BRB No. 13-0468 BLA

JACK D. SMITLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BCNR MINING CORPORATION	)	DATE ISSUED: 05/15/2014
	)	
and	)	
	)	
PENNSYLVANIA STATE WORKERS' INSURANCE FUND	)	
	)	
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 Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Edward K. Dixon and Ryan M. Krescanko (Zimmer Kunz, PLLC), Pittsburgh, Pennsylvania, for employer/carrier.

Jonathan Rolfe (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 Granting Benefits (2011-BLA-5420) of Administrative Law Judge Thomas M. Burke with respect to a subsequent claim filed on February 1, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant[2] established 17.19 years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that he invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge concluded that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer asserts that the administrative law judge erred in finding that employer must rule out the existence of both clinical and legal pneumoconiosis to rebut the presumed existence of pneumoconiosis. In addition, employer contends that the administrative law judge did not properly weigh the medical opinion evidence concerning rebuttal of the amended Section 411(c)(4) presumption. Counsel for claimant has responded on his behalf and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited brief, and requests that the Board reject employer's argument that the administrative law judge erred in requiring

[1] Claimant filed his initial claim for benefits on July 13, 1987, which was denied by the district director on September 29, 1987, because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment that was due to pneumoconiosis. Director's Exhibit 1. The record does not show that claimant took any other action prior to filing the current claim.

[2] Claimant died on March 10, 2013, before a telephonic hearing to receive his testimony could be scheduled. Administrative Law Judge's Memorandum to File; Decision and Order at 2.

[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 coal mine employment in conditions substantially similar to those in 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).

employer to disprove the existence of legal pneumoconiosis to rebut the presumed existence of pneumoconiosis.[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 supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 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 making his findings concerning rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge determined that the newly submitted evidence, and the evidence as a whole, was insufficient to rebut the presumed existence of legal pneumoconiosis.[6] Decision and Order at 11-13. The administrative law judge acknowledged that Drs. Koliner and Kaplan found that claimant's totally disabling respiratory impairment was not due to coal dust exposure. *Id*. at 12. However, the administrative law judge gave less weight to Dr. Koliner's opinion because it was "unclear from his report what his rationale was for concluding that [c]laimant's cigarette smoking, and not his coal dust exposure, was the cause of his [chronic obstructive pulmonary disease (COPD)]." *Id*.

Similarly, the administrative law judge gave less weight to Dr. Kaplan's opinion, as he found that it was equivocal, based on Dr. Kaplan's statement that coal dust exposure does not cause a reversible impairment, but that miners with severe coal dust-induced COPD might have some reversibility. Decision and Order at 12. In addition, the administrative law judge noted that Dr. Kaplan's observation, that "claimant's

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), and invocation of the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 5, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[6] The administrative law judge determined that "[b]ecause both the x-ray evidence and the physicians' opinions of record tend to rebut the presence of clinical pneumoconiosis, I find that [e]mployer has established rebuttal of the . . . presumption on this point." Decision and Order at 11.

impairment did not reverse to normal after bronchodilators were administered," did not rule out a contribution from coal dust exposure. *Id*. The administrative law judge determined that Dr. Kaplan also based his opinion on generalities and did not explain why coal dust inhalation could not be a significant contributing factor, in combination with claimant's cigarette smoking. *Id*. at 12-13. Therefore, the administrative law judge found that employer did not rebut the presumed existence of legal pneumoconiosis and noted that he would "not make a separate determination of the etiology of [c]laimant's disease, as the legal pneumoconiosis inquiry necessarily subsumes that inquiry." *Id*. at 13 n.5.

Employer argues that, because amended Section 411(c)(4) does not distinguish between clinical and legal pneumoconiosis, the administrative law judge erred in requiring it to rebut the presumed existence of legal pneumoconiosis after determining that employer rebutted the presumed existence of clinical pneumoconiosis. Employer states that "[i]nstead of treating separately the issues of the existence of pneumoconiosis and whether impairment and disability stem from employment, the [administrative law judge] evidently and improperly merged them into his Section [411](c)(4) analysis." Employer's Brief at 8. We reject employer's contention, as the administrative law judge's rebuttal analysis is consistent with the plain language of the Act. Section 411(c)(4) provides a presumption that claimant had pneumoconiosis and was totally disabled by it. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(c)). Amended Section 411(c)(4) further provides that the presumption can be rebutted by proving that claimant did not have pneumoconiosis or that his total disability did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)); *see Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). The former method of rebuttal necessarily encompasses both clinical and legal pneumoconiosis, as the Act defines pneumoconiosis broadly, to include any "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. §902(b). We affirm, therefore, the administrative law judge's finding that employer was required to disprove the existence of both clinical and legal pneumoconiosis to establish the first method of rebuttal set forth in amended Section 411(c)(4).

Employer also asserts that the administrative law judge mischaracterized Dr. Koliner's opinion, as Dr. Koliner explained his determination that claimant's COPD was due primarily to smoking. In addition, employer contends that the reasons the administrative law judge gave for discrediting Dr. Kaplan's opinion "amount[ed] to

isolated statements taken from his deposition transcript . . . which were taken in large part out of context by the [administrative law judge]." Employer's Brief at 13-14. Employer also alleges that the administrative law judge substituted his own opinion for that of the experts when he found that claimant's impairment would have reversed to normal by the application of bronchodilators to rule out coal dust exposure as a contributing factor. Employer further disagrees with the administrative law judge's determination that Dr. Kaplan's opinion was based on generalities. Additionally, employer asserts that "[i]t is not clear what the [administrative law judge's] rationale is" in finding that Dr. Kaplan did not explain why coal dust could not have contributed in this case, as the issue is whether claimant has shown that he is disabled and not whether some other miner could be disabled due to coal dust. *Id*. at 16. Employer argues that "[i]t was irrational for the [administrative law judge] to conclude that an individual without sufficient coal dust exposure to cause pneumoconiosis can have sufficient coal dust exposure to be totally disabled." *Id*. at 17.

Employer's allegations of error are without merit, as substantial evidence supports the administrative law judge's discrediting of the opinions of Drs. Koliner and Kaplan. Dr. Koliner stated:

> [Claimant] does have a significant gas exchange abnormality as well as a ventilator abnormality. In my opinion, the[y] are disproportionate to the chest x-ray in terms of changes brought by coal dust exposure. I do feel that the overwhelming factor in [claimant's] current disability is his obstructive lung disease; the major cause of that being cigarette smoke. He does however, have evidence of some simple pneumoconiosis with a borderline profusion of small opacities on the chest x-ray. A small additional contributing disability from COPD and cardiac dysfunction may be on the basis of coal dust exposure.

Director's Exhibit 21. Based on Dr. Koliner's reliance on the absence of significant evidence of clinical pneumoconiosis on x-ray, the administrative law judge acted within his discretion in giving less weight to the doctor's opinion because he did not adequately explain how he ruled out a contribution from coal dust exposure.[7] *See Lango v. Director,*

[7] Pursuant to 20 C.F.R. §718.201(a)(1):

> "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis,

OWCP, 104 F.3d 573, 578, 21 BLR 2-12, 2-20 (3d Cir. 1997); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

With respect to Dr. Kaplan's opinion, Dr. Kaplan stated that "[t]he combination of severe COPD and heart failure account for his severe exercise limitation and gas exchange abnormalities. Although coal dust exposure can result in some degree of emphysema, I do not believe in [claimant's] case that coal dust exposure contributed in a substantial fashion to his COPD." Employer's Exhibit 5. At his deposition, Dr. Kaplan testified that "one doesn't see this severe COPD in legal coal workers' pneumoconiosis" and "in this situation, given his work history, the amount of smoking he did, you know, I feel that his COPD is related primarily to his smoking." Employer's Exhibit 9 at 38. Dr. Kaplan concluded that coal dust was "a minor contribution [to claimant's impairment] and that he would be similarly impaired if he had never worked in a coal mine." *Id*. at 39. Based on these statements, the administrative law judge permissibly determined that Dr. Kaplan did not adequately explain how he excluded a contribution from coal dust exposure.[8] *See Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Furthermore, as it is employer's burden to rebut the amended Section 411(c)(4) presumption, and the administrative law judge acted within his discretion in discrediting the opinions of employer's experts, it is irrelevant that there was not a contrary opinion in the record. 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(d)(i), (ii)); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8; *Barber*, 43 F.3d at 901, 19 BLR at 2-67. Additionally, contrary to employer's contention, the administrative law judge did not "conclude that an individual without sufficient coal dust exposure to cause pneumoconiosis can have sufficient coal dust exposure to be totally disabled." Employer's Brief at 17. Rather, the administrative

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> anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). Under 20 C.F.R. §718.201(a)(2), "'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).

[8] As the administrative law judge provided a rational reason for discrediting the opinions of Drs. Koliner and Kaplan, we need not address the rest of employer's arguments concerning the administrative law's weighing of their opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

law judge rationally determined that employer rebutted the presumed existence of clinical pneumoconiosis, but did not affirmatively establish that claimant did not have legal pneumoconiosis, or that his totally disabling obstructive impairment did not arise out of, or in connection with, his coal mine employment.[9] 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(i), (ii)); *see Lango*, 104 F.3d at 578, 21 BLR at 2-20; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. Consequently, we affirm the administrative law judge's finding that employer did not rebut the presumption at amended Section 411(c)(4) and further affirm the award of benefits.

[9] We have affirmed the administrative law judge's finding that the opinions of Drs. Koliner and Kaplan were insufficient to establish that claimant does not have legal pneumoconiosis, i.e., a chronic obstructive lung disease or impairment arising out of coal mine employment. Under the facts of this case, this finding subsumed a determination that the opinions of employer's experts were also insufficient to establish that claimant's totally disabling obstructive impairment did not arise out of, or in connection with, his coal mine employment pursuant to amended Section 411(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(ii)); *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013).

Accordingly, the administrative law judge's Decision and Order Granting Benefits 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