BRB Nos. 12-0081 BLA
and 12-0081 BLA-A

RICHARD P. KUHN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
KANAWHA COAL COMPANY	)	
	)	DATE ISSUED: 11/19/2012
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals, the Decision and Order Awarding Benefits (09-BLA-05088) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on February 4, 2008.[1] Director's Exhibit 4.

The administrative law judge credited claimant with nineteen and one-half years of coal mine employment,[2] and noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish 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).

Applying amended Section 411(c)(4), the administrative law judge found that at least eighteen and one-half years of claimant's coal mine employment consisted of qualifying coal mine work, performed either underground, or aboveground at an underground coal mine. Additionally, the administrative law judge found that the new medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further

[1] Claimant filed three prior claims, each of which was finally denied. Director's Exhibits 1-3. His most recent prior claim, filed on February 8, 2006, was denied on December 18, 2006, because claimant did not establish any element of entitlement. Decision and Order at 34; Director's Exhibit 3.

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 6. 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, 1-202 (1989) (en banc).

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

On appeal, employer challenges the administrative law judge's application of Section 411(c)(4) to this case. Employer further argues that the administrative law judge did not properly assess whether claimant's aboveground work conditions were substantially similar to underground conditions, and, therefore, erred in finding that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Additionally, employer argues that the administrative law judge erred in finding that employer did not 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, arguing that the administrative law judge properly applied Section 411(c)(4) to this case, and that she properly found claimant's aboveground mining work to be qualifying coal mine employment for purposes of the Section 411(c)(4) presumption.[3] Claimant has filed a cross-appeal, asserting that the administrative law judge erred in weighing the medical opinion evidence in finding that employer failed to rebut the presumption of total disability due to pneumoconiosis.[4] Neither employer, nor the Director, has filed a response brief regarding claimant's cross-appeal.

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

[3] Employer does not challenge the administrative law judge's finding of nineteen and one-half years of coal mine employment, or her finding that the new medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] On cross-appeal, claimant contends that the administrative law judge erred in discounting the opinion of claimant's physician, Dr. Rasmussen. Claimant asks that the Board address the arguments raised in his cross-appeal only if the award is not affirmed. Claimant's Cross-Appeal Brief at 2, 4, 11-12.

I. Constitutionality of the Amendments and Application to Employer

Employer initially asserts that the application of amended Section 411(c)(4) is unconstitutional. Employer's Brief at 12. Employer's contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision. Employer's additional argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); Employer's Brief at 12. Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, which was filed after January 1, 2005, and was pending on March 23, 2010. Accordingly, we turn to employer's contentions regarding invocation of the Section 411(c)(4) presumption.[5]

II. Qualifying Coal Mine Employment

The administrative law judge noted that, according to claimant's testimony at the hearing and his employment records, claimant worked for one and one-half years in an underground mine, and worked an additional seventeen years aboveground at employer's underground mine site. Decision and Order at 10-14; Director's Exhibit 8; Hearing Transcript at 61-68. Relying on the Board's holding in *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1987), that the type of mine (underground or surface), rather than the location of the particular worker (above or below ground), is the element that determines whether a claimant is required to show comparability of conditions, the administrative law judge found that a showing of equivalency was not required for the seventeen years that claimant worked aboveground for employer. Decision and Order at

[5] Employer additionally contends that the Board should remand this case and order the administrative law judge to permit the parties to introduce additional evidence specific to the change in law and the allocation of the parties' burdens of proof. Employer's Brief at 19. Employer asserts that it is an error of law and violation of employer's due process rights to apply amended Section 411(c)(4) to this claim without allowing such additional evidentiary development. Employer's Brief at 19. Employer's argument lacks merit. The record reflects that, in her July 16, 2010 Notice of Hearing, the administrative law judge informed the parties that Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)), would be applied to this case, and that they were expected to be prepared to submit evidence that, in their judgment, was relevant to any of the elements of entitlement, in light of the change in law.

13, *citing Alexander*, 2 BLR at 1-504. The administrative law judge, therefore, credited claimant with at least eighteen and one-half years of qualifying coal mine employment. Decision and Order at 17.

Employer does not challenge the administrative law judge's finding that claimant was employed for at least eighteen and one-half years either underground, or aboveground at an underground mine site. Rather, employer challenges the administrative law judge's finding that the evidence is sufficient to establish that claimant was employed for at least fifteen years in qualifying coal mine employment. Employer's Brief at 12-14. Employer argues that the administrative law judge erred in finding that claimant did not have to show that the dust exposure at his job on the surface was substantially similar to the dust exposure in an underground mining position. *Id.* Employer's contention lacks merit.

Based on claimant's testimony, his employment records, and the absence of evidence to the contrary, the administrative law judge permissibly determined that all seventeen years of claimant's aboveground coal mine employment were performed at an underground coal mine site. Decision and Order at 10-14; Director's Exhibit 8; Hearing Transcript at 61-68. Consequently, claimant is not required to show comparability of environmental conditions in order to qualify for the Section 411(c)(4) presumption and, therefore, we affirm the administrative law judge finding that claimant established at total of at least eighteen and one-half years of qualifying coal mine employment. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011), *citing* Alexander, 2 BLR at 1-504. Based on the administrative law judge's unchallenged determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4).

III. Rebuttal of the Presumption

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), she properly noted that the burden of proof shifted to employer to establish rebuttal by establishing that claimant "does not . . . have pneumoconiosis" or that claimant's "respiratory or pulmonary impairment did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938, 2 BLR 2-38, 2-41 (4th Cir. 1980); Decision and Order at14-15. The administrative law judge found that employer did not establish either method of rebuttal. Decision and Order at 29-33.

As an initial matter, the administrative law judge determined that employer rebutted the presumption that claimant suffers from clinical pneumoconiosis,[6] as the weight of the x-ray and medical opinion evidence is negative for the existence of coal workers' pneumoconiosis. Decision and Order at 30-32. Regarding the existence of legal pneumoconiosis,[7] the administrative law judge considered the medical opinions of Drs. Rasmussen, Houser, Zaldivar and Bellotte. Drs. Rasmussen and Houser diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) with emphysema due to a combination of coal mine dust exposure and smoking. 20 C.F.R. §718.201(a)(2); Director's Exhibit 13; Claimant's Exhibits 7, 21, 22. Drs. Zaldivar and Bellotte opined that claimant's COPD with emphysema is due entirely to smoking, with no contribution from coal mine dust exposure. Employer's Exhibits 3, 4, 6, 7, 13.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge discredited the opinions of Drs. Zaldivar and Bellotte, that claimant does not suffer from legal pneumoconiosis. Specifically, the administrative law judge found that Dr. Zaldivar failed to adequately explain his opinion that claimant's more than nineteen years of coal mine dust exposure did not contribute to his disabling obstructive impairment, and that Dr. Bellotte relied on an inaccurate coal mine dust exposure history. Decision and Order at 30-32. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Zaldivar and Bellotte. We disagree. The administrative law judge correctly noted that Dr. Zaldivar conceded that coal mine dust exposure may cause COPD and emphysema, and that the effects of coal mine dust exposure and smoking are additive. Decision and Order at 31; Employer's Exhibit 13 at 29, 32. The administrative law judge also noted that, based on his opinion that legal pneumoconiosis is a "diagnosis of exclusion" that is appropriate if "nothing else is more likely" to have caused the impairment, Dr. Zaldivar concluded that claimant's pattern of impairment is fully explained by his smoking history. Decision and Order at 31-32; Employer's Exhibit 13

[6] Clinical pneumoconiosis is defined as "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).

[7] 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).

at 21-22. Contrary to employer's argument, the administrative law judge permissibly found, in light of Dr. Zaldivar's concessions, and in light of the rebuttal standard which requires employer to rule out a causal connection between claimant's coal mine dust exposure and his disabling impairment, that Dr. Zaldivar did not adequately explain why claimant's more than nineteen years of coal mine dust exposure did not contribute, along with claimant's smoking history, to his pulmonary impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Decision and Order at 32.

Moreover, the administrative law judge permissibly found that, to the extent Dr. Zaldivar relied on the improvement in claimant's pulmonary function after bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment,[8] Dr. Zaldivar did not adequately explain why claimant's response to bronchodilators necessarily ruled out any contribution from coal mine dust exposure. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 32. As the administrative law judge's findings are rational and supported by substantial evidence, we affirm her determination to discredit the opinion of Dr. Zaldivar.

We further reject employer's contention that the administrative law judge erred in discounting the opinion of Dr. Bellotte. The administrative law judge summarized Dr. Bellotte's opinion that, because ninety percent of claimant's coal mine employment was aboveground, claimant would have had less dust exposure and, consequently, a less than four percent chance of having a materially significant loss of lung function due to coal mine dust exposure. Decision and Order at 30; Employer's Exhibit 4 at 15, 17. The administrative law judge permissibly concluded, however, that Dr. Bellotte's assumption as to claimant's low level of coal mine dust exposure was belied by the credible testimony of claimant, and his wife, which detailed the effects of claimant's dust exposure on his clothing and body during claimant's aboveground coal mine employment. Decision and Order at 30. Thus, contrary to employer's contention, the administrative law judge rationally accorded less weight to Dr. Bellotte's opinion as

[8] Dr. Zaldivar noted that an early pulmonary function study performed by claimant's treating physician revealed "dramatic[]" improvement following the administration of bronchodilators. Employer's Exhibit 13 at 23. Dr. Zaldivar opined that response to bronchodilators is not consistent with coal mine dust-related disease. Employer's Exhibit 3 at 11.

unreasoned, as it was based on an underestimation of claimant's coal mine dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). As the administrative law judge's basis for discrediting the opinion of Dr. Bellotte is rational and supported by substantial evidence, it is affirmed.

The determination of whether a medical opinion is sufficiently documented and reasoned is a credibility matter within the purview of the administrative law judge. *Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-155. As the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Castle, 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 disprove the existence of legal pneumoconiosis. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Finally, employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption by showing that claimant's respiratory impairment did not arise out of, or in connection with, coal mine employment. Employer's Brief at 19-20. We disagree. The administrative law judge accurately noted that all of the physicians agree that claimant's disability is due to his pulmonary impairment. Decision and Order at 10. The same reasons for which the administrative law judge discredited the opinions of Drs. Zaldivar and Bellotte, 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. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 31. Because the opinions of Drs. Zaldivar and Bellotte are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. *See Barber*, 43 F.3d at 899, 901, 19 BLR at 2-61, 2-67; *Rose*, 614 F.2d at 936, 939, 2 BLR at 2-38, 2-43.

Consequently, we affirm the administrative law judge's award of benefits. In light of our affirmance of the administrative law judge's award of benefits, we need not address claimant's contentions of error raised in his cross-appeal.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge