**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0061 BLA

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| LAWRENCE E. LONG | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| ELK RUN COAL COMPANY, INCORPORATED | ) | DATE ISSUED: 11/23/2015 |
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| Employer-Petitioner | ) | |
| | ) | |
| 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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder and Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, 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, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05368) of Administrative Law Judge Scott R. Morris, rendered on a subsequent claim filed on March 9, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with 25.71 years of coal mine employment and adjudicated this claim under the regulations at 20 C.F.R. Part 718. Based on the filing date of the claim, and his determinations that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked 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).[2] Because claimant established total disability pursuant to 20 C.F.R. §718.204(b), an element of entitlement that he failed to prove in his prior claim, the administrative law judge also found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Further, the administrative law judge determined that employer did not establish rebuttal of the amended Section 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption under amended Section 411(c)(4), and erred in weighing the evidence relevant to rebuttal. Claimant has not responded to employer's appeal. The Director, Office of Workers'

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[1] Claimant filed an initial claim for benefits on April 20, 1983, which was denied by the district director on October 20, 1983, because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on October 23, 1998, which was denied by the district director on March 16, 1999, because claimant did not establish total disability. Director's Exhibit 2. Claimant's third claim, filed on December 5, 2001, was again denied by the district director on May 27, 2003. Director's Exhibit 3. The district director found that claimant established the existence of pneumoconiosis, but did not prove total disability. *Id*. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 4.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge applied the correct rebuttal standard.[3]

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.[4] 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).

In order to rebut the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer must affirmatively establish that claimant does not have legal[5] and clinical[6] pneumoconiosis, or that "no part of [claimant's] respiratory or

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[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 25.71 years of coal mine employment, with at least fifteen of those years in qualifying coal mine employment, a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12, 21.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[5] Legal pneumoconiosis includes "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).

[6] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

pulmonary total disability was caused by pneumoconiosis as defined in §718.201."[7] 20 C.F.R. §718.305(d)(1)(i), (ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting).

In addressing whether employer established rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge observed that, "each of the [x]-rays comprising the [c]laimant's current claim [is] positive" for clinical pneumoconiosis. Decision and Order at 25. He further found that each of the medical opinions in the record, by Drs. Rasmussen, Basheda and Zaldivar, concludes that claimant suffers from clinical pneumoconiosis. *Id.* at 25-26. Therefore, the administrative law judge found that employer failed to disprove the existence of clinical pneumoconiosis by a preponderance of the evidence and, thus, failed to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). This finding is not challenged on appeal and is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25-26.

In addressing whether employer established rebuttal under 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge observed that the "crux" of the opinions of employer's physicians, Drs. Basheda and Zaldivar, is that claimant's "total disability is not due to his pneumoconiosis, but is attributable to other ailments. Chief among these is asthma." Decision and Order at 28. The administrative law judge found that a diagnosis of asthma "actually strengthens [c]laimant's argument that his disability is due to pneumoconiosis, because asthma and pneumoconiosis are both part of the same disease process: [chronic obstructive pulmonary disease]." *Id.*, *citing* 65 Fed. Reg. 79,920, 79,942-43 (Dec. 20, 2000). Additionally, the administrative law judge found that Dr.

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[7] Employer argues that the regulatory language for establishing rebuttal at 20 C.F.R. §718.305(d)(1)(ii), *i.e.*, showing that "no part" of a miner's disability was caused by pneumoconiosis, should be construed as requiring proof that pneumoconiosis is not a "substantially contributing cause" of the miner's disabling impairment because employer's burden on rebuttal can be no greater than claimant's burden of proof in the absence of a presumption. Employer's Brief in Support of Petition for Review at 6-16. The Board, however, addressed and rejected this identical argument in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). The Fourth Circuit has also upheld the use of the "no part" standard in *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015). Thus, employer's challenge to the legal standard is rejected as without merit.

Basheda's opinion was insufficient to rebut the presumed fact of disability causation because Dr. Basheda conceded that claimant's clinical pneumoconiosis was a factor in claimant's qualifying arterial blood gas study results. Decision and Order at 29. The administrative law judge further found that Dr. Zaldivar failed to persuasively explain why pneumoconiosis could be excluded as a causative factor for claimant's respiratory disability. *Id*. at 30 n. 65.

Employer argues that the administrative law judge failed to properly identify the type of impairment causing claimant's disability, erred in focusing on the physicians' diagnoses of asthma based on the pulmonary function testing, misstated that asthma constitutes legal pneumoconiosis, and did not properly address the credibility of its medical experts regarding the etiology of claimant's disabling impairment on arterial blood gas testing.

To the extent that the administrative law judge's decision can be interpreted as indicating that every form of asthma constitutes legal pneumoconiosis, employer would be correct that the administrative law judge improperly construed the preamble to the revised 2001 regulations. Only asthma that is significantly related to, or substantially aggravated by, coal dust exposure will satisfy the regulatory definition of *legal pneumoconiosis*. *See* 65 Fed. Reg. 79,920, 79,939; 20 C.F.R. §718.201(a)(2), (b). However, any such error would not require remand, as the administrative law judge provided valid reasons for concluding that employer's evidence is insufficient to establish that claimant's *clinical pneumoconiosis* played no role in his respiratory disability, as shown by the qualifying blood gas studies. *See* 20 C.F.R. §718.305(d)(1)(ii); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); Decision and Order at 16, 30 n. 65.

In his medical report dated February 28, 2014, Dr. Basheda diagnosed "parenchymal lung disease" based on "B-readings positive for coal workers' pneumoconiosis with a profusion ranging from 1/1 to 2/3." Employer's Exhibit 5 at 22. He opined that claimant's arterial blood gas testing showed disabling "exercise-induced hypoxemia" and explained that it was "related to multiple factors[,] including cardiovascular disease, obstructive lung disease, *parenchymal lung disease*, and possible thrombotic pulmonary embolic disease." *Id*. at 22-23. Dr. Basheda specifically stated that there "is insufficient information available to determine the contribution of each of these disorders to [claimant's] pulmonary impairment and disability." *Id*. at 23. During a deposition taken on March 19, 2014, Dr. Basheda testified that "coal workers' pneumoconiosis may be playing a role" in claimant's disability. Employer's Exhibit 7 at 15.

Contrary to employer's argument, we see no error in the administrative law judge's finding that Dr. Basheda's opinion is insufficient to satisfy employer's burden of proof. The administrative law judge rationally concluded that Dr. Basheda's "admission that multiple processes – including pneumoconiosis – played a role in the [c]laimant's total disability does not help the [e]mployer to rebut the presumption under [20 C.F.R. §718.305(d)(1)(ii)], which requires that 'no part' of the [c]laimant's total disability was caused by his pneumoconiosis." Decision and Order at 30 n. 65, *quoting* 20 C.F.R. §718.305(d)(1)(ii); *Bender*, 782 F.3d at 138-43; *Minich*, BRB No. 13-0544 BLA, slip op. at 11.

We further reject employer's assertion that Dr. Zaldivar's opinion was not given proper consideration. The administrative law judge accurately described Dr. Zaldivar's opinion, and correctly stated that he attributed claimant's disability "to symptoms associated with a wide array of ailments[,] *including* asthma, [claimant's] history of pulmonary emboli, heart disease and obesity." Decision and Order at 27 (emphasis added); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999); Employer's Exhibits 1, 8. We specifically affirm the administrative law judge's rational finding that, while Dr. Zaldivar attributed claimant's disabling blood gas impairment to a very severe pulmonary embolism, Dr. Zaldivar failed to persuasively explain how pneumoconiosis could be ruled out as a cause of claimant's respiratory disability. Decision and Order at 30 n.65 *citing* Employer's Exhibit 8; *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).

The administrative law judge has broad discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR at 2-23, 2-31 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because the administrative law judge's credibility findings are rational and supported by substantial evidence, we affirm his determination that employer's rebuttal evidence failed to *affirmatively* establish that no part of claimant's respiratory disability was due to his clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Bender*, 782 F.3d at 135; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 30 n.65. We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and we affirm the award of benefits.[8] *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); *Bender*, 782 F.3d at 138-43; *Minich*, BRB No. 13-0544 BLA, slip op. at 11.

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[8] Employer contends that the administrative law judge improperly focused his analysis on claimant's "non-disabling ventilatory impairment," which Dr. Zaldivar

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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attributed to asthma, and that the administrative law judge substituted his opinion for that of a medical expert in rejecting Dr. Zaldivar's diagnosis of asthma. Employer's Brief in Support of Petition for Review at 22. Because the administrative law judge provided a valid reason for rejecting Dr. Zaldivar's opinion regarding the cause of claimant's disabling blood gas impairment, it is not necessary that we address this argument. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Moreover, we decline to address employer's contentions of error regarding the weight accorded Dr. Rasmussen's opinion, as employer bears the burden of proof on rebuttal, and Dr. Rasmussen's opinion does not aid employer in satisfying that burden. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011).