BRB No. 13-0408

WILBURN D. STACY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
D&F MINING CORPORATION	)	
	)	DATE ISSUED: 05/16/2014
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 Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Barry H. Joyner (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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Subsequent Claim (2012-BLA-5080) of Administrative Law Judge Christine L. Kirby (the administrative law

judge) 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).[2] The administrative law judge accepted the stipulation of the parties that claimant had twenty-eight years of underground coal mine employment and a totally disabling respiratory impairment, and adjudicated this subsequent claim, filed on July 14, 2010, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725.[3] Applying amended Section 411(c)(4) of the

[1] Claimant's initial claim for benefits, filed on July 22, 1991, was denied on July 7, 1993 by Administrative Law Judge Joel R. Williams on the ground that claimant failed to establish total respiratory disability. The Board affirmed the denial of benefits on January 27, 1995. *Stacy v. D&F Mining Co.*, BRB No. 93-2056 BLA (Jan. 27, 1995)(unpub.). Claimant's first request for modification was denied by the district director. Claimant's second request for modification was denied by Administrative Law Judge Alexander Karst on August 25, 1998, and the Board affirmed the denial of benefits. *Stacy v. D&F Mining Co.*, BRB No. 98-1561 BLA (July 14, 1999)(unpub.). Claimant's third and fourth modification requests were denied by the district director. Claimant's fifth modification request was denied by Administrative Law Judge Linda S. Chapman on June 6, 2005, who determined that the evidence established total disability, but did not establish the existence of pneumoconiosis or disability causation. Claimant again requested modification, which was denied on April 8, 2009 by Administrative Law Judge Edward Terhune Miller, who found no mistake in fact or change in conditions.

Claimant's current claim for benefits was filed on July 14, 2010. The district director awarded benefits, and employer requested a hearing, which was held on August 28, 2012. Director's Exhibit 3.

[2] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this living miner's claim, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4)(2012).

[3] The Department of Labor 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. *Id.* A regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

Act, 30 U.S.C. §921(c)(4), the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis thereunder, thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d)(2013).[4] Considering the entire record, the administrative law judge found that the new evidence outweighed the earlier evidence, and that employer failed to establish rebuttal of the presumption.[5] Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding a change in applicable condition of entitlement established at Section 725.309, without first considering whether employer rebutted the presumption. Employer further challenges the administrative law judge's finding on the merits that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge permissibly applied the rebuttable presumption to establish a change in an applicable condition of entitlement, and that any error in failing to consider rebuttal prior to finding a change in an applicable condition of entitlement established at Section 725.309 is harmless.[6] Employer has filed a reply brief in support of its position.[7]

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

[5] Upon invocation of the amended Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption with affirmative proof that claimant does not have clinical and legal pneumoconiosis, or that no part of his disabling respiratory or pulmonary impairment was caused by pneumoconiosis. 20 C.F.R. §725.305(d)(1).

[6] The Director expresses no opinion on the administrative law judge's findings of fact on the merits of entitlement. Director's Brief at 2.

[7] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established greater than fifteen years of underground coal mine employment and the presence of a totally disabling respiratory impairment, and that he was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (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.[8] 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 under the Act, claimant must demonstrate by a preponderance of the evidence 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 (2013), 718.204 (2013). Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and disability causation. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis or disability causation in order to obtain review of the merits of his claim. 20 C.F.R. §725.309(c).

Employer first contends that, because total respiratory disability was established in claimant's prior claim, the administrative law judge erred in finding a change in an applicable condition of entitlement established at Section 725.309 upon invocation of the amended Section 411(c)(4) presumption. While the existence of pneumoconiosis and disability causation are presumed upon invocation, employer asserts that the administrative law judge should have determined whether the newly submitted evidence was sufficient to establish rebuttal before she found a change in condition established and adjudicated the merits of the claim, based upon her review of the entire record. Employer's Brief at 5-7.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding a change in an applicable condition of entitlement established at Section 725.309, the administrative law judge determined that claimant was entitled to invocation at amended Section 411(c)(4), based upon employer's agreement that claimant had over fifteen years of underground coal mine employment

[8] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 2.

and suffered a totally disabling respiratory or pulmonary impairment. Decision and Order at 4. The administrative law judge found that "claimant has demonstrated by presumption a material change in condition since adjudication of his prior claim, and I must, therefore, consider all of the evidence of record." *Id*. The administrative law judge then found that, "given the age of the medical evidence in the prior claims which dates from 1991 to 2007 and given the progressive nature of [coal workers' pneumoconiosis], … the medical evidence submitted in the current claim [is] more probative of claimant's current medical condition." Decision and Order at 4 n. 3. Considering the newly submitted evidence, the administrative law judge found that employer failed to rebut the presumption that claimant had clinical[9] and legal[10] pneumoconiosis, and that his disabling respiratory impairment arose out of coal mine employment. Decision and Order at 5-17. The Director agrees with employer's argument that the administrative law judge should have considered whether the newly submitted evidence was sufficient to rebut the presumption at amended Section 411(c)(4) before she found a change in an applicable condition of entitlement established under Section 725.309. Director's Brief at 2; *see Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 795 BLR (7th Cir. 2013). However, as the administrative law judge ultimately reviewed the new evidence submitted in support of the current claim and found it insufficient to establish either that claimant does not have pneumoconiosis or that his disability is not due to pneumoconiosis, we agree with the Director's position that any error is harmless, and we reject employer's argument to the contrary. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §725.309(d)(2013).

Turning to the merits of entitlement, employer contends that the administrative law judge failed to consider the opinions of Drs. Fino and Castle as a whole in finding them insufficient to establish rebuttal of the amended Section 411(c)(4) presumption of legal pneumoconiosis. Employer also maintains that the administrative law judge failed to adequately explain her finding that the opinions of Drs. Fino and Castle were insufficient to prove that claimant's disabling respiratory impairment did not arise out of coal mine employment, in violation of 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). Employer's Brief at 12-14.

[9] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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." 20 C.F.R. §718.201(a)(1) (2013).

[10] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2)(2013).

In finding that employer failed to affirmatively establish that claimant does not suffer from legal pneumoconiosis, the administrative law judge accurately summarized the conflicting medical opinions of record and determined that the opinions of Drs. Al-Khasawneh and Splan, who diagnosed disabling pneumoconiosis, did not assist employer in meeting its burden on rebuttal of the amended Section 411(c)(4) presumption. Decision and Order at 10-17. The administrative law judge discounted Dr. Fino's opinion, that claimant does not have pneumoconiosis and that his disabling obstructive impairment is due to bronchial asthma,[11] on the ground that it was conclusory in nature and lacking in reasoning. Decision and Order at 15-16; Director's Exhibits 12, 17; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). The administrative law judge found that Dr. Fino failed to persuasively explain why coal mine dust could not be a contributing factor to claimant's asthmatic and obstructive impairment. While Dr. Fino noted that claimant's more recent pulmonary function studies revealed an airway obstruction, the administrative law judge found that Dr. Fino did not explain why the obstructive nature of the impairment necessarily eliminated a finding of legal pneumoconiosis, as the regulatory definition of legal pneumoconiosis explicitly provides that it may produce a purely obstructive impairment.[12] Decision and Order at 15; Director's Exhibits 12, 17; *see* 20 C.F.R. §718.201(a)(2) (2013). The administrative law judge further observed that Dr. Fino did not explain why coal dust exposure could not be a contributing cause of claimant's partially reversible respiratory impairment, which Dr. Fino attributed solely to asthma, in light of claimant's fully disabling residual impairment. Decision and Order at 15-16. Thus, the administrative law judge rationally determined that Dr. Fino's opinion was conclusory, not well-reasoned, and entitled to diminished weight. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark*, 12 BLR at 1-155.

Similarly, the administrative law judge rationally concluded that the opinion of Dr. Castle, that claimant has a strictly obstructive respiratory impairment due to bronchial

[11] Dr. Fino also noted that there was some fibrosis present, which, along with claimant's obesity, resulted in reversible resting hypoxemia. Director's Exhibit 17 at 21.

[12] Section 718.201(a)(2) (2013) states that legal pneumoconiosis includes 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) (2013).

asthma,[13] was not well reasoned and entitled to little weight. Decision and Order at 16-17; Employer's Exhibit 1 at 49. Specifically, the administrative law judge noted that Dr. Castle eliminated coal dust exposure as a source of claimant's obstructive impairment because he opined that when coal mine dust exposure causes an impairment, it generally causes a mixed, irreversible obstructive and restrictive ventilatory defect, which was not present in this case. Decision and Order at 16; Employer's Exhibit 1 at 49. The administrative law judge permissibly determined that Dr. Castle failed to adequately explain why the miner did not fall into the smaller category of those whose impairment was purely obstructive, as contemplated by the regulations, or why coal dust could not be a contributing factor to claimant's asthmatic impairment. *See* 20 C.F.R. §718.201(a)(2) (2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 BLR (4th Cir. 2013), *citing Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's credibility determinations, we affirm her determination that the opinions of Drs. Fino and Castle were insufficient to rebut the Section 411(c)(4) presumption of legal pneumoconiosis.[14] Further, because Drs. Fino and Castle did not diagnose pneumoconiosis, the administrative law judge acted within her discretion in according little weight to their opinions, that pneumoconiosis played no role in claimant's disability due to bronchial asthma. *See generally Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); 20 C.F.R. §718.305(d)(1)(i), (ii); Decision and Order at 17. As substantial evidence supports the administrative law judge's finding, that employer failed

[13] Dr. Castle also noted that claimant has a mild degree of obesity that can result in obstructive sleep apnea syndrome as well as resting hypoxemia. Employer's Exhibit 1 at 48.

[14] As the administrative law judge discounted the only two medical opinions supportive of employer's burden on rebuttal, we need not address employer's arguments regarding the reliability of the contrary opinions of Drs. Al-Khasawneh and Splan. Further, as employer failed to rebut the presumption of legal pneumoconiosis, we need not address employer's arguments regarding the administrative law judge's weighing of the evidence on the issue of clinical pneumoconiosis. 20 C.F.R. §718.305(d); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer' Brief at 7-9.

to successfully rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), we affirm her award of benefits.

Accordingly, the Decision and Order Awarding Subsequent Claim of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge