BRB No. 13-0065 BLA

JULIE STOUT,[1] o/b/o LESLIE STOUT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TOP HILL MINING COMPANY	)	DATE ISSUED: 11/12/2013
	)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

[1] The miner was diagnosed with dementia in 2011. Claimant, the wife of the miner, is pursuing the miner's claim on his behalf. *See* Decision and Order at 3; Director's Exhibit 1 at 78; Hearing Transcript at 9.

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/carrier (employer) appeals the Decision and Order Granting Benefits (2010-BLA-5629) of Administrative Law Judge Pamela J. Lakes rendered on a miner's subsequent claim filed on September 3, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] The administrative law judge credited the miner with at least fifteen years of underground coal mine employment. The administrative law judge found both that employer conceded that the miner was totally disabled and that the evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), an element of entitlement previously adjudicated against the miner. The administrative law judge found, therefore, that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309.[3] Additionally, the administrative law judge found that the miner was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[4] because the miner had at least fifteen years of coal mine employment and a totally disabling respiratory impairment. Finally,

[2] The miner's previous claim, filed on April 6, 1993, was denied by the district director on August 23, 1993 for failure to establish any element of entitlement, and was not further pursued. Director's Exhibit 1 at 1-5.

[3] Where a miner files an application 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." 20 C.F.R. §725.309(d); *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(d)(2).

[4] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010). The amendments, in pertinent part, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established.

the administrative law judge found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits on the miner's subsequent claim.

On appeal, employer challenges the administrative law judge's application of the amended Section 411(c)(4) presumption to this case. Employer also challenges the administrative law judge's finding that the evidence was insufficient to establish rebuttal of the amended Section 411(c)(4) presumption, arguing that the administrative law judge improperly evaluated the medical opinions of record and failed to render complete findings, contrary to the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[5] In response to employer's appeal, claimant urges that the administrative law judge's decision awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs, has filed a limited response to employer's appeal, urging the Board to affirm the application of the amended Section 411(c)(4) presumption to this case.[6]

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.[7] 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).

[5] 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). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[6] We affirm, as unchallenged on appeal, the administrative law judge's determinations: that the miner had at least fifteen years of coal mine employment; that he had total respiratory disability; that a change in an applicable condition of entitlement was established; and that the amended Section 411(c)(4) presumption was invoked. Decision and Order at 3-4, 5 n.8, 7, 8, 12; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1 at 78, 4.

Consideration of the Amended Section 411(c)(4) Presumption

Employer asserts that the rebuttal provisions of the amended Section 411(c)(4) presumption apply only to claims against the "Secretary," and not to claims brought against a responsible operator; that the absence of implementing regulations prevent application of the presumption; that employer's due process rights were violated by the absence of notice of the change in the avenue of entitlement created by the amended Section 411(c)(4) presumption, and that the presumption has changed the rebuttal standard. These arguments are rejected. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013)(Niemeyer, J. concurring); *Fairman v. Helen Mining Co.*, 24 BLR 1-227, 1-229 (2011); Director's Response at 1-2. Accordingly, we affirm the administrative law judge's consideration of this case under the amended Section 411(c)(4) presumption to this case.

Rebuttal of the Amended Section 411(c)(4) Presumption

In order to rebut the amended Section 411(c)(4) presumption, employer must affirmatively prove either that the miner does not suffer from legal pneumoconiosis or that his disability is not due to coal mine employment.[8] 30 U.S.C. §921(c)(4); *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, 2 BLR 2-38 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-480, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

Employer asserts that the opinions of Drs. Basheda[9] and Rosenberg[10] establish rebuttal of the amended Section 411(c)(4) presumption by showing that the miner does not have legal pneumoconiosis and that his total disability is not due to coal mine

[8] The administrative law judge found that employer "disprove[ed] the existence of clinical pneumoconiosis." Decision and Order at 12.

[9] Dr. Basheda found no evidence of legal pneumoconiosis. He diagnosed a severe obstructive lung disease due to smoking. Dr. Basheda also opined that the miner's pulmonary disability was due to tobacco-induced obstructive lung disease. Decision and Order at 10; Employer's Exhibits 3 at 11; 7 at 18-19; 21-23.

[10] Dr. Rosenberg diagnosed an obstructive lung disease due to smoking. He found no evidence of legal pneumoconiosis, and stated that the miner's pulmonary disability was not caused "to any degree by his occupational history of exposure to coal dust." Decision and Order at 11, 12; *see* Employer's Exhibits 4 at 5-6; 8 at 13-15; 21.

employment.[11] Employer also argues that the administrative law judge erred in discounting the opinions of Drs. Basheda and Rosenberg on the ground that they are inconsistent with the preamble of the 2001 revised regulations. Further, employer contends that the administrative law judge failed to adequately consider "the length and extent of [the miner's] smoking history" in "assessing the reliability and credibility of the medical opinion evidence[.]" Employer's Brief at 9.

Initially, we reject employer's contention that the administrative law judge failed to adequately consider the evidence regarding the miner's smoking history. While the administrative law judge did not make a specific finding concerning the length and extent of the miner's smoking history, she cited to the medical opinion evidence, which consistently reflected that the miner had a significant smoking history, namely, a one to two pack a day cigarette smoking history for at least fifty years.[12] She further determined that claimant's testimony indicating that the miner smoked one to two packs of cigarettes a day for at least fifty years was credible.[13] Hearing Transcript at 17-18. Thus, contrary to employer's contention, the administrative law judge did not fail to adequately consider the evidence relevant to the length and extent of the miner's smoking history, and the record does not reflect any conflict between the administrative law judge's understanding of the miner's smoking history and the evidence of record. *See* Decision and Order at 3, 9-12; Employer's Brief at 6, 7-9; *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985).

Employer's other arguments also lack merit. In finding that employer failed to establish rebuttal with affirmative proof that the miner does not have legal pneumoconiosis, or that his disabling respiratory impairment was not due to coal mine

[11] In addition to the opinions of Drs. Basheda and Rosenberg, the record includes the report of Dr. Forehand, who diagnosed legal pneumoconiosis, in the form of emphysema, due to "the combined effects of smoking and coal mine dust exposure." Decision and Order at 9-10, 11; Director's Exhibit 13; Employer's Exhibit 2 at 31-33, 38.

[12] Dr. Basheda noted that the miner started smoking at about age fifteen, had "quit for ? three to five years in the past," but was a "one to two pack a day smoker for approximately [fifty] years." Employer's Exhibits 3 at 4; 7 at 17-18; 9; 21.

Similar information was provided to Dr. Rosenberg, who referenced Dr. Forehand's report that the miner smoked from age fifteen or so, "throughout his entire adult life, up to about two packs of cigarettes per day." Employer's Exhibits 4 at 3, 6, 8 at 10, 17, 21.

[13] As the miner was born in 1943, claimant's testimony, that he smoked "about a pack a day" of cigarettes from the time he was a teenager until 2011, reflects a smoking history of at least fifty years. *See* Director's Exhibit 1; Hearing Transcript at 17-18.

employment, the administrative law judge found that the opinions of Drs. Basheda and Rosenberg are based on beliefs that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science, set forth in the preamble to the 2001 revised regulations. Decision and Order at 11-12, 13; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 24 BLR 2-297 (10th Cir. 2010).

Specifically, the administrative law judge rejected the opinion of Dr. Basheda that the miner's disabling chronic obstructive pulmonary disease (COPD) is due solely to smoking, based upon the reasons he provided: that statistically someone has a greater chance of developing obstructive lung disease from smoking than from coal dust exposure; that the reduction in FEV_1 on pulmonary function studies due to coal dust exposure is much less than that caused by smoking; and that it would be extremely unusual for coal dust exposure to cause COPD where a miner continued to smoke heavily twenty years after leaving the mines. Decision and Order at 10; Employer's Exhibits 3 at 9-10, 7 at 8, 9-10, 21-22, 23. The administrative law judge also rejected Dr. Rosenberg's opinion, that the miner's disabling COPD is due to smoking alone, for the same reasons. Decision and Order at 11; Employer's Exhibit 4 at 3-5, 8 at 19, 22-24, 37-38.

The preamble recognizes that "coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV_1/FVC ratio. 65 Fed. Reg. 79,943 (Dec. 20, 2000). The administrative law judge, therefore, properly found that Drs. Basheda's and Rosenberg's adherence to the "notion" that "there is a specific pattern of impairment characteristic of smoking and not coal mine dust" is contrary to the preamble and regulations.[14] Decision and Order at 11; *Sewell Coal Co. v. Triplett*, 253 F. App'x 274, 277 (4th Cir. 2007).

[14] Dr. Basheda stated:

> The loss of FEV_1 is approximately two to three cc's per year after dust regulations in the early 1970's, when the majority of [the miner's] coal mine dust exposure occurred. With his use of respiratory protection, and work above ground, this would lessen his risk of obstructive lung disease. If airway obstruction developed, this would be minimal…. The total loss of FEV_1 due to coal dust has been estimated with a cumulative exposure of 180gh/m2 which corresponds to 45 years (2000 hours per year) at a mean concentration of 2/mg/m2. The total loss of FEV_1 ranged from 120 cc's to as much as 610 cc's with a median of 169 cc's…. [The miner] did not approach this exposure threshold… The loss of projected FEV_1, should coal dust have affected his pulmonary

Similarly, the administrative law judge properly found that the opinions of Drs. Basheda and Rosenberg, implying that coal dust-related lung disease does not cause a clinically significant pulmonary impairment, are contrary to the preamble. *See* 65 Fed. Reg. 79,938-40 (Dec. 20, 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

Additionally, the administrative law judge rejected the opinion of Dr. Basheda as Dr. Basheda relied, in part, on the fact that the miner ceased working in the mines twenty years ago, while continuing to smoke, to support his conclusion that the miner suffers from a smoking-induced lung disease and disability.[15] The administrative law judge also

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> physiology, would be minimal…. [The miner] has severe, progressive obstructive lung disease since leaving the coal mines. This clinical picture is most consistent with tobacco-induced chronic obstructive pulmonary disease. He continued to smoke long after leaving the coal mines. Coal worker's pneumoconiosis has been defined as a latent and progressive disease. This is seen radiographically as increasing profusion with progressive massive fibrosis/emphysema. This was not evident on [his] chest x-rays. I frequently observe this clinical picture in aging cigarette smokers.

Employer's Exhibit 3 at 9-10.

Dr. Rosenberg described a "pattern of impairment" demonstrating that when latent and progressive legal coal workers' pneumoconiosis occurs, "there's a preservation of the FVC and the FEV_1 such as the ratio of FEV_1 divided by FVC generally is preserved.…that does not occur as you develop chronic obstructive pulmonary disease (COPD) related to smoking. And in this situation, [the miner] developed a marked decrease in his FEV_1 with a preservation of the FVC. So that's inconsistent with latent and progressive legal [coal workers' pneumoconiosis]." Employer's Exhibit 8 at 18-19, 20-21.

[15] Dr. Basheda discussed the miner's respiratory condition/symptoms:

> Q. [The miner] started the symptoms while he was working as a coal miner, but yet, they've continued for years after he stopped?
>
> A. That's correct.

rejected Dr. Rosenberg's opinion that coal dust-related symptomology dissipates after leaving coal mine employment.[16] The administrative law judge properly rejected these opinions because they failed to accord with the latent and progressive nature of pneumoconiosis. S*ee* 20 C.F.R. §718.201(c); *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *see also* 65 Fed. Reg. at 79,937-79,945, 79,968-79,977 (Dec. 20, 2000).

Finally, the administrative law judge found that "[t]he problem" with Dr. Basheda's opinion is that he "discuss[ed] [what] was the most likely cause of the claimant's disability (smoking or coal dust) as opposed to the question of whether coal mine dust was a significant contributing factor." Decision and Order at 10. Likewise, the administrative law judge found that Dr. Rosenberg's "focus was on which factor (smoking or coal dust) was the likely cause, … did not adequately address the issue of whether coal mine dust could have significantly contributed to the disability as an aggravating or contributing factor." *Id*. at 11; *see* Employer's Exhibits 7 at 18; 8 at 10-11; 21; 23.

Because the phrase "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R. §718.201(b), the administrative law judge's observations regarding the opinions of Drs.

> Q. Is that of any importance?
>
> A. Well, when you look at industrial-induced diseases, especially a bronchitis-type of problem or asthma symptoms, oftentimes, when you remove someone from that environment, the symptoms should go away. So if [the miner] had a disease process or symptoms related to coal dust, [on] leaving coal mines, you would expect those symptoms to have gotten better.…
>
> A.…when you look at his significant and persistent smoking, that appears to be the likely explanation [for] why he has progressive and persistent symptoms.

Employer's Exhibit 7 at 14-15, 18-19.

[16] Dr. Rosenberg stated that the pattern of obstruction seen in the miner was "not characteristic generally of that developing in relationship [sic] to *past* coal mine dust exposure" but it is "classic for a smoking-related form of COPD." Employer's Exhibit 4 at 6 [emphasis added].

Basheda and Rosenberg are appropriate. Further, employer fails to identify any explanation or discussion by Drs. Basheda or Rosenberg addressing the issues of contribution or aggravation. Thus, the administrative law judge properly found that Drs. Basheda and Rosenberg failed to adequately explain why the miner's coal mine-dust exposure was not a contributing or aggravating cause of his disabling COPD or emphysema. Decision and Order at 11; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *see also Millburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-335(4th Cir. 1988). Consequently, the administrative law judge rationally rejected that the opinions of Drs. Basheda and Rosenberg, because they fail to adequately explain why the miner's disabling respiratory impairment was due to smoking, rather than coal dust exposure, and because they are inconsistent with the view expressed in the preamble and regulations, that coal dust-related and smoking related pollutants cause pulmonary impairment by the same mechanism. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000)(Medical literature "support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms."); *see also Looney*, 678 F.3d at 305, 25 BLR at 2-115;*Obush*, 650 F.3d at 256-57, 24 BLR at 2-383; Decision and Order at 9-10, 12.

In light of the foregoing, therefore, we affirm the administrative law judge's conclusion that the opinions of Drs. Basheda and Rosenberg fail to carry employer's burden to affirmatively disprove the existence of legal pneumoconiosis or that the miner's total disability is due to coal mine employment. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Decision and Order at 7, 10, and 12. The administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption is, therefore, affirmed.[17] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2013); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR 2-43; *see also Morrison*, 644 F.3d at 479-480, 25 BLR at 2-8-9.

[17] Because employer bears the burden of proof on rebuttal, the sufficiency of claimant's evidence is not at issue. We decline, therefore, to address employer's arguments regarding the administrative law judge's evaluation of the medical opinion of Dr. Forehand, who found that the miner has legal pneumoconiosis and that his total disability is due to both coal mine employment and smoking. *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, 2 BLR 2-38 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-480, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); Decision and Order at 9-10, 11; Director's Exhibit 13; Employer's Exhibit 2 at 31-33, 38.

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