BRB No. 13-0419 BLA

PAUL A. HAYNES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/23/2014
	)	
and	)	
	)	
A.T. MASSEY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harmon & Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Richard A. Seid (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5256) of Administrative Law Judge Lystra A. Harris rendered on a claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited claimant with 28.12 years of coal mine employment, with 26 of those years in underground coal mine employment, as supported by the record, and she adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and 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).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, arguing that she applied an incorrect rebuttal standard and erred in weighing the evidence relevant to rebuttal. 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 argument that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4). Employer has filed a combined reply brief in support of its position.[3]

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[1] Claimant, Paul A. Haynes, filed his claim for benefits on October 6, 2009. Director's Exhibit 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, 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 28.12 years of coal mine employment with 26 of those years in underground coal mine employment, total respiratory disability at 20 C.F.R. §718.204(b), and invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*,

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4), contrary to the unambiguous statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer's Brief at 5-12. Specifically, employer asserts that it was denied the opportunity to establish rebuttal with proof that claimant's pneumoconiosis is mild and that his totally disabling respiratory impairment was the product of another disease. Employer's Brief 10-11, 17-24; Employer's Reply Brief at 11. Employer's argument lacks merit.

In finding that employer failed to establish rebuttal under amended Section 411(c)(4), the administrative law judge cited the requisite elements of entitlement under Part 718 and, after assessing the credibility of the relevant evidence, found that employer affirmatively rebutted the presumption that claimant suffers from clinical pneumoconiosis arising out of coal mine employment. Decision and Order at 13-19. However, as more fully discussed *infra*, the administrative law judge found that the medical opinions supportive of employer's burden were not well-reasoned and, therefore, were insufficient to establish either that claimant does not have legal pneumoconiosis or that his disabling respiratory impairment did not arise out of coal mine employment. Decision and Order at 20-28. Since the medical opinions supportive of employer's burden did not diagnose pneumoconiosis as defined at 20 C.F.R. §718.201, we reject employer's argument that the administrative law judge denied employer the opportunity to establish rebuttal with proof that "claimant's pneumoconiosis is mild and that the totally disabling respiratory impairment was the product of another disease." Employer's Brief at 10-11; Employer's Exhibits 1, 8, 12; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013)(Niemeyer, J., concurring). Rather, consistent with *Owens*, the administrative law judge properly analyzed whether employer presented credible evidence to rebut any element of entitlement covered by the presumption.

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6 BLR 1-710 (1983); Decision and Order at 6-8, 12-13.

[4] 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. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

Employer next maintains that the administrative law judge provided invalid reasons for finding that the opinions of Drs. Rosenberg and Crisalli were insufficient to affirmatively rebut the amended Section 411(c)(4) presumption. Employer's Brief at 26-36. We disagree. After finding that employer successfully rebutted the presumption of clinical pneumoconiosis, the administrative law judge provided a comprehensive summary and analysis of the opinions of Drs. Rosenberg and Crisalli, that there is insufficient evidence of legal pneumoconiosis, and that no part of claimant's disabling respiratory or pulmonary impairment is secondary to coal dust exposure. Decision and Order at 24-28; Employer's Exhibits 1, 8. After reviewing the underlying bases for the physicians' conclusions, the administrative law judge acted within her discretion in finding that the opinions of Drs. Rosenberg and Crisalli were entitled to little weight, as she determined that neither physician had rendered an adequately explained and reasoned opinion. Decision and Order at 21-28; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). In so finding, the administrative law judge determined that Dr. Rosenberg's opinion was inconsistent because, in his August 11, 2011 report, Dr. Rosenberg maintained that claimant's total lung capacity was normal and that there was no restriction despite a reduced FVC, but he later testified at his April 11, 2012 deposition that "there's clearly reduction … in a restrictive pattern on spirometry and an oxygenation abnormality." Employer's Exhibit 12 at 23-24. Because Dr. Rosenberg failed to reconcile the findings in his original narrative report with his subsequent deposition testimony, the administrative law judge reasonably found that the reliability of Dr. Rosenberg's opinion was diminished. Decision and Order at 25; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). The administrative law judge also rationally inferred that Dr. Rosenberg's inability "to entirely rule out the contribution of coal dust exposure to the Claimant's respiratory condition"[5] rendered his opinion equivocal, thereby further undermining the probative value of the opinion. Decision and Order at 25; Employer's Exhibit 12 at 26; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). Since she found that Dr. Rosenberg failed to adequately explain how he eliminated claimant's twenty-eight years of coal dust

[5] At his deposition, Dr. Rosenberg testified that the probable causes of claimant's respiratory impairment are non-coal mine dust-related, and that it is possible that claimant has a "contribution or a cause" from pneumoconiosis, "but there's no objective basis for that conclusion." Employer's Exhibit 12 at 26; Decision and Order at 24. Dr. Rosenberg testified that, if claimant had macular pneumoconiosis, "it's conceivable that the fall in PO_2 was in part related to it," Employer's Exhibit 12 at 20, but that, with claimant's restrictive pattern on spirometry with an oxygenation abnormality, he would expect to see advanced clinical pneumoconiosis, "which is not present here." Employer's Exhibit 12 at 23-24; Decision and Order at 24, 27.

exposure as a contributing cause of claimant's respiratory condition, the administrative law judge permissibly concluded that Dr. Rosenberg's opinion was entitled to little weight. Decision and Order at 32-34; *see Clark*, 12 BLR at 1-155.

Similarly, the administrative law judge permissibly found that Dr. Crisalli's opinion was "poorly reasoned and conclusory" because the physician failed to provide any explanation or support for his opinion that claimant's respiratory condition is not due to coal dust exposure. Decision and Order at 24-25; Employer's Exhibit 1; *see Trumbo*, 17 BLR at 1-88, 1-89; *Clark*, 12 BLR at 1-155. While Dr. Crisalli noted that obesity and a left lung abnormality were potential contributors to claimant's respiratory impairment, the administrative law judge determined that Dr. Crisalli was unable to definitively diagnose the cause of claimant's respiratory condition, and recommended further testing in order to properly evaluate claimant's condition. Thus, the administrative law judge acted within her discretion in finding that the opinion of Dr. Crisalli was entitled to little weight. *Id.* As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the opinions of Drs. Rosenberg and Crisalli were insufficient to establish rebuttal of the amended Section 411(c)(4) presumption of legal pneumoconiosis.

Lastly, we reject employer's argument that the administrative law judge erroneously equated a legal presumption with a factual finding by stating that "I give reduced weight to the opinions of Drs. Rosenberg and Crisalli regarding disability causation, as neither doctor diagnosed the Claimant with pneumoconiosis, contrary to my finding." Employer's Brief at 24-26, *citing* Decision and Order at 27. By virtue of claimant's entitlement to invocation of the amended Section 411(c)(4) presumption, it is a presumptive fact that he is totally disabled due to pneumoconiosis. Since the administrative law judge found that employer failed to meet its burden of rebutting this presumption with affirmative proof that claimant does not have pneumoconiosis as defined at 20 C.F.R. §718.201, claimant has established that he has pneumoconiosis as a matter of law. Because Drs. Rosenberg and Crisalli did not diagnose pneumoconiosis, the underlying premise of their opinions is contrary to the established fact that pneumoconiosis exists. *See, e.g., Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995). Hence, we affirm the administrative law judge's finding that the opinions of Drs. Rosenberg and Crisalli were entitled to little weight on the issue of disability causation, and affirm her award of benefits. Decision and Order at 27-28; *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).

Accordingly, the Decision and Order Awarding Benefits 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