BRB No. 13-0490 BLA

ALVA H. COGAR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PAMMLID COAL COMPANY	)	
	)	DATE ISSUED: 05/30/2014
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS 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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Alva H. Cogar, Webster Springs, West Virginia, *pro se*.

Ashley M. Harman, William S. Mattingly, and Jeffrey F. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Michelle S. Gerdano (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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (12-BLA-5244) of Administrative Law Judge Richard A. Morgan rendered 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 September 20, 2010.[1] Director's Exhibit 3.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with twenty-three years of coal mine employment,[3] and found that claimant worked for more than fifteen years in underground coal mine employment. The administrative law judge further found that the new evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby demonstrating a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The

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[1] Claimant's initial claim for benefits, filed on May 13, 1999, was finally denied by the district director on July 13, 1999, because claimant did not establish any element of entitlement. Director's Exhibit 1.

[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, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability 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).

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred 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, has filed a limited response, urging the Board to reject employer's arguments that the administrative law judge applied an improper rebuttal standard, and erred in discounting the disability causation opinions of employer's physicians. Employer has 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.

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[4] Employer does not challenge the administrative law judge's findings that claimant established more than fifteen years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that claimant invoked the Section 411(c)(4) presumption. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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 responsible operators. Employer's Brief at 6-16. The Board rejected this argument 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). Therefore, we reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *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 938-40, 2 BLR at 2-43-44. Moreover, as discussed *supra* n.2, the DOL recently promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(1)).

Employer also asserts that the administrative law judge applied an improper rebuttal standard under Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's totally disabling respiratory impairment. Employer's Brief at 17-24. 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 32; 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 dust exposure in coal mine employment.[6] *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,[7] the administrative law judge considered whether employer disproved the existence of legal pneumoconiosis. Decision and Order at 25-27. The administrative law judge considered the medical

[6] 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 3.

[7] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, based upon the x-ray, CT scan, and medical opinion evidence. Decision and Order at 25.

opinions of Drs. Bellotte and Zaldivar that claimant does not have legal pneumoconiosis, but suffers from severe airway obstruction caused by emphysema due to smoking[8] and by asthma, and which is unrelated to dust exposure in coal mine employment. Employer's Exhibits 1, 3, 15-18.

The administrative law judge discounted the opinions of Drs. Bellotte and Zaldivar, in part, because he found that they did not adequately explain why claimant's years of dust exposure in coal mine employment did not contribute to, or aggravate, his emphysema and asthma.[9] The administrative law judge found their lack of explanation on that issue to be significant, given that Drs. Bellotte and Zaldivar concluded that smoking could aggravate asthma. 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. Bellotte and Zaldivar. Employer's Brief at 39. We disagree. Contrary to employer's contention, the administrative law judge permissibly determined that neither physician adequately explained how he determined that claimant's years of dust exposure in coal mine employment did not contribute to, or aggravate, claimant's severe obstructive pulmonary impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. This determination was within the administrative law judge's discretion as the fact-finder, and the Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. As the administrative law judge's basis for discounting the opinions of Drs. Bellotte and Zaldivar is rational and supported by substantial evidence, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.[10]

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[8] The administrative law judge found that claimant had a smoking history of "at least forty pack-years, ending in large part in 1986." Decision and Order at 6.

[9] The administrative law judge also found that Dr. Bellotte's opinion was "not fully compatible with the Act," because of Dr. Bellotte's view that claimant's emphysema was not of the focal type found with coal dust-related disease. Decision and Order at 26. Additionally, the administrative law judge discounted Dr. Zaldivar's opinion because he found that Dr. Zaldivar "provided little or no reason as to why he was able to distinguish the cause of [claimant's] emphysema." *Id.*

[10] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Bellotte and Zaldivar, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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. Bellotte and Zaldivar, that claimant's disabling impairment is unrelated to his coal mine employment, because he found their opinions, that claimant does not suffer from legal pneumoconiosis, were not credible. Decision and Order at 34-36.

Employer argues that the administrative law judge erred in relying on the "presumed" finding of legal pneumoconiosis to discredit the disability causation opinions of Drs. Bellotte and Zaldivar. Employer's Brief at 29-33. Contrary to employer's contention, the administrative law judge reasonably determined that the same reasons he provided for discrediting the opinions of Drs. Bellotte and Zaldivar on the issue of legal pneumoconiosis also undercut their opinions that claimant's disabling impairment is unrelated to his coal mine employment. *See Scott v. Mason Coal Co.,* 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013)(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). 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. *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 failed to rebut the presumption. Therefore, we affirm the 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.

ROY P. SMITH
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I agree with my colleagues that the administrative law judge permissibly determined that neither Dr. Bellotte nor Dr. Zaldivar adequately explained how he determined that claimant's coal dust exposure did not contribute to, or aggravate, claimant's chronic obstructive pulmonary impairment, and therefore permissibly discredited their opinions for purposes of rebutting the presumptions established under 30 U.S.C. §921(c)(4). Consequently, I concur in the result.

JUDITH S. BOGGS
Administrative Appeals Judge