BRB No. 13-0415 BLA

ROBERT E. COULSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McELROY COAL COMPANY	)	
	)	DATE ISSUED: 05/09/2014
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Jeffrey R. Soukup (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2010-BLA-5175) 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 case involves a subsequent claim filed on November 21, 2008.[1]

After crediting claimant with twenty-five years of underground coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2008 claim on the merits. Because the administrative law judge credited claimant with over fifteen years of qualifying coal mine employment, and found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant's prior claim for benefits, filed on March 17, 1995, was denied as abandoned by the district director on November 8, 1995. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 5. 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).

[3] 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 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.* 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 and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

On appeal, employer contends that the administrative law judge applied an improper rebuttal standard, and erred in his analysis of the evidence in finding that employer failed to rebut the 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, urging the Board to reject employer's contention that the administrative law judge applied an improper rebuttal standard, and to affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment. Employer filed a reply brief, reiterating its contentions on 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, 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).

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 both clinical and legal pneumoconiosis,[5] 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); *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). The administrative law judge found that employer failed to establish rebuttal by either method.

[4] Because employer does not challenge the administrative law judge's findings of twenty-five years of qualifying coal mine employment, that the evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309, and that claimant invoked the Section 411(c)(4) presumption, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's Brief at 8-17. 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] *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose*, 614 F.2d at 936, 2 BLR at 2-38.

Employer also asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 19-32. Contrary to employer's argument, the administrative law judge correctly explained that, 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 totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 13; 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the United States Court of Appeals for the Fourth Circuit has explicitly stated that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure.[7] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case. We now turn to the administrative law judge's rebuttal findings.

After finding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Rosenberg and Basheda. Drs. Rosenberg and Basheda opined that claimant suffers from disabling chronic obstructive pulmonary disease (COPD) that is due to smoking and is

[6] Moreover, the regulations implementing amended Section 411(c)(4) make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)).

[7] Similarly, the implementing regulation that was promulgated after the administrative law judge's decision requires the party opposing entitlement in a miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)); Director's Brief at 2.

unrelated to coal mine dust exposure. Employer's Exhibits 1 at 5-6; 8 at 21-22; 11 at 25-26; 18 at 25, 28, 32, 43.

The administrative law judge discounted the opinions of Drs. Rosenberg and Basheda because he found that they were not well-reasoned, as they were inconsistent with the regulations, or with the scientific views endorsed by the Department of Labor (DOL) in the 2000 preamble to the regulatory revisions. Decision and Order at 20-21. The administrative law judge therefore determined 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. Rosenberg and Basheda. Employer's Brief at 36-47. We disagree. The administrative law judge examined the reasoning employed by Drs. Rosenberg and Basheda to eliminate coal mine dust exposure as a cause of claimant's COPD, and found that it was not credible. Specifically, the administrative law judge noted that Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's COPD, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC value which, in Dr. Rosenberg's view, is characteristic of obstruction due to smoking, but not of lung disease caused by coal mine dust exposure. Decision and Order at 20; Employer's Exhibits 1 at 5; 18 at 21-22, 28. The administrative law judge permissibly found that the reasoning Dr. Rosenberg used to eliminate coal mine dust exposure as a source of claimant's COPD was inconsistent with the medical science accepted by DOL, recognizing that coal mine dust can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 20.

Considering Dr. Basheda's opinion, that any contribution caused by coal mine dust did not play a significant role in claimant's pulmonary impairment, the administrative law judge noted Dr. Basheda's reasoning that claimant's progressive loss of lung function occurred after his exposure to coal mine dust had ceased. Decision and Order at 20; Employer's Exhibits 8 at 21; 11 at 31-32. The administrative law judge permissibly discredited that reasoning as inconsistent with DOL's recognition that pneumoconiosis is "a latent and progressive disease that may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009).

Contrary to employer's contention, the administrative law judge recognized that Drs. Rosenberg and Basheda provided additional reasons in support of their conclusions that coal mine dust exposure did not contribute to claimant's COPD. Decision and Order

at 10-14; Employer's Brief at 39-40, 45-56. However, the administrative law judge permissibly discounted their opinions for the reasons he gave. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Basheda, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving 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 Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

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 discredited the opinions of Drs. Rosenberg and Basheda, that claimant's disabling impairment is unrelated to his coal mine employment, because "they erroneously dismissed the possibility" that claimant suffers from legal pneumoconiosis. Decision and Order at 21.

Employer argues that the administrative law judge erred in relying on the "presumed" finding of legal pneumoconiosis to reject the disability causation opinions of Drs. Rosenberg and Basheda. Employer's Brief at 32-36. Employer contends that, because the existence of legal pneumoconiosis was established by presumption, the opinions of Drs. Rosenberg and Basheda are not contrary to any affirmative findings made by the administrative law judge. Employer's Brief at 32-36. Contrary to employer's contention, and as the Director contends, the administrative law judge reasonably found that the same reasons that he provided for discrediting the opinions of Drs. Rosenberg 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. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Ogle*, 737 F.3d at 1074 (rejecting the employer's contention that an administrative law judge may not discredit a disability causation opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found); Decision and Order at 21. Therefore, we 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.[8] *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 did not rebut the presumption. Therefore, we affirm the administrative law judge's award of benefits. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[8] Thus, we need not address employer's argument that the administrative law judge erred in failing to make a specific determination regarding the length of claimant's smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).