

BRB No. 14-0232 BLA

FRANKLIN CHRISTENBERRY)
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 Claimant-Respondent)
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 v.)
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 HERITAGE COAL COMPANY)
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) DATE ISSUED: 11/20/2014
 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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (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.

PER CURIAM:

Employer appeals the Decision and Order (11-BLA-5107) of Administrative Law Judge Alice M. Kraft awarding benefits 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 February 1, 2010.¹

Applying amended Section 411(c)(4),² the administrative law judge credited claimant with nineteen and a quarter years of qualifying coal mine employment,³ and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).⁴ The administrative law judge, therefore, found that claimant invoked the rebuttable Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Employer also contends that the administrative law judge's preconceived views of the evidence deprived it of a fair hearing. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's arguments that the administrative law judge erroneously relied on the preamble to the 2001 regulatory

¹ Claimant's initial claim, filed on October 30, 1995, was denied by the district director on March 11, 1996, because claimant failed to 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 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).

³ The administrative law judge determined that all except two years of claimant's twenty-one and a quarter years of surface coal mine employment occurred in conditions substantially similar to those existing underground. Decision and Order at 4-5.

⁴ Because the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

revisions when she assessed the medical opinion evidence and determined that employer failed to rebut the Section 411(c)(4) presumption. The Director also urges the Board to reject employer's allegations of bias on the part of the administrative law judge. Employer has filed a reply brief, reiterating its arguments on appeal.⁵

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *see Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 25 BLR 2-405 (7th Cir. 2013); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either clinical or legal pneumoconiosis,⁷ 20 C.F.R. §718.305(d)(1)(i), or by establishing that

⁵ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had nineteen and a quarter years of qualifying coal mine employment, that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710. In light of our affirmance of the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), we also affirm her determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

⁶ Claimant's most recent coal mine employment was in Indiana. Hearing Transcript at 10; Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

⁷ "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).

“no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.” 20 C.F.R. §718.305(d)(1)(ii).

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Murthy, Houser, Repsher, and Tuteur. Drs. Murthy and Houser diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. Director’s Exhibit 9; Claimant’s Exhibits 3, 4. In contrast, Drs. Repsher and Tuteur diagnosed COPD due entirely to claimant’s cigarette smoking. Employer’s Exhibits 1, 7, 18, 19.

The administrative law judge discredited the opinions of Drs. Repsher and Tuteur because she found that each was inadequately explained and inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 31. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 32.

Initially, we reject employer’s contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. It was within the administrative law judge’s discretion to rely on the preamble as a guide to assess the credibility of the medical evidence in this case. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Further, contrary to employer’s contention, the administrative law judge did not utilize the preamble as a legal rule, or as a presumption that all obstructive lung disease is pneumoconiosis, but merely consulted it as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012).

Specifically, the administrative law judge found that Drs. Repsher and Tuteur relied, in part, on their shared views that coal mine dust exposure rarely causes a degree of COPD that is clinically significant.⁸ Decision and Order at 31. In promulgating the

⁸ Based upon his review of several studies, Dr. Repsher indicated that, while “some miners would have a clinically significant loss of FEV1,” the “vast majority would have none or only a clinically insignificant loss of FEV1.” Employer’s Exhibit 1 at 4. Based on these results, Dr. Repsher opined that, even if coal mine dust exposure contributed to claimant’s decrease in FEV1, that contribution would “not be clinically significant” compared to the effects of claimant’s cigarette smoking and aging. *Id.* Dr. Repsher reiterated his conclusions during his deposition, ruling out coal mine dust as a

revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), the DOL reviewed the medical literature on that issue and found that there was a consensus among medical experts that coal mine dust-induced COPD is clinically significant and is not rare. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; 65 Fed. Reg. 79,920, 79,939-45 (Dec. 20, 2000). Accordingly, the administrative law judge acted within her discretion as fact-finder in determining that the opinions of Drs. Repsher and Tuteur were entitled to diminished weight. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

Additionally, noting that the preamble to the revised regulations acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited the opinions of Drs. Repsher and Tuteur, in part, because they did not adequately explain why claimant's coal mine dust exposure could not have contributed, along with his cigarette smoking, to his obstructive pulmonary impairment. *See Freeman United Coal Mining*

cause of claimant's obstructive impairment because its effect on lung function was not significant, compared to the effects of cigarette smoking and aging. Employer's Exhibit 18 at 46-48.

Although Dr. Tuteur opined that coal mine dust exposure can produce airflow obstruction, he stated that "it occurs so infrequently that on a statistical basis, . . . it just doesn't show up." Employer's Exhibit 19 at 59. Dr. Tuteur acknowledged that whether an obstructive impairment is caused by coal mine dust exposure or cigarette smoking cannot be differentiated based on history, physical examination, or testing. *Id.* at 52. However, Dr. Tuteur explained that, based on medical studies, he could determine the likelihood of claimant's coal mine dust exposure causing his chronic obstructive pulmonary disease (COPD):

There is, for all intents and purposes, one miner out of a hundred who will develop coal mine dust-related [COPD]. A non-mining never smoker will not, for all intents and purposes develop [COPD] with rare exception. And a non-mining smoker will develop it one time out of five or 20 miners out of 100 versus one out of 100; and therefore, the likelihood that [claimant's COPD] was due to coal mine dust rather than cigarette smoking is very small. The likelihood is 1/20th of the likelihood of cigarette smoking being the culprit.

Employer's Exhibit 19 at 63.

Dr. Tuteur, therefore, attributed claimant's COPD to his cigarette smoking, noting that it was "highly unlikely" that it was due to coal mine dust exposure. *Id.*

Co. v. Summers, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 31.

Thus, the administrative law judge provided valid reasons for discrediting the opinions of Drs. Repsher and Tuteur, attributing claimant's disabling obstructive impairment solely to smoking.⁹ Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Burriss*, 732 F.3d at 734, 25 BLR at 2-424.

With regard to the second method of rebuttal, the administrative law judge permissibly found that the same reasons for which she discredited the opinions of Drs. Repsher and Tuteur, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling impairment is unrelated to his coal mine employment. *See Burriss*, 732 F.3d at 735, 25 BLR at 2-425; *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355 (7th Cir. 1990); Decision and Order at 32. Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis.¹⁰ 30 U.S.C. §921(c)(4).

⁹ Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Repsher and Tuteur, 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).

¹⁰ Citing *Peabody Coal Co. v. Vigna*, 2 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), employer contends that that claimant's cigarette smoking took him outside of the scope of the Act. Employer's Brief at 29. In *Vigna*, the Seventh Circuit held that a claimant's preexisting condition precluded an award of benefits. Employer's reliance on *Vigna* is misplaced. Because this claim was filed after January 19, 2001, *Vigna* does not apply to this case. *See* 20 C.F.R. §718.204(a); *Gulley v. Director, OWCP*, 397 F.3d 535, 23 BLR 2-242 (7th Cir. 2005).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.¹¹

¹¹ Employer argues that the administrative law judge's decision in this case, as well as her decisions in other cases, "raise questions as to her impartiality or ability to provide 'just' proceedings." Employer's Brief at 17. The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence, which is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). In the instant case, employer has not met that burden. Employer merely asserts that, in the 107 decisions issued by the administrative law judge since 2006, she has declared that "[m]edical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant, . . . are . . . contrary to the premises underlying the regulations." Employer's Brief at 17. Even if employer's characterization of the administrative law judge's decisions is accurate, employer has failed to demonstrate how this reflects bias on the part of the administrative law judge. Moreover, employer has not provided any concrete evidence to support its allegations that the administrative law judge held a preconceived view of the evidence, or that she applied a "formula" that finds employers "strictly liable in any case where a former miner and cigarette smoker is totally disabled by obstructive lung disease." *Id.*

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge