BRB No. 13-0371 BLA

BENNIE L. WORKMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LIGHTING CONTRACT SERVICES, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 03/24/2014
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Kevin T. Gillen and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5088) of Administrative Law Judge John P. Sellers, III rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 25.66 years in underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) overall. Consequently, the administrative law judge implicitly found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[2] Further, the administrative law judge found that claimant is 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). The administrative law judge also found that employer

[1] Claimant filed his first claim on January 31, 2002. Director's Exhibit 1. It was finally denied by the district director on April 1, 2003 because claimant did not establish total respiratory disability. *Id*. Claimant filed his second claim on June 10, 2004. Director's Exhibit 2. It was finally denied by the district director on April 5, 2005 because claimant did not establish total respiratory disability. *Id*. Claimant filed his third claim on May 9, 2006. Director's Exhibit 3. It was finally denied by the district director on November 9, 2006 because claimant did not establish any of the elements of entitlement. *Id*. Claimant filed this claim on September 17, 2009. Director's Exhibit 5.

[2] The administrative law judge stated, "Though not marked as a contested issue on Form CM-1025, the [c]laimant's present claim is clearly a subsequent claim and[,] therefore, the [c]laimant must establish a material change in condition pursuant to 20 C.F.R. §725.309(c)(d)." Decision and Order at 3 n.3. In considering Dr. Castle's newly submitted deposition testimony, the administrative law judge stated: "Although the threshold issue in a subsequent claim is whether the [c]laimant has established a material change in conditions, such that only evidence developed after the prior denial should be initially considered, here the [c]laimant will be able to show such a change in condition, thereby triggering a *de novo* review of all evidence of record. Accordingly, I do not find it problematic that Dr. Castle considered testing from one of the [c]laimant's prior claims." *Id*. at 18 n.9. Further, after noting that "this is a subsequent claim for benefits, and therefore once a material change in conditions is found, the record as a whole must be examined," *id.* at 27, the administrative law judge considered both the old and the new evidence regarding rebuttal of the presumption at amended Section 411(c)(4).

did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b) overall, and thus that claimant is entitled to invocation of the presumption at amended Section 411(c)(4). Employer also challenges the administrative law judge's finding that it did not establish rebuttal of the presumption at amended Section 411(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more years of qualifying coal mine

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 25.66 years in underground coal mine employment, that the new pulmonary function study evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and that employer proved the absence of clinical pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 2, 3, 6.

employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

Invocation of the Amended Section 411(c)(4) Presumption

Initially, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. 30 U.S.C. §921(c)(4) (2012).

Next, we will address employer's contention that the administrative law judge erred in finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b) overall. Specifically, employer argues that the administrative law judge erred in failing to weigh all the relevant evidence together. Employer asserts that "[the administrative law judge] never considered whether the totality of the contrary probative evidence from all the other categories outweighed the [pulmonary function study] evidence." Employer's Brief at 6.

While entitlement is not precluded if a miner suffers from a combination of disabling conditions, the miner must still establish the presence of a respiratory or pulmonary impairment which, standing alone, prevents him from performing his usual coal mine employment or similar work. 20 C.F.R. §718.204(a), (b)(1). In determining whether total respiratory disability is established, the adjudicator must weigh the evidence in each category at Section 718.204(b)(2)(i)-(iv), and then weigh all the evidence together, like and unlike. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc). In this case, the administrative law judge found that a preponderance of the new pulmonary function study evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). After noting that "evidence that is sufficient to establish total disability in one category must be weighed against all contrary probative evidence, regardless of category," Decision and Order at 23, the administrative law judge considered Dr. Zaldivar's comments questioning the accuracy of the predicted spirometry values used in the new pulmonary function study evidence. The administrative law judge determined that Dr. Zaldivar's comments were not a compelling basis to preclude the use of the pulmonary function study evidence to establish total respiratory disability. The administrative law judge also determined that the non-qualifying arterial blood gas studies did not preclude the use of the pulmonary function studies to establish total respiratory disability "because they measure a different form of impairment." *Id.* Further, the administrative law judge considered the opinions of Drs. Ranavaya, Zaldivar, Klayton, Splan, and Castle.[5] The administrative law judge found that Dr. Ranavaya's opinion was not

[5] Dr. Ranavaya opined that claimant's severe impairment would prevent

persuasive because he found that the validity of the results of the qualifying pulmonary function study that Dr. Ranavaya relied on were questionable. By contrast, the administrative law judge found that Dr. Zaldivar's opinion was entitled to substantial weight because he found that it was reasoned and documented. Further, the administrative law judge found that the opinions of Drs. Klayton, Splan, and Castle would not constitute contrary probative evidence that would preclude the use of the pulmonary function study evidence to establish total respiratory disability. Hence, the administrative law judge found that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b) overall.

Employer is correct that the administrative law judge did not specifically state that, on weighing all the evidence together, he found that claimant established total respiratory disability. However, the administrative law judge weighed the pulmonary function study evidence against the arterial blood gas study evidence and then the medical opinion evidence, and concluded that the new evidence established total respiratory disability. The administrative law judge therefore effectively considered the evidence on total respiratory disability together in finding that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b). *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Employer's argument is, therefore, rejected. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b).

In light of our affirmance of the administrative law judge's finding that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b), we also affirm the administrative law judge's implicit finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). Furthermore, we affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, based on his findings

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him from performing his last or usual coal mine employment. Director's Exhibit 13. Dr. Zaldivar opined that claimant was totally disabled from a pulmonary or respiratory standpoint, and could not perform even "light to heavy" or "medium" work duties due to his restrictive impairment. Employer's Exhibits 1, 9. Dr. Klayton opined that "[claimant's] impairment is severe as he cannot walk more than 30 feet before becoming short of breath. Claimant's Exhibit 6. Dr. Splan opined that claimant has a "moderately severe impairment from a ventilator standpoint." Claimant's Exhibit 7. Dr. Castle opined that claimant suffers from a totally disabling restrictive impairment. Employer's Exhibits 8, 10.

that claimant established 25.66 years in underground coal mine employment and has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), 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. *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)); *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). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 27-39.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. After noting that claimant's presumed legal pneumoconiosis is a form of disease or impairment significantly related to, caused by, or aggravated by coal dust exposure, the administrative law judge stated that "the [e]mployer has the burden of disproving a significant causal connection between the [c]laimant's coal dust exposure and his disabling pulmonary impairment." Decision and Order at 31. The administrative law judge found that the opinions of Drs. Zaldivar and Castle, that claimant does not have legal pneumoconiosis, supported the first method of rebuttal. Employer's Exhibits 1, 2, 8, 9, 10. By contrast, the administrative law judge found that the opinions of Drs. Klayton,[6] Splan, and Ranavaya, that claimant has legal pneumoconiosis, did not support the first method of rebuttal. Director's Exhibit 13; Claimant's Exhibits 6, 7. The administrative law judge concluded that the opinions of Drs. Zaldivar and Castle, that claimant's restrictive impairment was solely related to a traumatic injury, lacked the power to persuade because "such a theory does not account for the [c]laimant's pre-injury respiratory symptoms of shortness of breath, sputum production, and chronic cough in [a] person who never smoked." Decision and Order at 37. In addition, the administrative law judge

[6] The administrative law judge noted that "Dr. Klayton diagnosed legal pneumoconiosis even though he agreed with Drs. Zaldivar and Castle that the [c]laimant's impairment was restrictive rather than obstructive in nature." Decision and Order at 37. The administrative law judge also stated that "Dr. Klayton noted that the [c]laimant[,] on July 19, 2002, experienced a severe trauma when a tree fell on him after it was struck by lightning." *Id.*

found that "neither Dr. Zaldivar nor Dr. Castle provide[d] an adequate alternative explanation for this slow progression of the [c]laimant's impairment following his tree-fall accident." *Id*. Hence, the administrative law judge found that the opinions of Drs. Zaldivar and Castle were not sufficient to satisfy employer's burden to rebut the presumption of legal pneumoconiosis. Further, the administrative law judge gave weight to Dr. Klayton's opinion that claimant's restrictive impairment was related to coal dust exposure "because, among other things, the [c]laimant's symptoms predated his tree-fall injury and because he never smoked." *Id*. at 39. Moreover, the administrative law judge stated, "[n]otwithstanding the infirmities in the opinions of Drs. Ranavaya and Splan,[7] however, I still find that the [e]mployer has failed to rebut the presumptions (sic) of legal pneumoconiosis." *Id*.

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle. Specifically, employer asserts that the administrative law judge substituted his own opinion for that of the medical experts. Employer's assertions have merit.

In considering whether the opinions of Drs. Zaldivar and Castle established rebuttal of the presumption of legal pneumoconiosis, the administrative law judge stated that "central to the opinions of Dr. Zaldivar's and Dr. Castle's view that the [c]laimant's respiratory disability is due entirely to his previous chest trauma is their determination that the [c]laimant presented only a restrictive impairment and no evidence of obstruction." Decision and Order at 33. The administrative law judge noted that Dr. Ranavaya's reports from the prior claims would appear to substantiate the restrictive nature of claimant's impairment. The administrative law judge also noted that Dr. Ranavaya's early reports would appear to contradict the opinions of Drs. Zaldivar and Castle, that claimant's restrictive impairment was solely caused by severe chest trauma from a tree-fall accident in 2002, because these reports made the following two things clear: (1) that claimant did not suddenly incur a totally disabling restrictive impairment after the tree-fall accident; and (2) that claimant's respiratory symptoms predated his tree-fall accident.

[7] The administrative law judge determined that "Dr. Ranavaya offered an equivocal opinion when he stated the [c]laimant's chronic bronchitis was 'most probably related' to coal dust inhalation." Decision and Order at 38. The administrative law judge also gave less weight to Dr. Ranavaya's opinion because the validity of the pulmonary function study that Dr. Ranavaya relied on was questioned by Dr. Fino. Further, the administrative law judge determined that neither Dr. Ranavaya nor Dr. Splan provided any explanation for finding that claimant has an obstructive impairment.

In discussing the chronology of claimant's impairment, the administrative law judge determined that, contrary to Dr. Castle's suggestion, there was no evidence that claimant suddenly became totally disabled from a respiratory impairment around the time of the tree-fall accident. The administrative law judge specifically stated:

> Although the [c]laimant experienced the tree-fall accident in June of 2002, it was, in fact, not until 2009 or later that the [c]laimant's pulmonary function studies produced qualifying values. These tests (sic) results show that, whatever the nature of the [c]laimant's impairment – either obstructive or restrictive, it slowly progressed from no impairment in 2002, to a mild impairment in 2004, to a mild to moderately severe impairment in 2006, and finally to a totally disabling impairment in 2009 and thereafter. This slow progression does not seem at all consistent with a disability resulting from a sudden traumatic injury as posited by Drs. Zaldivar and Castle. If the [c]laimant's totally disabling restrictive impairment was due to an acute traumatic injury in June or July of 2002,[8] one would expect for the [c]laimant's first pulmonary function studies taken after the accident in 2004 to show more than just a mild restrictive impairment.

Decision and Order at 35 (footnote added).

In considering Dr. Zaldivar's opinion, the administrative law judge noted that Dr. Zaldivar indicated that the curvature of claimant's spine, which he attributed to an infection in at least two vertebrae as a result of the tree-fall accident, was a progressive condition. The administrative law judge also noted that, while Dr. Zaldivar testified at deposition that the collapse of the spine progresses with osteoporosis, Dr. Zaldivar did not state that this is what specifically happened to claimant. The administrative law judge further stated:

> Even if he had, however, the theory that the [c]laimant's disabling restrictive impairment was due to severe chest trauma – and then to mild to severe – becomes extremely attenuated. It would have been one thing for the [c]laimant to have gone from no impairment to a disabling impairment in one round of pulmonary function testing after his accident – such a sudden onset of disability would have provided sound support for Dr. Zaldivar's and Dr. Castle's theory of

[8] The administrative law judge noted that "Dr. Castle put the tree-fall accident in June of 2002, whereas Dr. Klayton stated that it occurred on July 19, 2002. (CX 6)." Decision and Order at 32 n.16.

causation. But this is not what happened here.

Decision and Order at 35-36.

Finally, in finding that the opinions of Drs. Zaldivar and Castle, that claimant's disabling restrictive impairment was solely attributable to a traumatic injury, were not convincing, the administrative law judge stated:

> As I noted, such a theory does not account for the [c]laimant's pre-injury respiratory symptoms of shortness of breath, sputum production, and chronic cough in [a] person who never smoked. Furthermore, despite Dr. Castle's suggestion to the contrary, the pulmonary function study evidence does not support that immediately after his accident the [c]laimant became disabled. Rather, the pulmonary function study evidence suggests a progression of the [c]laimant's impairment from mild to severe over a course of many years – a trajectory that I am persuaded is inconsistent with an impairment due to traumatic injury. I also find that neither Dr. Zaldivar nor Dr. Castle provide an adequate alternative explanation for this slow progression of the [c]laimant's impairment following his tree-fall accident.

Decision and Order at 37.

Although it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the interpretation of medical data is for the medical experts. *Marcum v. Director,* OWCP, 11 BLR 1-23 (1987). Thus, to the extent that the administrative law judge discredited the opinions of Drs. Zaldivar and Castle because he found that the slow progression of claimant's restrictive impairment does not seem consistent with a disabling respiratory impairment caused by a traumatic injury, the administrative law judge erroneously substituted his opinion for that of the physicians. *Marcum*, 11 BLR at 1-24. Consequently, we vacate the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. We, therefore, vacate the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption.

On remand, the administrative law judge should initially reconsider whether employer has rebutted the presumed existence of legal pneumoconiosis. Employer bears the burden to disprove the existence of legal pneumoconiosis on rebuttal under amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4) (2012); *Barber*, 43 F.3d at 901, 19 BLR at 2-67. When weighing the medical opinions of Drs. Zaldivar, Castle, Klayton, Splan, and Ranavaya on this issue, the administrative law judge must render a finding on each of the factors relevant to their probative value, including the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In so doing, the administrative law judge must set forth his findings on remand in detail, including the underlying rationale, as required by the Administrative Procedure Act (APA).[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

If the administrative law judge determines that employer has proven that claimant does not have legal pneumoconiosis, employer will have established rebuttal of the amended Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. 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. If the administrative law judge finds that employer has not rebutted the presumed fact that claimant has pneumoconiosis, he must determine whether employer has proven that claimant is not totally disabled due to pneumoconiosis. *Id*. On remand, the administrative law judge must consider the medical opinion evidence relevant to the second method of rebuttal in accordance with the APA, if reached.

[9] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

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