BRB No. 13-0443 BLA

DARRELL L. BARNETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DECKER COAL COMPANY	)	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 on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman Law Firm, P.C.), Denver, Colorado, for claimant.

John S. Lopatto III, Washington, D.C., for employer.

Maia S. Fisher (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 on Remand (2008-BLA-05683) of Administrative Law Judge Richard K. Malamphy, rendered on a subsequent claim filed on May 22, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time pursuant to employer's appeal of an award of benefits. The Board previously rejected employer's contention that the principles of res judicata preclude consideration of claimant's subsequent claim. *Barnett v. Decker Coal Co.*, BRB No. 11-0722 BLA, slip op. at 5 n.6 (July 24, 2012) (unpub.). The Board has affirmed, as unchallenged by the parties, the administrative law judge's finding that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id*. at 2 n. 3. The Board, however, vacated the prior award because the administrative law judge erred in failing to explain, in accordance with the Administrative Procedure Act (APA),[2] the bases for his findings that claimant established the existence of legal pneumoconiosis *Id*. at 3-4. Because the Board vacated the administrative law judge's determination that the newly submitted evidence established that claimant has pneumoconiosis at 20 C.F.R. §718.202(a)(4), the Board further vacated his determination that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and disability causation under 20 C.F.R. §718.204(c). *Id*. at 4. Thus, the case was remanded for further consideration.

In light of the filing date of the claim, the Board instructed the administrative law judge on remand to consider whether claimant was entitled to the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4). *Barnett*, BRB No. 11-0722 BLA, slip op. at 5. Specifically, the Board directed the administrative law judge to address whether claimant has established at least fifteen years of qualifying coal mine employment for invocation of the presumption.[3] *Id*. If so, the administrative law judge was advised to reinstate his finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and then

[1] A complete procedural history of the case is set forth in *Barnett v. Decker Coal Co.*, BRB No. 11-0722 BLA, slip op. at 2 n. 1 (July 24, 2012) (unpub.).

[2] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[3] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

determine whether employer rebutted the presumption. *Id*. If claimant did not invoke the amended Section 411(c)(4) presumption, the administrative law judge was instructed to reconsider whether the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement under 20 C.F.R §725.309. *Id*. The administrative law judge was also instructed to determine, as necessary, whether claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 6. The Board further instructed the administrative law judge to explain the bases for all of his findings on remand in accordance with the APA. *Id*.

On remand, the administrative law judge found that claimant established twenty-six years of qualifying coal mine employment and, therefore, invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. With regard to rebuttal, the administrative law judge found that employer failed to establish either that claimant does not suffer from pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, coal mine employment. Accordingly, benefits were awarded.

On appeal, employer maintains that in order for claimant to satisfy the requirements of 20 C.F.R. §725.309, he must submit evidence of a physical change in his condition since the denial of his prior claim. Employer also contends that the administrative law judge erred in weighing the evidence relevant to 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, responds, arguing that the administrative law judge performed the correct analysis pursuant to 20 C.F.R. §725.309. Employer has filed a reply brief along with a request for oral argument on the issue of whether claimant must establish a change in his medical condition in order to prevail on his subsequent claim.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[4] The record reflects that claimant's last coal mine employment was in Montana. Director's Exhibit 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Ninth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

I. CHANGE IN AN APPLICABLE CONDITION OF ENTITLEMENT

When 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."[5] 20 C.F.R. §725.309(c); *see 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)(2).[6]

Employer argues that claimant may only satisfy the requirements of 20 C.F.R. §725.309, based on a comparison of the prior claim evidence with the newly submitted evidence in order to determine whether there has been a physical change in claimant's condition since the denial of his prior claim. Employer's Petition for Review with Supporting Brief at 10-12. Contrary to employer's assertion, however, the proper analysis at 20 C.F.R. §725.309 is whether claimant has established at least one of the elements of entitlement previously adjudicated against him. *See* 20 C.F.R. §725.309(c); *Buck Creek Coal Co. v. Sexton*, 706 F.3d 756, 25 BLR 2-221 (6th Cir. 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *White*, 23 BLR at 1-3. Because claimant invoked the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4),[7] claimant satisfied his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *See Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789,

[5] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

794, BLR (7th Cir. 2013); *Barnett,* BRB No. 11-0722 BLA, slip op. at 5. Thus, employer's arguments with regard to 20 C.F.R. §725.309 are rejected as without merit.[8]

II. REBUTTAL OF AMENDED SECTION 411(c)(4)

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not suffer from either clinical or legal pneumoconiosis, or that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Employer contends that the administrative law judge erred in finding that the opinion of its sole medical expert, Dr. Repsher, was not sufficiently reasoned to rebut the presumed fact of legal pneumoconiosis.[9] We disagree.

Dr. Repsher opined that claimant suffers from a disabling obstructive lung disease due entirely to smoking. Employer's Exhibit 4. Dr. Repsher provided the following explanation for determining that coal dust exposure did not play an "additive" role with smoking in causing claimant's chronic obstructive respiratory impairment:

> [S]eminal studies establ[ish] that approximately 13% of the chronic smokers – regardless of occupation – will develop the catastrophic level of chronic obstructive lung disease exhibited [by claimant] in his 2003 and 2007 pulmonary testing, with FEV1 at 33% of predicted in 2003 and 24% of predicted in 2007 and the FEF (25%-75%) in the single percentage digits of predicted. The remaining approximately 87% will continue to have normal pulmonary function or develop only very mild and clinically insignificant [chronic obstructive pulmonary disease (COPD)]. I acknowledge that the [Department of Labor] regulations recognize that COPD can also be caused by coal dust exposure, but the medical literature is conclusive that the majority of non-smoking, non-asthmatic coal miners, are in the 87% class and have average, normal pulmonary function, or at most, a clinically

[8] We also decline employer's request to hold oral argument on the issue of whether claimant must demonstrate a change in his physical condition since the prior denial in order to satisfy his burden of proof under 20 C.F.R. §725.309. Employer's Reply Brief at 6.

[9] Legal pneumoconiosis is defined as "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).

> insignificant loss of FEV1. It is my opinion that [claimant] is firmly in the 13% of heavy smokers who develop disabling COPD, and that the severe COPD occurred irrespective of whether this claimant ever worked in surface coal mine employment.

Employer's Exhibit 4.

The administrative law judge determined that Dr. Repsher's opinion was not sufficiently reasoned to rebut the presumption, as he "significantly relied on the figure of 13% of smokers developing severe pulmonary deficiency, but failed to relate the mere existence of such a statistic to the etiology of [c]laimant's lung disease." Decision and Order on Remand at 6. We see no error in this determination as an administrative law judge has discretion to assign less weight to a medical opinion that is based on generalizations, as opposed to the specific conditions of the miner. *See Peabody Coal Co. v. Director, OWCP* [*Opp*], F.3d , 2014 WL 1282289, slip op. at 17 (9th Cir. April 1, 2014); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Furthermore, the administrative law judge permissibly rejected Dr. Repsher's explanation that claimant's lung disease occurred too early in life to be caused by coal dust exposure, since Dr. Repsher did not "provide any support for such a statement or adequate rationale given that Claimant's breathing problems began to manifest near the end of his twenty-six years of coal mine employment." Decision and Order on Remand at 6; *see Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-314 (10th Cir. 2010); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). Moreover, the administrative law judge rationally found that Dr. Repsher's reliance on the "approximately eleven year gap in Claimant's coal mine employment" to exclude legal pneumoconiosis was unpersuasive because Dr. Repsher "does not address the effects of [c]laimant's cumulative exposure." Decision and Order on Remand at 6; *see Gunderson*, 601 F.3d at 1024, 24 BLR at 2-314; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Opp*, 2014 WL 1282289, slip op. at 17; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we affirm the administrative law judge's determination that employer failed to rebut the

presumption by establishing that claimant does not have legal pneumoconiosis.[10] Additionally, to the extent that the administrative law judge's analysis of whether employer rebutted the presumed fact of legal pneumoconiosis subsumed the issue of disability causation, we also affirm his finding that employer failed to establish that claimant's respiratory disability did not arise out of, or in connection with, his coal mine employment. *See* 30 U.S.C. §921(c)(4); 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); Decision and Order on Remand at 7. We therefore affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption.

[10] Because employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's finding that employer's evidence fails to affirmatively establish that claimant does not have legal pneumoconiosis, it is not necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Accordingly, the administrative law judge's Decision and Order on Remand 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