. Zaldivar and Crisalli on the issues of legal pneumoconiosis and the cause of disability, because of their reliance on the theory, contrary to that adopted by the DOL and set forth in the preamble, that emphysema caused by coal dust exposure is distinguishable from that caused by smoking.[7] *See*

[6] Dr. Zaldivar diagnosed claimant with severe bullous emphysema and life-long asthma. He concluded that claimant's bullous emphysema was caused by smoking, and that claimant's asthma caused lung remodeling and contributed to the emphysema. He stated that claimant's emphysema was not related to his coal mine employment and that coal dust exposure and smoking caused damage to the lungs in different ways. Director's Exhibit 18; Employer's Exhibit 7.

Dr. Crisalli also diagnosed claimant with bullous emphysema and asthma. He opined that claimant's bullous emphysema was due to his smoking, noting that "there is nothing in the literature that associates bullous emphysema to coal dust exposure." Employer's Exhibit 1 at 7. He further noted that claimant's asthma is not related to coal dust exposure as "[a]sthma is not a disease related to coal dust exposure and is not exacerbated by coal dust exposure." Employer's Exhibit 1 at 7; Employer's Exhibit 8 at 43; Employer's Exhibit 10 at 2.

The record also includes the contrary opinion of Dr. Rasmussen, diagnosing claimant with emphysema related to his coal dust exposure. Dr. Rasmussen also opined that both smoking and coal mine employment contributed to claimant's disabling respiratory impairment, noting that coal dust exposure was a significant contributor. Director's Exhibit 14; Employer's Exhibit 6.

[7] Within the comments to the 2001 revised regulations, the DOL noted, in part:

> Smokers who mine have additive risk for developing significant obstruction. The risk of chronic bronchitis clearly increases with increasing dust exposure; again[,] smokers who mine have an additive risk of

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 sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); 65 Fed. Reg. 79,943 (Dec. 20, 2000). Further, the administrative law judge acted properly in discounting the opinions of Drs. Zaldivar and Crisalli because they did not adequately explain why claimant's coal dust exposure could not have contributed to his respiratory disability. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Crisalli.

Employer also asserts that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Crisalli on the issue of whether claimant's disability was related to his coal mine employment because they did not find that claimant had legal pneumoconiosis. Employer's Brief at 22-25. Specifically, employer asserts that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Crisalli for this reason because the existence of legal pneumoconiosis in this case was only presumed, pursuant to amended Section 411(c)(4), and not factually determined. *Id*. This argument has, however, been rejected. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013). Thus, in weighing the opinions of Drs. Zaldivar and Crisalli, the administrative law judge also properly discounted them because they did not

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> developing chronic bronchitis. The message from the Marine study is unequivocal: Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking.
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> . . . [D]ust-induced emphysema and smoke[-]induced emphysema occur through similar mechanisms-namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with a decrease in protective enzymes in the lung.
>
> In addition to the risk of simple CWP and PMF, 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 in some miners, whether or not pneumoconiosis is also present.

65 Fed. Reg. 79,942-43 (Dec. 20, 2000) (internal citations omitted).

find the existence of legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Ogle*, 737 F.3d at 1074.

As the administrative law judge rationally discounted the two opinions supportive of employer's burden of disproving legal pneumoconiosis or of establishing that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment, we affirm her finding that employer has failed to rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4) (2012); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge