**U.S. Department of Labor**

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

BRB No. 17-0087 BLA

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| TERRY L. BRYANT | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| NEWTOWN ENERGY, INCORPORATED | ) | |
| and | ) | |
| BRICKSTREET MUTUAL INSURANCE COMPANY | ) | DATE ISSUED: 11/28/2017 |
| 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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman, Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-5266) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim[1] filed on March 24, 2014.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with 15.76 years of underground coal mine employment, 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)(i), (ii), (iv), and 718.204(b) overall. The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Further, 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 it failed to rebut the presumed fact that claimant has legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), which affected his weighing of the evidence on the issue of disability causation at 20 C.F.R. §718.305(d)(1)(ii). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal. Employer filed a reply brief, reiterating its prior contentions.[3]

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[1] Claimant's prior claim, filed on September 4, 1998, was denied by the district director on January 11, 1999 for failure to establish any of the elements of entitlement, and was not further pursued. Decision and Order at 2, 3; Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant 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) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 15.76 years of underground coal mine employment, the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 5, 7-9, 10.

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

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[5] or that "no part of [claimant'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)(1)(i), (ii). The administrative law judge found that employer failed to rebut the presumption by either method.

Employer does not challenge the administrative law judge's finding that it failed to rebut the presumption that claimant has clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). That finding is therefore affirmed. Decision and Order at 14, 18-19; Employer's Brief at 4-5; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), and ordinarily would obviate the need to consider the administrative law judge's findings on the issue of legal pneumoconiosis. However, we must address employer's arguments on this issue as the administrative law judge's legal pneumoconiosis findings affected his disability causation findings.

In considering the medical opinion evidence, the administrative law judge determined that Drs. Zaldivar and Spagnolo provided the only opinions which, if credited, could support rebuttal of the presumed fact of legal pneumoconiosis. Decision

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[4] The record reflects that claimant's last coal mine employment was in West Virginia. Decision and Order at 7; Director's Exhibit 4 at 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] "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). "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).

and Order at 19. Finding that neither physician adequately explained how he eliminated coal dust exposure as a contributing or aggravating cause of claimant's obstructive pulmonary impairment, the administrative law judge concluded that their opinions merited "no weight," and thus found that employer failed to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). *Id*. at 19-20.

Employer first argues that the administrative law judge erred in failing to consider the relative qualifications of the physicians and indicate whether they rendered each opinion more or less credible pursuant to relevant case law and the requirements of the Administrative Procedure Act (APA).[6] Employer's Brief at 16, *citing Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); Employer's Reply Brief at 13-14. We disagree. Under *Hicks*, the administrative law judge must consider the qualifications of the physicians, the explanations for their medical opinions, and the documentation underlying their opinions. *Hicks*, 138 F.3d at 21 BLR at 2-323; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). As fact-finder, however, the administrative law judge need not credit the opinions of better-qualified physicians, nor find any opinion more or less credible based on the physician's credentials. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341. Here, the administrative law judge reviewed the relevant factors in assigning weight, including a detailed listing of each physician's credentials, but did not assign more or less weight to any opinion based on the physician's qualifications. Rather, the administrative law judge discounted every opinion of record based on each physician's lack of persuasive reasoning. We therefore reject employer's argument. *Id*.

Next, employer maintains that the administrative law judge applied an incorrect standard when weighing the opinions of Drs. Zaldivar and Spagnolo on the issue of legal pneumoconiosis.[7] Employer argues that the administrative law judge "essentially" required its experts to "rule out" coal mine dust exposure as a contributing or aggravating

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[6] The Administrative Procedure Act, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), provides that adjudicatory decisions 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 on the record." 5 U.S.C. §557(c)(3)(A).

[7] Drs. Zaldivar and Spagnolo diagnosed COPD/emphysema, but opined that the disease was unrelated to coal dust exposure. Further, they opined that coal dust exposure is not associated with bullous emphysema, and that coal dust exposure did not contribute to claimant's emphysema. Decision and Order at 19; Director's Exhibit 14; Employer's Exhibits 4, 6.

cause of impairment.[8] Employer's Brief at 9, 15; Employer's Reply Brief at 2. This argument lacks merit. As the administrative law judge recognized, to disprove the existence of legal pneumoconiosis, employer must establish by a preponderance of the evidence that claimant's lung disease or impairment was not "significantly related to, or substantially aggravated by" dust exposure in coal mine employment. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2), (b); Decision and Order at 10, 19. The administrative law judge noted that Dr. Zaldivar and Dr. Spagnolo each opined that claimant's chronic obstructive pulmonary disease (COPD)/emphysema is completely unrelated to coal mine dust exposure. Decision and Order at 19; Director's Exhibit 14; Employer's Exhibits 4, 6. He determined, however, that the rationale offered by the physicians was insufficient to "exclude coal dust as an aggravating factor" in claimant's emphysema, and did not "sufficiently address eliminating coal dust as a contributing cause" of claimant's remaining post-bronchodilation impairment. *Id.* In so finding, the administrative law judge did not use the phrase "rule out," nor did he "essentially" impose a "rule-out" or "no part" standard. *See* Employer's Brief at 9; Reply Brief at 2. Rather, he properly addressed the extent to which the physicians adequately explained their opinions that claimant's COPD/emphysema is unrelated to his coal dust exposure, and found their explanations insufficient to disprove that claimant has legal pneumoconiosis. Decision and Order at 19-20. Thus, employer's argument is rejected.[9]

Employer next contends that the administrative law judge erred in discrediting Dr. Zaldivar's exclusion of coal dust exposure as a contributing or aggravating factor in claimant's COPD, which he attributed to asthma and emphysema due to smoking. Employer's Brief at 9; Employer's Reply Brief at 3-6. Employer asserts that Dr. Zaldivar

[8] A "rule out" standard applies only to the second method of rebutting the Section 411(c)(4) presumption, where employer must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. . . ." 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502, 25 BLR 2-713, 2-716 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.,* 25 BLR 1-149, 1-155-56 (2015) (Boggs, J., concurring and dissenting).

[9] Similarly, we reject employer's argument that the administrative law judge, in discounting the opinions of Drs. Zaldivar and Spagnolo that bullous emphysema is not caused by coal mine dust, improperly assumed that "all emphysema is legal pneumoconiosis." Employer's Brief at 9; *see also* Employer's Brief at 10-11, 14; Employer's Reply Brief at 6, 9. Rather, in light of the definition of legal pneumoconiosis, the administrative law judge permissibly determined that Drs. Zaldivar and Spagnolo failed to adequately explain how they excluded coal dust exposure as an aggravating factor in claimant's emphysema. Decision and Order at 19; *see* 20 C.F.R. §718.201(a)(2), (b).

properly concluded that claimant's emphysema is unrelated to coal dust exposure because emphysema caused by coal mine dust is linked to dust retention, and claimant's x-rays lack "a significant amount of dust retention." Employer's Brief at 11-12. Employer's arguments lack merit. The regulatory definition of legal pneumoconiosis does not require the presence of clinical pneumoconiosis, and the presence of legal pneumoconiosis is not necessarily based on the degree of dust retention in the lungs.[10] *See* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *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). While Dr. Zaldivar opined that claimant's disease was not related to coal dust exposure because his negative x-ray suggested that claimant had a low dust burden in his lungs, the administrative law judge reasonably determined that Dr. Zaldivar's rationale was inconsistent with the administrative law judge's finding that the "overwhelming majority" of x-ray readings was positive for clinical pneumoconiosis. Decision and Order at 17, 19; Employer's Exhibit 6 at 34-36. Thus, we affirm the administrative law judge's determination that Dr. Zaldivar's reliance on the absence of evidence of clinical pneumoconiosis to exclude coal dust exposure as a contributing or aggravating cause of claimant's COPD/emphysema was inconsistent with the preponderance of the positive x-ray readings and diminished the validity of his opinion.

Next, employer argues that the administrative law judge erred in finding that Drs. Zaldivar and Spagnolo did not explain the source of the impairment that remained after claimant's use of bronchodilators. Employer's Brief at 4, 9, 12-14. Employer asserts that Dr. Zaldivar explained that the irreversible portion of claimant's post-bronchodilation impairment was caused by remodeling of his lungs from untreated asthma, and that asthma is unrelated to, and not aggravated by, coal dust exposure. Employer's Brief at 6-9; Employer's Reply Brief at 3-6; *see* Employer's Exhibit 6 at 33-34, 40-41. Employer asserts that, likewise, Dr. Spagnolo opined that claimant's significant post-bronchodilation reversibility is not consistent with coal dust-related COPD/emphysema. Employer's Brief at 13-14; *see* Employer's Exhibit 4 at 9. Employer's arguments lack merit.

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[10] Moreover, the Department of Labor has declined to endorse the view that coal dust exposure does not cause or contribute to emphysema, and has adopted the view of the medical community that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012).

As fact-finder, the administrative law judge determines the credibility of the medical experts and is not bound to accept any particular medical theory. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). In this case, the administrative law judge was not persuaded by Dr. Zaldivar's opinion that the post-bronchodilation reversibility of claimant's pulmonary function studies showed that claimant's obstructive impairment was due to a combination of asthma and emphysema caused entirely by smoking, because "at no point [did Dr. Zaldivar] explain *how* he excluded coal dust as a contributing factor." Decision and Order at 17; Director's Exhibit 14 at 4-5. Similarly, the administrative law judge was not persuaded by Dr. Spagnolo's opinion that claimant's significant post-bronchodilator reversibility is consistent with smoking, cardiac issues, and the effects of various medications, but not consistent with coal dust-induced disease which would be non-responsive to bronchodilation, as Dr. Spagnolo failed to explain how he was able to eliminate coal dust exposure as a contributing cause of claimant's residual disabling impairment.[11] Decision and Order at 18; Employer's Exhibit 4 at 9. Thus, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Spagnolo because they relied on the reversibility of claimant's impairment but did not "sufficiently address eliminating coal dust as a contributing cause" of the totally disabling impairment that remained after the administration of bronchodilators. Decision and Order at 19; *see Crockett Collieries, 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) (unpub.).

As the administrative law judge fully explained his reasons for discrediting the opinions of Drs. Zaldivar and Spagnolo, we reject employer's assertion that the administrative law judge substituted his own opinion for those of the medical experts, selectively evaluated or mischaracterized the medical evidence, failed to consider the entirety of the medical opinions, or violated the APA. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-55 (4th Cir. 2013) (Traxler, C.J., dissenting); *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Employer's Brief at 3, 14-15; Employer's Reply Brief at 2. Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Spagnolo, the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.

[11] Employer inaccurately asserts that the administrative law judge "made no mention" of Dr. Spagnolo's discussion attributing claimant's impairment to heart disease and heart medications. *See* Decision and Order at 27 n.33; Employer's Brief at 14-15.

In view of our affirmance of the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), employer's arguments regarding rebuttal of disability causation are unavailing. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Spagnolo that claimant's totally disabling respiratory impairment was not caused by legal pneumoconiosis on the ground that neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that claimant has the disease. Decision and Order at 26-27; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 25 BLR 2-713 (4th Cir 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 1995); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Thus, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii), and we affirm the award of benefits.

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