BRB No. 13-0334 BLA

TERRY W. SUTTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 03/10/2014
	)	
HARLAN FUEL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
THE HARTFORD	)	
	)	
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 Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

David L. Murphy (Murphy Law Offices, PLLC), Louisville, Kentucky, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5404) of Administrative Law Judge Stephen M. Reilly awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a subsequent claim filed on March 9, 2009.[2]

The administrative law judge credited claimant with eighteen years of underground coal mine employment,[3] and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309;[4] Decision and Order at 10. Consequently, the administrative law judge considered claimant's 2009 claim on the merits. The administrative law judge initially considered the evidence with the burden on claimant, and found that, while claimant established a totally disabling respiratory

[1] 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. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability 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) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[2] Claimant's previous claim, filed on May 9, 2003, was finally denied by the district director because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1 at 7-14.

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

impairment pursuant to 20 C.F.R. §718.204(b)(2), he failed to establish, by a preponderance of the evidence, that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). The administrative law judge alternatively found, however, that because claimant established more than fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory or pulmonary impairment, claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that because the administrative law judge initially found that the preponderance of the evidence does not establish that claimant's total disability is due to pneumoconiosis, the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that the administrative law judge made contradictory findings on the issue of disability causation.[5]

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

On appeal, employer contends that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Employer specifically asserts that the administrative law judge erred in finding that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[6] 30 U.S.C. §921(c)(4). In addressing this

[5] Because employer does not challenge the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment, and thereby established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309(c), and invocation of the Section 411(c)(4) presumption, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence establishes the existence of clinical pneumoconiosis, arising out of coal

method of rebuttal, the administrative law judge considered the opinions of Drs. Dahhan and Broudy.

Dr. Dahhan opined that claimant does not suffer from clinical pneumoconiosis, and that, while claimant "does not retain the respiratory capacity to return to his previous coal mining work or job of comparable physical demand," this impairment is related to smoking, and not to claimant's coal mine dust exposure. Employer's Exhibit 4 at 3-4. Dr. Dahhan further relied on the reversibility of claimant's obstructive impairment with the administration of bronchodilators, as well as the absence of any evidence of a restrictive impairment attributable to pneumoconiosis or coal mine dust exposure, in reaching his opinion. *Id.* at 4; Employer's Exhibit 5 at 13-14. Similarly, Dr. Broudy opined that claimant does not have pneumoconiosis, but instead suffers from a totally disabling respiratory impairment "due to [chronic obstructive pulmonary disease] from cigarette smoking." Employer's Exhibit 6 at 2-3. In support of his opinion, Dr. Broudy noted "the obstructive nature of [claimant's] defect with reversibility after bronchodilation," the presence of hyperinflation of the lung and air trapping, and "the deterioration of [claimant's] lung function long after [the cessation of his] exposure to coal dust . . . ." *Id.* at 3; Employer's Exhibit 7 at 12-13.

The administrative law judge found that neither physician considered whether clinical pneumoconiosis contributed to claimant's totally disabling pulmonary impairment, as neither diagnosed the disease. *See* Decision and Order at 15. The administrative law judge further found that each physician's basis for excluding pneumoconiosis as a cause of claimant's pulmonary impairment, i.e., that claimant's pulmonary impairment was reversible, was not well-reasoned. *Id.* at 15-16. The administrative law judge also discounted the opinions of Drs. Dahhan and Broudy because he found that each was premised on assumptions that were contrary to the revised regulations. The administrative law judge, therefore, found that employer failed to establish that claimant's pulmonary impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 16.

Employer argues that, because the administrative law judge initially found that claimant could not establish, by a preponderance of the evidence, that his totally disabling respiratory impairment is due to pneumoconiosis, the administrative law judge

---

mine employment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 11-12; Employer's Brief at 7. Therefore, we further affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); Decision and Order at 15.

erred in finding that employer did not rule out a connection between claimant's coal mine employment and total disability. Employer's Brief at 10-11. Specifically, employer contends that these findings may not be affirmed, because they are contradictory. We disagree. As the Director correctly notes, there is no contradiction or inconsistency in the administrative law judge's findings. After claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant does not have pneumoconiosis or that his impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *see also Kline v. Director, OWCP*, 877 F.2d 1175, 1178, 12 BLR 2-346, 2-352-53 (3d Cir. 1989); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). Thus, the sufficiency of claimant's evidence to affirmatively establish disability causation, by a preponderance of the evidence, is no longer at issue. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013). Rather, the United States Court of Appeals for the Sixth Circuit has held that "rebuttal [of the Section 411(c)(4) presumption] requires an affirmative showing . . . that the claimant does not suffer from pneumoconiosis, or that the disease is not related to coal mine work." *Morrison*, 644 F.3d at 480 and n.5, 25 BLR at 2-9, 2-12 n.5.

We also reject employer's contention that the administrative law judge erred in his evaluation of the opinions of Drs. Dahhan and Broudy. The administrative law judge rationally discredited the opinions of Drs. Dahhan and Broudy, that claimant's impairment is unrelated to coal mine dust exposure, because the physicians did not diagnose claimant with clinical pneumoconiosis, contrary to the administrative law judge's finding, and therefore did not discuss the contribution of the disease to claimant's total disability. *See Ogle*, 737 F.3d at 1074; *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 15-16. The administrative law judge also permissibly found that the physicians' opinions are not well-reasoned, as neither Dr. Dahhan, nor Dr. Broudy, adequately explained why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); Decision and Order 15-16. Additionally, the administrative law judge permissibly discredited the reasoning of Dr. Broudy, that because claimant's deterioration in lung function began in 2003, long after he stopped working in the mines, it was unlikely that his COPD is related to coal mine dust exposure, because that reasoning is inconsistent with the Department of Labor's recognition that pneumoconiosis "may first become detectable only after the cessation of

coal mine dust exposure." 20 C.F.R. §718.201(c); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488, 25 BLR 2-135, 2-151 (6th Cir. 2012); Decision and Order at 16. Finally, the administrative law judge permissibly found that Dr. Dahhan's opinion, that the lack of a restrictive component in claimant's impairment mitigated against coal mine dust exposure as a causative factor, was contrary to the revised regulations which define pneumoconiosis as including include both restrictive and obstructive impairments arising out of coal mine dust exposure. 20 C.F.R. §718.201(c); *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-211; Decision and Order at 16.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Dahhan and Broudy, the only opinions supportive of a finding that claimant's disabling pulmonary impairment does not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden on rebuttal. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge properly awarded benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge