BRB No. 12-0427 BLA

DONALD E. GILBERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 05/30/2013
	)	
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 on Remand - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2008-BLA-5982) of Administrative Law Judge Michael P. Lesniak on a subsequent claim[1]

[1] Claimant's original claim, filed on January 22, 2002, was denied by the administrative law judge on May 21, 2004, as he found that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Gilbert v. Consolidation Coal Co.*, BRB Nos. 04-0672 BLA, 04-0672 BLA-A (May 31, 2005)(unpub.). Claimant filed his current claim on November 1, 2007. Director's Exhibit 3.

filed pursuant to the provisions of Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for the second time. In the last appeal, the Board affirmed the administrative law judge's finding that the weight of the new x-ray evidence was positive for pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but vacated his finding that the new medical opinion evidence was sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4), as he failed to make relevant findings regarding the comparative quality of the conflicting physicians' opinions. Consequently, the Board also vacated the administrative law judge's finding that the new evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and remanded the case for the administrative law judge to weigh all of the new evidence together and explain his findings. On the merits of entitlement, in the interest of judicial economy, the Board affirmed the administrative law judge's finding that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and his finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). However, the Board vacated the administrative law judge's finding that the medical opinion evidence at 20 C.F.R. §718.202(a)(4) and the evidence of record overall established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as well as his finding of disability causation at 20 C.F.R. §718.204(c), and instructed him, on remand, to discuss and weigh all relevant evidence and provide a sufficient rationale for his credibility determinations. The Board also instructed the administrative law judge, on remand, to determine whether employer has rebutted the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), if reached. Lastly, because this claim was filed after January 1, 2005, and claimant was credited with thirty years of underground coal mine employment, the Board directed the administrative law judge to consider, on remand, whether the evidence establishes that claimant is entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and, if so, whether employer has established rebuttal of the presumption. *Gilbert v. Consolidation Coal Co.*, BRB No. 10-0314 BLA (Feb. 18, 2011)(unpub.).

[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. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

On remand, the administrative law judge allowed for the submission of additional evidence to address the change in law, and admitted Employer's Exhibits 13-15 into the record, subject to the evidentiary limitations at 20 C.F.R. §725.414. The administrative law judge found that new evidence submitted in support of this subsequent claim established the existence of pneumoconiosis pursuant to Section 718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to Section 725.309(d). Considering the entire record, the administrative law judge found that the new evidence outweighed the earlier evidence, and that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4). The administrative law judge further found that employer failed to establish rebuttal of the presumption.[3] Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's weighing of the evidence in finding that employer failed to establish rebuttal of the presumption under amended Section 411(c)(4). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, filed a letter indicating that he is not participating in this appeal.[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,

[3] The administrative law judge placed the burden of proof on claimant and found that the weight of the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order on Remand at 10-12. The administrative law judge then found that employer failed to establish rebuttal of the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order on Remand at 15-16. However, as the administrative law judge found that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), it was employer's burden to establish, with affirmative proof, that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) as a matter of law.

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).

After considering the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we hold that the Decision and Order on Remand of the administrative law judge is supported by substantial evidence, consistent with applicable law, and contains no reversible error.

Initially, we reject employer's challenge to the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not suffer from clinical pneumoconiosis.[6] Specifically, employer avers that the administrative law judge's finding of clinical pneumoconiosis remains unexplained and fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer asserts that the opinions of Drs. Altmeyer, Rosenberg and Fino are sufficient to establish rebuttal, and that the administrative law judge provided invalid reasons for discounting these opinions. We disagree. In evaluating the evidence, after noting that the Board had affirmed his determination that the weight of the x-ray evidence supported a finding of clinical pneumoconiosis, the administrative law judge accurately summarized the conflicting medical opinions of record. The administrative law judge determined that Dr. Altmeyer, claimant's treating pulmonologist, diagnosed a type of pneumoconiosis, but concluded that it arose out of the inhalation of a "significant" amount of asbestos prior to 1969. Dr. Altmeyer explained that claimant's x-rays showed linear opacities located predominantly in the lung bases, consistent with asbestosis rather than coal workers' pneumoconiosis, and ruled out coal dust exposure as a cause because

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[6] We reject employer's argument that the administrative law judge erroneously gave claimant the benefit of a "double presumption" by finding that employer failed to rebut the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Employer's Brief at 20-21. Upon invocation, amended Section 411(c)(4) presumes that a miner is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §921(c)(4). Thus, the administrative law judge's findings at Section 718.203(b) are subsumed in his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have pneumoconiosis.

the asbestos exposure occurred prior to claimant's coal mine employment.[7] Decision and Order on Remand at 9, 16; Claimant's Exhibit 3; Employer's Exhibit 14. Considering the factors at 20 C.F.R. §718.104(d)(1)-(4), the administrative law judge acknowledged that Dr. Altmeyer's treatment of claimant's pulmonary condition was relatively frequent and of long duration, as he examined claimant approximately twelve times over a period of nine years. Decision and Order on Remand at 15. However, as the regulations do not limit the classification of clinical pneumoconiosis to rounded opacities in specified lung zones, and as Dr. Altmeyer is not a radiologist or a B reader, the administrative law judge acted within his discretion in finding that his opinion regarding claimant's x-ray results was not entitled to deference. Decision and Order on Remand at 16; *see* 20 C.F.R. §718.102(b); *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). Additionally, the administrative law judge determined that Dr. Altmeyer lacked a complete understanding of the extent of claimant's exposure to asbestos, as the physician was unable to state the length of the exposure, and did not explain the basis for his characterization of the exposure as "significant." Decision and Order on Remand at 16. Consequently, the administrative law judge permissibly declined to accord the opinion controlling weight pursuant to 20 C.F.R. §718.104(d)(5), and properly found Dr. Altmeyer's opinion insufficient to rebut the presumption of clinical pneumoconiosis arising out of coal mine employment. *Id.*; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Similarly, the administrative law judge determined that Dr. Rosenberg based his opinion, that claimant does not have clinical pneumoconiosis, in part on his own negative x-ray interpretation, which the administrative law judge found was outweighed by the x-ray evidence considered as a whole, and in part on the findings of linear opacities on

[7] The administrative law judge noted, however, that the record contained varying accounts of claimant's asbestos exposure, as claimant testified to one day of exposure prior to his coal mine employment, Hearing Transcript at 11; Dr. Saludes reported exposure to asbestos during coal mine employment "through a shield and drape that claimant came into contact with and a building he had to enter," Director's Exhibit 18, Claimant's Exhibit 2; Dr. Schaaf reported asbestos exposure in coal mine employment through the shield, the drape, the building and a pipe containing asbestos that claimant had to hold, Director's Exhibit 18; Dr. Fino was told that claimant believed there was asbestos in the motor he worked with in the mine, Employer's Exhibit 6; and Dr. Altmeyer reported that, prior to his coal mine employment, claimant worked for a company where he blew asbestos containing compound onto walls and ceilings with an air gun, Claimant's Exhibit 3. Decision and Order on Remand at 16; Decision and Order at 3 n.3.

some of the other x-rays of record. Relying on Section 718.102(b), the administrative law judge permissibly concluded that Dr. Rosenberg's opinion was entitled to diminished weight because the regulations do not require the presence of rounded, rather than linear, opacities to support a diagnosis of clinical pneumoconiosis. Decision and Order on Remand at 11; Employer's Exhibits 1, 12.

With regard to Dr. Fino's opinion, the administrative law judge determined that the physician classified an x-ray as positive for pneumoconiosis but concluded that claimant does not have clinical pneumoconiosis because he found no rounded opacities but found significant cardiomegaly, a diffusing capacity that waxed and waned, and the lack of a restrictive impairment. Decision and Order at 6-7; Employer's Exhibits 5, 6, 9, 15. The administrative law judge acted within his discretion in discounting Dr. Fino's opinion because the regulations do not require a finding of rounded opacities to support a diagnosis of clinical pneumoconiosis, and because he found that Dr. Fino's conclusion, that "a lack of a restrictive ventilatory defect due to interstitial fibrosis all point to left ventricular failure as the cause of the increased interstitial abnormalities," Employer's Exhibit 5, was inconsistent with the other medical opinions and the evidence in the record considered as a whole, which documented the presence of a restrictive impairment. Decision and Order on Remand at 12; *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have pneumoconiosis. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Lastly, employer challenges the administrative law judge's determination that it failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Employer again maintains that the opinions of Drs. Altmeyer, Rosenberg and Fino are sufficient to establish rebuttal and were improperly discredited. Employer's arguments lack merit. The administrative law judge properly determined that the opinions of Drs. Altmeyer, Rosenberg and Fino were worthy of little weight because they were premised on the erroneous belief that claimant does not have pneumoconiosis, contrary to the administrative law judge's determination to the contrary. Decision and Order on Remand at 17-18; *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); *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 2-306 (4th Cir. 1994). Consequently, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption, and affirm his award of benefits. *See* 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9.

Accordingly, the Decision and Order on Remand – Awarding Benefits of the administrative law judge 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