BRB No. 13-0398 BLA

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| DAVID L. BROWN | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | |
| | ) | DATE ISSUED: 05/30/2014 |
| 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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2012-BLA-5170) of Administrative Law Judge Michael P. Lesniak 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). This claim involves a subsequent claim filed on February 14, 2011.[1]

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least thirty-three years of qualifying coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the applicability of amended Section 411(c)(4) to this claim. Employer also contends that the administrative law judge erred in crediting claimant with fifteen years of qualifying coal mine employment and, therefore, erred in

[1] Claimant's previous claims, filed on March 1, 2006 and May 7, 2008, were finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2.

[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, 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 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 (DOL) 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. 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 may be found in 20 C.F.R. Parts 718, 725 (2013).

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

[4] Because the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

determining that claimant invoked the Section 411(c)(4) presumption. In addition, employer contends that 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) responds, urging the Board to reject employer's arguments with regard to the application of Section 411(c)(4) to this case. The Director also responds in support of the administrative law judge's finding that claimant established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. In a reply brief, employer reiterates its previous contentions.[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).

**Applicability of the Section 411(c)(4) Presumption**

Employer asserts that the administrative law judge's application of amended Section 411(c)(4) 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, after employer filed its 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).

Employer also contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one that the Board rejected 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), and we reject it here for the reasons set forth in that decision.[6]

[5] Because they are unchallenged on appeal, we affirm the administrative law judge's findings that the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Moreover, as noted, the DOL has promulgated regulations implementing amended Section 411(c)(4). Those regulations make clear that the rebuttal provisions

We also reject employer's contention that its due process rights were violated because it was not provided with adequate notice of the change in law and the new rebuttal standard. Employer's Brief at 19. As the Director accurately notes, employer was provided notice of claimant's claim on February 22, 2011, eleven months after the amendments were enacted. The law has not changed during the pendency of this claim. Moreover, employer was provided with a Schedule for the Submission of Additional Evidence on June 29, 2011, which set forth the criteria for establishing rebuttal of the Section 411(c)(4) presumption. Employer was able to develop evidence addressing the proper rebuttal standard. We, therefore, hold that the administrative law judge properly applied Section 411(c)(4) in this case.

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

Employer next argues that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. In order to invoke the Section 411(c)(4) presumption, claimant must establish that he worked for at least 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). The administrative law judge noted employer's stipulation that it employed claimant as a coal miner for thirty-three years.[7] Decision and Order at 2, 16. The administrative law judge further found that it was undisputed that claimant worked at an underground mine site during his employment with employer. *Id.* at 16. Relying on the Board's decisions in *Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011) and *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-501 (1979), the administrative law judge correctly found that, because claimant was employed at the site of an underground coal mine, he was not required to show comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption.[8] *Id.* Therefore, we affirm the

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apply to responsible operators. 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)).

[7] Claimant testified that, during his thirty-three years of coal mine employment with employer, he worked aboveground and underground, "about half and half." Hr'g Tr. at 14.

[8] 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.) did not overrule the Board's holding in *Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011), that an aboveground miner employed at the site of an underground coal mine is not required to show comparability of environmental conditions in order to qualify for the Section

administrative law judge's finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at 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. 30 U.S.C. §921(c)(4). The administrative law judge found that employer failed to establish rebuttal by either method. Specifically, the administrative law judge found that while employer disproved the existence of clinical pneumoconiosis,[9] it failed to disprove the existence of legal pneumoconiosis.[10] The administrative law judge also found that employer failed to rule out a causal relationship between claimant's total disability and his pneumoconiosis.[11]

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411(c)(4) presumption. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1057 n.2 (6th Cir. 2013).

[9] "Clinical pneumoconiosis" consists of "those 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[10] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[11] Employer argues that it cannot be required to "rule out" pneumoconiosis as a cause of claimant's disabling impairment in order to establish rebuttal. We disagree. The Fourth Circuit has explicitly stated that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to the miner's pulmonary impairment by coal mine dust exposure. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Moreover, the implementing regulation that was promulgated after the administrative law judge's decision requires the party opposing entitlement in a

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Gaziano, Abrahams, Schaaf, Bellotte and Basheda. Drs. Gaziano, Abrahams, and Schaaf diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 13; Claimant's Exhibits 1, 4; Employer's Exhibits 7, 12, 16. In contrast, Drs. Bellotte and Basheda diagnosed COPD and emphysema due entirely to claimant's cigarette smoking. Employer's Exhibits 1, 13, 18. Drs. Bellotte and Basheda also diagnosed asthma unrelated to claimant's coal mine dust exposure. *Id.*

The administrative law judge discounted the opinions of Drs. Bellotte and Basheda, that claimant does not suffer from legal pneumoconiosis, because he found that the doctors failed to adequately explain how they eliminated claimant's thirty-three years of coal mine dust exposure as a contributor to claimant's disabling obstructive impairment. Decision and Order at 18-19. Additionally, the administrative law judge accorded less weight to the opinions of Drs. Bellotte and Basheda regarding the cause of claimant's COPD and emphysema, because he found that they were based upon generalities. *Id.* The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Bellotte and Basheda. Employer's Brief at 22-38. We disagree. The administrative law judge noted that Dr. Bellotte relied on the absence of radiographic evidence of heavy fibrosis (defined by Dr. Bellotte as clinical pneumoconiosis of at least category 2 or 3) in opining that claimant's COPD and emphysema are not related to coal mine dust exposure. Decision and Order at 19; Employer's Exhibits 1, 18 at 71, 89. The administrative law judge appropriately found Dr. Bellotte's reasoning to be inconsistent with the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12, 25 BLR 2-115, 2-125 (4th Cir. 2012); *see also* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis). The administrative law judge, therefore, permissibly accorded less weight to Dr. Bellotte's opinion.

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miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 78 Fed Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (holding that there is no meaningful difference between the "play[ed] no part" standard and the "rule-out" standard).

The administrative law judge found that Dr. Basheda relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration, to exclude coal mine dust exposure as a cause of claimant's obstructive impairment. Decision and Order at 19. The administrative law judge found, as was within his discretion, that Dr. Basheda failed to adequately explain why the irreversible portion of claimant's pulmonary impairment was not due, in part, to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling obstructive pulmonary impairment.[12] *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v.* Swiger, 98 F. App'x 227, 237 (4th Cir. 2004).

Further, the administrative law judge permissibly gave less weight to the opinions of Drs. Bellotte and Basheda because he found that the doctors applied generalized statistical conclusions that did not adequately address claimant's specific condition.[13] *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735 (7th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 18-19. Because the administrative law judge rationally found that Drs. Bellotte and Basheda did not adequately explain the bases for their opinions, in light

[12] Dr. Basheda reviewed the results of claimant's pulmonary function studies, including the most recent studies conducted on April 12, 2011, October 18, 2011, April 12, 2012, and May 23, 2012. As the administrative law judge accurately noted, each of these pulmonary function studies produced qualifying results both before and after the administration of a bronchodilator. Decision and Order at 5; Director's Exhibit 13; Claimant's Exhibit 4; Employer's Exhibits 1, 13. Although Dr. Basheda interpreted some of the pulmonary function studies as showing significant reversibility, he did not address the significance of the residual disabling impairment remaining after the administration of a bronchodilator. Employer's Exhibit 13.

[13] Dr. Bellotte acknowledged that the effects of smoking and coal mine dust exposure can be additive, but stated that the "functional loss associated with dust [is] small." Employer's Exhibit 1. Based on epidemiological data, Dr. Bellotte found that while there was a 5% chance that a miner with a thirty-five year history of coal mine dust exposure would suffer a significant decrease in his FEV1, there was a 95% chance that he would suffer no materially significant loss of ventilatory function related to his coal mine dust exposure. Employer's Exhibit 1. Dr. Bellotte also relied on studies demonstrating that "the smoking effects on the lungs exceed the coal dust effects by a factor of 3." *Id.* Dr. Basheda similarly relied on studies showing that while only a small minority of coal miners (approximately 6 to 8 percent) develop airway obstruction, "[t]obacco-induced COPD can occur in up to 15 percent of people." Employer's Exhibit 13.

of the specifics of claimant's case, he permissibly discounted their opinions that claimant's coal mine dust exposure was not a causative factor in his disabling COPD and emphysema. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

As the administrative law judge's bases for discrediting the opinions of Drs. Bellotte and Basheda are rational and supported by substantial evidence, they are affirmed.[14] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000). We, therefore, affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

The administrative law judge next addressed whether employer established rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). The administrative law judge reasonably determined that the same reasons he provided for discrediting the opinions of Drs. Bellotte and Basheda, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 20. We, therefore, affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption. Therefore, we affirm the administrative law judge's award of benefits. 30 U.S.C. §921(c)(4).

[14] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Bellotte and Basheda, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I agree with my colleagues that the administrative law judge permissibly discounted Dr. Bellotte's opinion because he relied on the absence of radiographic evidence of heavy fibrosis (defined by Dr. Bellotte as clinical pneumoconiosis of at least category 2 or 3) in opining that claimant's COPD and emphysema are not related to coal mine dust exposure. I also agree with my colleagues that the administrative law judge permissibly found, as was within his discretion, that Dr. Basheda failed to adequately explain why the irreversible portion of claimant's pulmonary impairment was not due, in part, to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling obstructive pulmonary impairment. The administrative law judge, therefore, permissibly discredited their opinions for purposes of rebutting the presumptions established under 30 U.S.C. §921(c)(4). Consequently, I concur in the result.

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JUDITH S. BOGGS
Administrative Appeals Judge