BRB No. 13-0381 BLA

JAMES E. SUTPHIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHARPLES COAL COMPANY	)	DATE ISSUED: 03/19/2014
	)	
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Kathleen H. Kim (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5043) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on August 23, 2010, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant established twenty-seven years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. 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), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[2] Based on the filing date of the claim and his determinations that claimant established fifteen years in underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked 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).[3] The administrative law judge further found that employer failed to rebut that presumption. Accordingly, benefits were awarded.

On appeal, employer challenges the application of amended Section 411(c)(4) to this claim. Employer contends that the administrative law judge erred in finding that claimant established fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the presumption at amended Section 411(c)(4). Employer also contends that the administrative law judge erred in weighing the evidence relevant to rebuttal of the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments with regard to the application of amended Section 411(c)(4) to this case. The Director takes no position on

[1] Claimant's initial claim for benefits, filed on February 7, 2001, was denied by the district director on June 28, 2002, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to that denial until he filed his current subsequent claim.

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

[3] 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 surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

the qualifying coal mine employment issue or the weight accorded the evidence. Employer also filed a reply brief, reiterating its arguments.[4]

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.[5] 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).

I. INVOCATION OF THE PRESUMPTION – COAL MINE EMPLOYMENT

Employer asserts that the administrative law judge's application of amended Section 411(c)(4) to this case was premature, because the Department of Labor (DOL) has yet to promulgate implementing regulations. We reject employer's assertion of error, as the mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Moreover, subsequent to the filing of employer's brief, the DOL issued regulations implementing amended Section 411(c)(4), which became effective on October 25, 2013. 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305). Thus, the administrative law judge properly applied amended Section 411(c)(4).

In order to invoke the amended Section 411(c)(4) presumption, claimant must establish that he worked fifteen years in underground coal mine employment or in surface coal mine employment, in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Because the regulations do not contain a required method for computing the time spent in coal mine employment, the Board has held that it will uphold the administrative law judge's determination if it is based on a

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability, based on the newly submitted evidence, and thus demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 19; Employer's Brief in Support of Petition for Review at 16-17 n. 10.

[5] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16; Director's Exhibits 1, 4.

reasonable method and is supported by substantial evidence in the record considered as a whole. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In considering whether claimant established fifteen years of qualifying coal mine employment, the administrative law judge stated:

> I find that claimant was a coal miner (underground or in conditions substantially similar thereto) . . . for at least twenty-seven years. *He was employed in one or more underground mines for fifteen years or more*. His Social Security records reflect he worked at: Dal-Tex from 1969 until 1972; Beth Energy from 1971 through 1982; Southern Appalachian in 1982; Sharples from 1983 through 1995; and, Hobet in 1996.

Decision and Order at 3-4 (emphasis added), citing Hearing Transcript at 9-12; Director's Exhibits 3-7.

Employer alleges that there is no factual support in the record for the administrative law judge's finding that claimant worked fifteen or more years in *underground* coal mine employment. We disagree.

Claimant indicated on Form CM-911, "Employment History," that he worked for Dal-Tex Coal Company from September 1969 to October 1971 as a "greaser." Director's Exhibit 3. He further reported that he worked for Beth Energy Coal Company from October 1971 to 1982 as an underground miner and then at the preparation plant as an electrician. *Id*. Claimant also noted that he worked for Southern Appalachian Coal from July 1982 to November 1982 as an "electrician underground" and that he next worked for employer (Sharples Coal Company) as an electrician at the preparation plant from 1983-1995. *Id*.

Claimant confirmed at the September 27, 2012 hearing that worked for Dal-Tex for two years in underground coal mine employment in "the deep mines." Hearing Transcript at 9. He stated that worked eleven years with Beth Energy as an underground coal miner and at the preparation plant. *Id*. at 9-10. He also testified that he worked for Southern Appalachian Coal in 1982. *Id*. at 10. With respect to Sharples, claimant described that he worked near the face of the mine for a "number of years," but then worked at the "tipples or preparation plants" for the remainder of his employment with employer. *Id*. at 10-11.

Based on our review of the record and the citations to the record provided by the administrative law judge, we conclude that substantial evidence supports the administrative law judge's finding that claimant established at least fifteen years of

qualifying coal mine employment. *See Muncy*, 25 BLR at 1-27.[6] Employer has offered no contrary evidence in this case to dispute claimant's testimony with regard to his employment. Therefore, as we affirm the administrative law judge's findings that claimant established fifteen years of qualifying coal mine employment, and a totally disabling respiratory or pulmonary impairment, *see* supra n.4, we also affirm the administrative law judge's determination that claimant invoked the amended Section 411(c)(4) presumption.

II. REBUTTAL OF AMENDED SECTION 411(c)(4)

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not suffer from 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* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (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 v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). In this case, the administrative law judge considered the opinions of employer's experts, Drs. Fino and Zaldivar, and found that they were insufficient to disprove the presumed fact that claimant has legal pneumoconiosis[7] or to establish that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 26-29, 36-37.

Initially, employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief in Support of Petition for Review at 10-14, citing *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976). Employer also argues that its due process rights were violated because it did not receive appropriate notice of the rebuttal standard applied at amended Section 411(c)(4). Employer's Brief in Support of Petition

[6] Contrary to employer's contention, the Board's unpublished decision in *Mosko v. Eighty Four Mining Co.*, BRB No. 10-0672 BLA (Nov. 9, 2012) (unpub.) does not overrule the Board's holding in *Muncy v. Elkay Mining Co*., 25 BLR 1-21 (2011), that an aboveground miner employed by an underground coal mine operator is not required to show comparability of environmental conditions in order to qualify for the Section 411(c)(4) presumption. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1057 n.2, BLR (6th Cir. 2013).

[7] Legal pneumoconiosis is defined as "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).

for Review at 14-16. We reject these arguments for the reasons set forth in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). Moreover, as discussed *supra* n.2, 3, 7, the DOL recently promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 20 C.F.R. §718.305(d)(1); *see also* 78 Fed. Reg. 59,101, 59,109 (Sept. 25, 2013); *Usery*, 428 U.S. at 37-38, 3 BLR at 2-58-59. Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Fino and Zaldivar were insufficient to rebut the presumed fact of legal pneumoconiosis. We disagree. In a report dated July 25, 2012, Dr. Fino opined that claimant suffers from disabling chronic obstructive pulmonary disease (COPD)/emphysema caused by smoking. Employer's Exhibit 6. In excluding coal dust exposure as a causative factor for claimant's respiratory condition, Dr. Fino noted that claimant's pulmonary function studies demonstrated partial reversibility of his obstruction upon the use of a bronchodilator and explained that "[r]eversibility is quite important when trying to assess whether the obstruction or emphysema is related to coal mine dust." *Id*. Specifically, Dr. Fino stated that, while not totally reversible, claimant's lung function improving "following bronchodilators . . . would not be consistent with a coal dust related disease." *Id*.

In a report dated August 22, 2011, Dr. Zaldivar concluded that claimant suffers from a totally disabling, irreversible, moderate obstructive impairment. Employer's Exhibit 1. He opined that this impairment was caused by bullous emphysema, which he attributed to claimant's smoking history. *Id*. He explained that "[b]ullous emphysema is not a manifestation of coal workers' pneumoconiosis." *Id*. During his deposition, Dr. Zaldivar also noted that claimant had a reversible component to his obstruction, which he attributed to asthmatic bronchospasms caused by claimant's smoking. Employer's Exhibit 8 at 28-30. He testified that reversibility is not consistent with coal dust-induced lung disease.[8] *Id*. at 29, 58-60.

Contrary to employer's argument, the administrative law judge permissibly discounted the opinions of Drs. Fino and Zaldivar because they did not adequately explain why "post-bronchodilator reversibility" necessarily ruled out coal mine dust exposure as a cause of claimant's COPD "where, as here, the miner continued to

[8] In his deposition, Dr. Zaldivar reiterated that the irreversible component of claimant's obstructive respiratory defect was due to smoking-induced emphysema, as "smoking itself is sufficient to produce this kind of damage regardless of the occupation of the individual." Employer's Exhibit 8 at 38-39.

evidence a fully disabling residual impairment" post-bronchodilator. Decision and Order at 27-28; *see Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004) (holding that an administrative law judge "could rightfully conclude that the presence of the residual fully disabling impairment suggested that coal mine dust was a contributing cause of [the miner's] condition."); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Additionally, Dr. Fino specifically opined that claimant does not have a coal-dust related lung disease because he had normal lung function for the first six years after he left the mines and "if a miner leaves the mines with normal lung function, it is unlikely that he will develop significant obstruction in the following years." Employer's Exhibit 6. The administrative law judge, however, rationally concluded that Dr. Fino's opinion is inconsistent with the position of the DOL that pneumoconiosis is "a latent and progressive disease, which may first become detectable only after the cessation of coal mine dust exposure."[9] Decision and Order at 19 n.26, 27, 28, *quoting* 20 C.F.R. §718.201(c); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Furthermore, the administrative law judge noted correctly that Dr. Zaldivar's "view that coal dust causes focal as opposed to centrilobular/panlobular emphysema, has not been adopted by the [DOL]." Decision and Order at 28 (internal quotations omitted); *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000) (Medical literature "support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms."); *Cochran*, 718 F.3d at 319; *Looney*, 678 F.3d at 305, 25 BLR at 2-115; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Because the administrative law judge acted within his discretion in rendering his credibility determinations with regard to Drs. Fino and Zaldivar, we affirm his finding that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.[10] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336;

[9] Contrary to employer's contention, the administrative law judge considered Dr. Fino's qualifications, but permissibly rejected his opinion, based on the rationales and explanations he provided. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); Decision and Order at 15, 24.

[10] Employer incorrectly asserts that claimant is required to prove the existence of pneumoconiosis even if he is eligible for the amended Section 411(c)(4) presumption. Employer's Brief in Support of Petition for Review at 16-17 n. 10. Once invoked, amended 411(c)(4) provides for a presumption that claimant has pneumoconiosis and that

Akers, 131 F.3d at 441, 21 BLR at 2-274; *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

We also reject employer's contention that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of disability causation. The administrative law judge rationally rejected the opinions of Drs. Fino and Zaldivar, relevant to the etiology of claimant's respiratory disability, because neither physician diagnosed legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 25-26.[11]

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Looney*, 678 F.3d at 305, 25 BLR at 2-115. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to disprove that claimant's respiratory disability did not arise out of, or in connection with, his coal mine employment.[12] *See* 30 U.S.C. §921(c)(4); 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

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his disability is due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[11] Employer argues that *Scott* and *Toler* are inapplicable where legal pneumoconiosis is only presumed, rather than factually found. Contrary to employer's argument, however, the administrative law judge may use the determination that employer has failed to rebut the presumption of legal pneumoconiosis to discredit, on the issue of disability causation, the opinions of physicians who failed to diagnose legal pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013).

[12] Employer argues that the administrative law judge erred in assigning "some weight" to the finding of pneumoconiosis by the West Virginia Occupational Pneumoconiosis Board. Decision and Order at 28; *see* Employer's Brief in Support of Petition for Review at 32-34. Because employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's finding that employer's evidence fails to affirmatively establish that claimant does not have pneumoconiosis, it is not necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir.

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

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

1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).