BRB No. 14-0075 BLA

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| LEONARD S. CUMBRIDGE | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| DONALDSON MINING COMPANY | ) | DATE ISSUED: 11/17/2014 |
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| Employer-Petitioner | ) | |
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| 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.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (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, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5413) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (2012)(the Act).[1] In light of claimant's September 7, 2010 filing date, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and credited claimant with at least twenty-four years of coal mine employment underground, or in conditions substantially similar, based on the parties' stipulation. The administrative law judge found that new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against claimant. The administrative law judge, therefore, found that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and was entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.[2] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings of total respiratory disability at Section 718.204(b) and invocation of the Section 718.305

[1] Claimant filed his initial claim for benefits on November 22, 1991, which was denied by the district director, based on the determination that claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Claimant filed a second claim on August 31, 2006, which was ultimately denied by Administrative Law Judge Richard A. Morgan, in a Decision and Order issued on April 30, 2009. Director's Exhibit 2. Judge Morgan found that claimant failed to establish a total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* No further action was taken by claimant on this claim. However, the Department of Labor sought the recovery of an overpayment of interim benefits in association with claimant's second claim. *Id*. Judge Morgan, in a Decision and Order issued on February 18, 2011, denied claimant's request for waiver of the overpayment. *Id*. By Decision and Order dated March 16, 2012, the Board affirmed the denial of waiver. *Cumbridge v. Director, OWCP*, BRB No. 11-0445 BLA (Mar. 16, 2012)(unpub.); Director's Exhibit 2.

[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 that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

presumption, based on his finding that claimant's usual coal mine employment involved hard labor. Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the Section 718.305 presumption, arguing that the administrative law judge erred in weighing the medical opinions of Drs. Zaldivar and Rosenberg, and improperly utilized the preamble to the 2001 regulations in evaluating the medical opinion evidence. In response, claimant urges 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 utilized the preamble in evaluating the credibility of the medical opinions of record, and permissibly discounted the opinions of Drs. Zaldivar and Rosenberg.

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.[3] 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).

**Section 718.305 Invocation**

In challenging the administrative law judge's finding of invocation, employer contends that the administrative law judge did not resolve the conflict in the evidence regarding the exertional requirements of claimant's last coal mine job, and erred in finding that claimant's work constituted hard labor. Employer contends that the administrative law judge failed to consider all of the evidence relevant to claimant's last coal mine employment, and exclusively relied on one employment history provided by claimant. Employer's Brief at 7. As a result, employer asserts that Dr. Rosenberg's opinion, that claimant's respiratory impairment was not disabling, was improperly discredited on the issue of total respiratory disability. Employer's Brief at 8.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence consistent with applicable law, and contains no reversible error. The Board has defined an individual's usual coal mine work as "the most recent job the miner performed regularly and over a substantial period of time." *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). In finding that claimant's usual coal mine employment required hard labor, the

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

administrative law judge considered claimant's hearing testimony,[4] as well as claimant's application for benefits, Director's Exhibit 4, Form CM-913, claimant's description of his coal mine work,[5] Director's Exhibit 6, and claimant's answers to employer's interrogatories,[6] Employer's Exhibit 4. The administrative law judge determined that claimant's usual coal mine employment, as a fire boss and mine foreman, required claimant to install belts, rock dust and move power at the beginning of a shift, "lift[ing] the belt structure which weight about 85 pounds per piece and rock dust bags which weighed about 60 pounds;" and to walk seven miles inspecting the return airways at the end of a shift.[7] Decision and Order at 5. Based on the descriptions contained in the record, the administrative law judge concluded that claimant's usual coal mine employment required hard labor. *Id.* After summarizing the medical opinions addressing the issue of total disability, the underlying documentation, and the job duties relied upon by the physicians, the administrative law judge determined that Drs. Ammisetty, Klayton, Gallai and Zaldivar opined that claimant was totally disabled from performing his usual coal mine employment from a respiratory standpoint, and that only Dr. Rosenberg opined that claimant's oxygenation abnormality, reduced diffusion and mild to moderate airflow obstruction were not disabling. Decision and Order at 11-15, 29; Director's Exhibit 14; Claimant's Exhibits 4, 5; Employer's Exhibits 1, 5, 6, 8, 9. Dr. Rosenberg related that

[4] The administrative law judge summarized claimant's January 16, 2013 hearing testimony, noting that claimant's last coal mine work "involved lots of walking, i.e., seven miles a day for two to three days a week," and that claimant now must stop and catch his breath after climbing thirteen steps at home. Decision and Order at 15.

[5] Claimant described his work as a fire boss and mine foreman as walking the return and belt lines, installing belts, moving power and doing rock dust. Claimant listed his physical activities as sitting one hour per day; standing eight hours per day; lifting sixty pounds; and carrying sometimes. Director's Exhibit 6.

[6] In his answers to employer's interrogatories, claimant indicated that his duties as a mine foreman and fire boss were to check mine safety, walking the return airways from one to seven miles, supervising mine construction, rock dusting and moving sections. Claimant's physical activities included sitting for one hour per day; standing for eight hours per day; lifting sixty pounds for two hours per day; and carrying sometimes. Employer's Exhibit 4.

[7] The administrative law judge incorrectly attributed this description of claimant's job requirements to Employer's Exhibit 4, claimant's answers to employer's interrogatories, when in fact the administrative law judge was actually quoting the summary he made, in his April 30, 2009 Decision and Order, of claimant's testimony at the October 23, 2008 hearing on claimant's second claim. Director's Exhibit 2.

claimant was short of breath walking a block or climbing a flight of stairs, and acknowledged that, over the years, claimant operated all of the equipment underground and did a lot of belt work, regularly lifting fifty pounds or more. Decision and Order at 14; Employer's Exhibit 6. However, Dr. Rosenberg characterized claimant's work as "light," based on claimant's description of his last coal mine duties as consisting of "walking around," checking the return airways for compliance, and not performing "much" manual labor. Decision and Order at 14-15; Employer's Exhibits 6, 9. Since claimant credibly testified that he was unable to walk short distances or lift weights without dyspnea, as required by his usual coal mine employment, the administrative law judge acted within his discretion in discounting Dr. Rosenberg's opinion that claimant's impairment was not disabling. Decision and Order at 29; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). Because substantial evidence supports the administrative law judge's credibility determinations, and employer has not otherwise challenged the administrative law judge's weighing of the evidence relevant to the issue of total disability, we affirm his finding that the evidence, as a whole, establishes total respiratory disability pursuant to Section 718.204(b). Decision and Order at 29; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc). Consequently, we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309, and is entitled to invocation of the Section 718.305 presumption. 20 C.F.R. §718.305, implementing 30 U.S.C. §921(c)(4); Decision and Order at 3, 29, 31.

**Section 718.305 Rebuttal**

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the administrative law judge determined that the burden shifted to employer to disprove that claimant has clinical and legal pneumoconiosis, or to establish that his disability did not arise out of, or in connection with, coal mine employment.[8] 30 U.S.C. §921(c), implemented by 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). The administrative law judge found that employer successfully rebutted the presumed fact of clinical pneumoconiosis, but failed to rebut the presumed fact of legal pneumoconiosis, and failed to prove that claimant's total disability is not due to pneumoconiosis. Decision

[8] Employer does not challenge the rebuttal standard applied by the administrative law judge. However, effective October 25, 2013, the Department of Labor, in the implementing regulation, adopted a slightly different formulation for establishing the second prong of rebuttal, requiring that employer 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." 20 C.F.R. §718.305(d)(ii).

and Order at 25-26, 31-34.

Employer initially argues that the administrative law judge improperly applied the preamble to the revised regulations in evaluating the medical opinions of Drs. Zaldivar and Rosenberg, and alleges that, unlike the regulations, the preamble was not subject to notice and comment, and is not binding on the Department of Labor (DOL). To the contrary, the preamble sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Hence, we agree with the Director that, contrary to employer's assertion, the administrative law judge had the discretion to consider the preamble to the revised regulations in assessing the credibility of the medical experts in this case. In so doing, the administrative law judge did not treat the preamble as medical evidence, substitute his own opinion for that of the medical experts, or deprive employer of a fair hearing or impartial findings. Rather, he permissibly consulted the preamble as an authoritative statement of medical principles accepted by the DOL. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Obush*, 24 BLR at 1-125-26. Accordingly, we reject employer's argument that the administrative law judge erred in utilizing the preamble in his evaluation of the medical opinion evidence.

Employer argues that the administrative law judge provided invalid reasons for discounting the opinions of Drs. Zaldivar and Rosenberg on the issue of legal pneumoconiosis, and failed to render a reasoned finding as to whether claimant's disability was due to pneumoconiosis. Employer's Brief at 9-23.

In addressing rebuttal, the administrative law judge determined that Drs. Ammisetty, Gallai and Klayton diagnosed chronic obstructive pulmonary disease (COPD)/emphysema attributable to coal dust exposure, whereas Drs. Zaldivar and Rosenberg opined that claimant's COPD is unrelated to coal dust exposure. Decision and Order at 26. Drs. Zaldivar and Rosenberg diagnosed asthma and bullous emphysema, and excluded coal mine dust exposure as a possible cause of those conditions. Decision and Order at 25-26; Employer's Exhibits 10, 11. However, the administrative law judge was not persuaded by Dr. Zaldivar's supporting documentation that did not list coal dust exposure as a possible cause of bullous emphysema, and noted that neither Dr. Zaldivar

nor Dr. Rosenberg adequately explained why coal dust exposure did not exacerbate claimant's asthma. Decision and Order at 25; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). The administrative law judge permissibly concluded that the opinions of Drs. Zaldivar and Rosenberg were inconsistent with the DOL's acknowledgment in the preamble that the term "chronic obstructive pulmonary disease includes . . . chronic bronchitis, emphysema and asthma," and that the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease. *See* 65 Fed. Reg. 79,920, 79,939, 79,944 (Dec. 20, 2000); *Obush*, 24 BLR at 1-125-26; *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Additionally, Dr. Rosenberg stated that patterns of airflow obstruction help determine the etiology of a miner's airway obstruction, and that "while the $FEV_1$ decreases in relationship to coal mine dust exposure, the $FEV_1$/FVC ratio generally is preserved." Employer's Exhibit 6. Dr. Rosenberg opined further that a decreased $FEV_1$ and $FEV_1$/FVC ratio is inconsistent with the pattern of impairment related to a past coal dust exposure. *Id.* The administrative law judge found, however, that the basis of Dr. Rosenberg's opinion was inconsistent with the scientific studies cited in the preamble, recognizing that "coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced $FEV_1$/FVC ratio." *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); Decision and Order at 25. Hence, the administrative law judge acted within his discretion in finding that the opinions of both Dr. Zaldivar and Dr. Rosenberg were inconsistent with the medical science credited by the DOL in the preamble, and were entitled to little weight. Decision and Order at 14-15, 24-25, 32-33; *see Sewell Coal Co. v. Triplett*, 253 F. App'x 274, 277 (4th Cir. 2007); *Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Freeman United Coal Mining v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *see also Obush*, 24 BLR at 1-125. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the opinions of Drs. Zaldivar and Rosenberg were insufficient to establish rebuttal of the presumed fact of legal pneumoconiosis.

Because Drs. Zaldivar and Rosenberg did not diagnose pneumoconiosis, contrary to the administrative law judge's finding that employer failed to rebut the presumed fact of legal pneumoconiosis, the administrative law judge permissibly found that their opinions were entitled to little weight on the issue of disability causation. 20 C.F.R. §718.305(d)(1)(ii); *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 34. As substantial evidence supports the administrative law judge's findings, and the remaining medical opinions of record do not support employer's burden, we affirm the administrative law judge's conclusion that the opinions of Drs. Zaldivar and Rosenberg were insufficient to establish rebuttal of the presumed fact of disability causation, and that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i), (ii). Consequently, we affirm the

administrative law judge's award of benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the majority's decision to affirm, as supported by substantial evidence, the administrative law judge's findings that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b); that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309; that claimant was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis; and that employer failed to establish rebuttal of the presumption. In finding that rebuttal was not established, I agree that the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Rosenberg on the ground that the physicians failed to adequately explain why coal dust exposure did not exacerbate claimant's asthma. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). I note, however, that while the preamble cites specific evidence linking the development of bronchitis and emphysema to coal dust exposure, it does not cite any evidence explicitly showing that asthma is a condition caused by coal dust exposure.[9] *See* 65 Fed. Reg. 79,939-44 Dec. 20, 2000). Additionally, to the extent that the preamble discusses

[9] The preamble does discuss scientific evidence relating to cytokines, which it notes are also involved in asthma; however, the studies cited do not specifically relate coal dust exposure to the development of asthma. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000).

specific types of emphysema that may be caused by coal dust exposure, I note that the preamble identifies centrilobular emphysema, centriacinar emphysema and focal emphysema, but not bullous emphysema. *See* 65 Fed. Reg. 79,941-42 (Dec. 20, 2000). Consequently, the scientific evidence cited in the preamble does not supply a basis for discounting the opinions of Drs. Zaldivar and Rosenberg on the grounds that coal dust exposure causes asthma and bullous emphysema. As the administrative law judge provided at least one valid reason for discrediting the opinions of Drs. Zaldivar and Rosenberg, however, I concur with the majority's decision to affirm the administrative law judge's award of benefits.

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JUDITH S. BOGGS
Administrative Appeals Judge