**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0301 BLA

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| ELDON K. HINTZE | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| PLATEAU MINING CORPORATION | ) | DATE ISSUED: 03/30/2016 |
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| Employer-Petitioner | ) | |
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| 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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman Law Firm, P.C.), Denver, Colorado, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-06121) of Administrative Law Judge Scott R. Morris, rendered on a miner's claim filed on February 8, 2011, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established twenty-five years of coal mine employment, either underground or in conditions substantially similar to underground mining. Based on the length of claimant's coal mine employment, and employer's withdrawal of total disability from the list of contested issues, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge also found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in considering whether it rebutted the presumed existence of legal pneumoconiosis and the presumed fact of total disability causation, as there are different standards of proof applicable to each method of rebuttal. Employer also asserts that, contrary to the administrative law judge's findings, it successfully rebutted the presumption. Further, employer contends that the administrative law judge erred in failing to resolve the conflict in the record concerning the length of claimant's smoking history. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded and contends that employer's argument, that the administrative law judge erred in failing to separately address rebuttal of the presumed existence of legal pneumoconiosis and rebuttal of total disability causation, has no merit. The Director also maintains that the administrative law judge properly applied the presumption and properly considered whether employer's experts submitted reasoned and documented opinions.[2]

[1] Under Section 411(c)(4) of the Act, a miner's total disability or death is presumed to be due to pneumoconiosis if he or she had 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) (2012), as implemented by 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-five years of qualifying coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, invoked the rebuttable presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to rebut the Section 411(c)(4) presumption, employer must affirmatively prove that the miner does not have legal pneumoconiosis[4] and clinical pneumoconiosis,[5] or prove that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting); *see Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345 (10th Cir. 2014).

In evaluating rebuttal, the administrative law judge initially stated:

> I note that the physician's opinions of record have largely combined the discussions of legal pneumoconiosis and the correlation between coal mine

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[3] The record reflects that claimant's coal mine employment was in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] 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).

[5] Clinical pneumoconiosis is defined as:

> [T]hose 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).

> dust exposure and [c]laimant's disability. Therefore, I will consider both topics in this section as I assess whether the physician's opinions meet the [e]mployer's burden of rebutting the presumption that the [c]laimant is totally disabled due to pneumoconiosis.

Decision and Order at 9. The administrative law judge then reviewed the medical opinions of Drs. James, Farney, and Tuteur. Decision and Order at 20-24; Director's Exhibits 11, 55, 62; Employer's Exhibits 1, 6-8. The administrative law judge observed that, although all of the physicians diagnosed chronic obstructive pulmonary disease (COPD), only Dr. James attributed this condition to coal mine dust exposure.[6] Decision and Order at 20-24; Director's Exhibits 11, 55, 62; Employer's Exhibit 1. The administrative law judge gave less weight to the opinions of Drs. Farney and Tuteur on the cause of claimant's totally disabling respiratory impairment because he found that they did not "account for [c]laimant's extensive coal mine employment history and exclude it as a potential etiology of [c]laimant's disease process." Decision and Order at 20; *see* Director's Exhibits 55; Employer's Exhibits 1, 6, 8. The administrative law judge further found that their opinions are inconsistent with the recognition by the Department of Labor (DOL), in the preamble to the revised 2001 regulations, of the consensus among experts that coal dust exposure can cause chronic obstructive lung disease, including emphysema. Decision and Order at 21-22, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 21, 2000). The administrative law judge also gave less weight to Dr. Farney's opinion because he relied on the lack of x-ray evidence to find that coal dust inhalation played no role in claimant's COPD. Decision and Order at 22, *citing* 20 C.F.R. §§718.202(a)(4), 718.202(b). Additionally, the administrative law judge discredited Dr. Tuteur's opinion because it was based on statistical generalities, rather than the specific facts of this case. Decision and Order at 23. Therefore, the administrative law judge concluded that employer did not rebut the Section 411(c)(4) presumption under either method set forth in 20 C.F.R. §718.305(d)(1).[7] *Id*. at 24.

Employer contends that in considering rebuttal of the presumed existence of legal pneumoconiosis and the presumed fact of total disability causation together, the

[6] Weighing the evidence at 20 C.F.R. §718.202(a)(1), (4), the administrative law judge found that employer rebutted the presumed existence of clinical pneumoconiosis, based on the x-ray and medical opinion evidence. Decision and Order at 12, 19.

[7] The administrative law judge determined that the "other medical evidence," in the form of CT scans and treatment notes, "does not weigh in favor of a rebuttal of the presumption that Claimant has pneumoconiosis or that his total disability was due to his pneumoconiosis." Decision and Order at 24-26.

administrative law judge impermissibly applied the "rule out" standard to legal pneumoconiosis. Employer also argues that the administrative law judge erred in discrediting the opinions of Drs. Farney and Tuteur on the ground that they relied on the absence of x-ray evidence of clinical pneumoconiosis to find that claimant does not have legal pneumoconiosis.[8] Employer further contends that the administrative law judge erred in finding that their opinions are contrary to scientific evidence in the preamble to the 2001 regulatory revisions. In addition, employer maintains that the administrative law judge's discrediting of Dr. Tuteur's opinion, because it is based on generalities, is in error. Employer also alleges that the administrative law judge's smoking history finding was erroneous because he did not adequately explain his crediting of claimant's testimony. Finally, employer argues that the administrative law judge erred in crediting Dr. James's opinion when he did not explain how he determined that claimant's respiratory impairment was due to coal dust exposure, other than relying on his history of coal mine employment.

Although we agree with employer that the administrative law judge's rebuttal analysis blends the standards applicable to legal pneumoconiosis and total disability causation, remand is not required in this case. In *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1346, 25 BLR 2-549, 2-570 (10th Cir. 2014), a case decided by the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction this case arises, the court rejected the argument that it is error, *per se*, for an administrative law judge to rely on findings rendered under one prong of rebuttal, without separately considering the other prong of rebuttal. The *Goodin* court found that, although the administrative law judge did not specifically analyze disability causation, "he made findings showing that [the employer] did not rebut the presumption." *Goodin*, 734 F.3d at 1346, 25 BLR at 2-570. The court further stated:

> [A]lthough the [administrative law judge (ALJ)] did not provide a separate analysis for this particular element, the reasoning and evidentiary analysis throughout the ALJ's opinion supports the ALJ's holding that the presumption was not rebutted. This fulfills the ALJ's duty of explanation under the Administrative Procedure Act . . . because we can "discern what the ALJ did and why he did it." *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1022 (10th Cir.2010) (quotations omitted).

[8] Specifically, employer maintains that the administrative law judge erred in relying on an unpublished decision by the United States Court of Appeals for the Fourth Circuit in *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], Case No. 03-1232 (4th Cir. 2004) (unpub.), for the proposition that it is error for a physician to assume negative x-rays rule out bronchitis caused by coal dust inhalation.

*Goodin*, 743 F.3d at 1346 n.20, 25 BLR at 2-570 n.20. In this case, we can discern that the administrative law judge provided valid reasons for finding that employer's experts' opinions were not reasoned as to the source of claimant's totally disabling COPD, thereby rendering their opinions insufficient to establish the absence of legal pneumoconiosis and the absence of a causal link between legal pneumoconiosis and claimant's total respiratory disability. *See West Virginia CWP Fund v. Bender*, 782 F.3d 129, 135 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1217, 24 BLR 2-155, 1-164 (10th Cir. 2009).

Contrary to employer's contentions, the administrative law judge's decision to discredit the opinions of Drs. Farney and Tuteur on rebuttal is rational and supported by substantial evidence. Dr. Farney explained that claimant's centrilobular emphysema and chronic bronchitis "can be explained entirely on the basis of chronic tobacco smoke exposure possibly aggravated by GERD [gastroesophageal reflux disease]." Director's Exhibit 55. Dr. Farney stated that "[g]iven that the prevalence of CWP [coal workers' pneumoconiosis] in the western United States is relatively low, the likelihood of developing CWP or COPD due to coal dust inhalation from [claimant's] work would be low." *Id*. Dr. Farney also concluded that "the absence of radiographic evidence of CWP reduces the probability that coal dust exposure was responsible for emphysema." *Id*. At his deposition, Dr. Farney reiterated these findings, testifying that "[i]n the West," pulmonary impairments are more often related to cigarette smoking and "[v]irtually every study that I've seen correlates the presence of emphysema with dust retention in the lung." Employer's Exhibit 6 at 36, 56. Based on these statements, the administrative law judge acted within his discretion in determining that Dr. Farney's reasoning reflects premises that are inconsistent with both the regulations, which recognize that a physician can render a credible diagnosis of pneumoconiosis "notwithstanding a negative x-ray," and the preamble, in which the DOL found that there was a consensus among scientific experts that coal dust exposure can cause obstructive lung disease, including COPD/emphysema.[9] 20 C.F.R. §718.202(a)(4), (b); 65 Fed.Reg.79,920, 79,940 (Dec. 21, 2000); *Goodin*, 743 F.3d at 1346, 25 BLR at 2-570; *A & E Coal Co. v. Adams*, 694

[9] We reject employer's argument that the administrative law judge could have found Dr. Farney's opinion consistent with the negative CT scans in the record, even if he was barred by 20 C.F.R. §718.202(a)(4), (b), from crediting Dr. Farney's opinion concerning legal pneumoconiosis based solely on the negative x-ray evidence. Employer does not explain how treating negative CT scan evidence as supportive of a finding that legal pneumoconiosis is not present, differs meaningfully from the proscribed treatment of negative x-ray evidence in the regulations.

F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-127 (4th Cir. 2012).

Dr. Tuteur stated:

> It is well recognized that smoking non-miners develop clinically meaningful [COPD] approximately 20% of the time. Uncontrolled and even silent gastroesophageal reflux is regularly associated with pulmonary disease . . . . Among never smoking coal miners, careful review of the medical literature leads one to estimate that clinically meaningful airflow obstruction is caused by the inhalation of coal mine dust about 1% of the time, quite possibly substantially less often. On this basis, it is with reasonable medical certainty that the etiology of [claimant's COPD] of mild and not disabling severity is due to the chronic inhalation of tobacco smoke likely aggravated by chronic silent incompletely treated gastroesophageal reflux.

Employer's Exhibit 1. Dr. Tuteur reiterated his written opinion at his deposition and concluded that coal dust inhalation did not play a role in claimant's disabling respiratory impairment. Employer's Exhibit 8 at 28. Based on Dr. Tuteur's statements, the administrative law judge permissibly determined that, because the physician relied on generalities, rather than the specific facts of this case, his conclusion that claimant's COPD/emphysema is unrelated to coal dust exposure was not well-reasoned. *See Oliver*, 555 F.3d at 1217, 24 BLR at 1-164.

Finally, contrary to employer's contention, remand is not required for the administrative law judge to reconsider claimant's smoking history. Even assuming the administrative law judge erred in finding that claimant smoked for approximately thirty pack-years,[10] employer does not explain how this error would have affected his determination that employer did not rebut the presumption at 20 C.F.R. §718.305(d)(1). *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."). Rather, employer focuses on Dr. James's opinion, which does not support a finding of rebuttal because he identified coal dust exposure as a cause of claimant's total respiratory disability. Because it is

[10] The administrative law judge stated: "I find that Dr. Tuteur's opinion of between forty-five and sixty pack years likely represents a high estimation of Claimant's smoking history; and the Claimant's testimony of ten to sixteen pack years likely represents a low estimation. Thus, I reasonably find that Claimant's [sic] smoked for around thirty pack-years." Decision and Order at 4.

employer's burden to affirmatively rebut the Section 411(c)(4) presumption, we decline to address employer's allegation that the administrative law judge erred in crediting Dr. James's diagnosis of legal pneumoconiosis and total disability due to legal pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984); 30 U.S.C. §902(b).

In light of the administrative law judge's rational findings that the opinions of Drs. Farney and Tuteur are not adequately reasoned on the source of claimant's totally disabling COPD/emphysema, these opinions could not be credited for the purposes of rebuttal at 20 C.F.R. §718.305(d)(1)(i)(A) and (ii), regardless of the standard applied. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-447 (6th Cir. 2013); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-245 (4th Cir. 2013); *Goodin*, 743 F.3d at 1346, 25 BLR at 2-570. We affirm, therefore, the administrative law judge's determination that the opinions of Drs. Farney and Tuteur are insufficient to rebut both the presumed existence of legal pneumoconiosis, and the presumed fact that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), (ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge