**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0617 BLA

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| RAYMOND MIDDLETON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| HAR LEE COAL CORPORATION, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN INTERNATIONAL SOUTH/CHARTIS | ) | DATE ISSUED: 11/27/2018 |
| | ) | |
| 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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Sarah Y.M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Awarding Benefits (2016-BLA-05070) of Alan L. Bergstrom rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on October 8, 2014.[1]

The administrative law judge credited claimant with 32.12 years of underground coal mine employment and found that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c),[2] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

[1] This is claimant's second claim for benefits. His prior claim, filed on June 2, 1986, was denied by the district director on October 2, 1986 because claimant failed to establish any element of entitlement. Decision and Order at 4; Hearing Transcript at 6.

[2] Where a miner files a claim 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(c); *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(c)(3).

[3] Under Section 411(c)(4) of the Act, 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) (2012); *see* 20 C.F.R. §718.305.

On appeal, employer challenges the administrative law judge's finding that it did not rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[4]

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.[5] 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).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[6] or that "no part of [his] 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 establish rebuttal by either method.

To prove that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 32.12 years of qualifying coal mine employment; a totally disabling respiratory or pulmonary impairment pursuant to 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 Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 15, 19-20.

[5] 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[6] "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).

dissenting). The administrative law judge considered the opinions of Drs. Green, Rosenberg, and Fino. Dr. Green diagnosed legal pneumoconiosis in the form of an obstructive pulmonary impairment due to coal dust inhalation and asthma. Decision and Order at 9-10; Director's Exhibits 15, 18. Drs. Rosenberg and Fino also diagnosed an obstructive impairment, but opined that it is caused by asthma unrelated to coal mine dust exposure. Decision and Order at 11-12, 23-24; Employer's Exhibits 5, 6, 9, 10. The administrative law judge found that the opinions of Drs. Rosenberg and Fino are not well-reasoned and, therefore, do not rebut the presumed fact that claimant has legal pneumoconiosis. Decision and Order at 24.

We reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Fino. The administrative law judge observed that both Dr. Rosenberg[7] and Dr. Fino[8] diagnosed asthma, a condition they stated is not caused or aggravated by coal mine dust exposure, based on the reversibility of claimant's obstructive impairment after the administration of a bronchodilator. Decision and Order at 24; Employer's Exhibits 5 at 2-3; 6 at 4; 9 at 4; 10 at 5. Both physicians acknowledged that claimant's impairment is not completely reversible, but stated that this did not undermine their diagnoses because, as Dr. Rosenberg explained, "when one has asthma, over time, airway remodeling occurs which prevents total normalization of airflow in response to bronchodilator administration." Employer's Exhibit 10 at 4. Dr. Fino also relied on the improvement, stating that "based on the post-bronchodilator study, [claimant] is not disabled and that kind of improvement argues against a diagnosis of clinical or legal pneumoconiosis. Instead, he has asthma . . . ." Employer's Exhibit 9 at 4. Contrary to employer's contention, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Fino because they did not persuasively explain why claimant's

[7] Dr. Rosenberg examined claimant on March 18, 2015 and opined that he has airway obstruction with a bronchodilator response and associated variability which is inconsistent with a coal mine dust-related disorder and is indicative of asthma. Employer's Exhibits 6 at 4; 10 at 4. Dr. Rosenberg opined that claimant's asthma "does not relate to past coal mine dust exposure which ceased many years ago" because "coal mine dust is not listed as a sensitizer for the development of this type of respiratory disorder." Employer's Exhibit 10 at 5. He further explained "it is not logical after coal mine dust exposure has ceased to conclude that past coal dust exposure is causing persistent bronchospasm." *Id*.

[8] Dr. Fino performed record reviews on October 18, 2016 and April 5, 2017 and opined that claimant has significant obstructive lung disease with significant reversibility that is classic for asthma, and is inconsistent with a coal dust-related condition. Employer's Exhibits 5 at 2-3; 9 at 4. Dr. Fino stated that asthma is a disease of the general public and there is no evidence that it is aggravated by coal mine dust inhalation. Employer's Exhibits 5 at 3; 9 at 4.

32.12 years of coal mine dust exposure did not contribute, along with asthma, to his obstructive impairment.[9] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order at 24.

Substantial evidence supports the administrative law judge's credibility determinations regarding the opinions of Drs. Rosenberg and Fino, and the Board is not empowered to reweigh the evidence. *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000)*; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the administrative law judge permissibly discredited the only opinions[10] supportive of a finding that claimant does not have legal pneumoconiosis,[11]

[9] The administrative law judge noted that while Dr. Green also diagnosed an obstructive impairment, and agreed with Drs. Rosenberg and Fino that claimant's response to bronchodilators indicated an asthmatic component, he did not exclude a contribution by coal mine dust exposure on this basis. Decision and Order at 24, *referencing* Director's Exhibit 18. He explained that while asthma can cause airway remodeling, which had likely occurred in claimant, it is not possible to distinguish the relative contributions of asthma-related remodeling and claimant's years of coal mine dust exposure to the irreversible portion of claimant's obstructive impairment. Director's Exhibit 18. Thus, Dr. Green concluded that claimant's impairment is multifactorial, with coal mine dust being a significant contributing cause. *Id.* The administrative law judge correctly noted that despite having reviewed Dr. Green's reports, neither Dr. Rosenberg nor Dr. Fino explained why a diagnosis of asthma necessarily precluded the existence of a "concomitant" coal dust-related lung disease. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 24.

[10] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Fino, we need not address employer's remaining arguments regarding the weight accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[11] Employer asserts that the administrative law judge erred in failing to identify the weight he accorded to Dr. Green's opinion that claimant has legal pneumoconiosis. Employer's Brief at 20-21. We decline to address this argument as Dr. Green's opinion does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[12] 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer established rebuttal by proving 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)(1)(ii). Having found that employer did not disprove that claimant's totally disabling respiratory or pulmonary impairment was caused by coal dust exposure, i.e., is legal pneumoconiosis, the administrative law judge permissibly discredited the opinions of Drs. Rosenberg and Fino that no part of claimant's totally disabling impairment was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-24 (4th Cir. 2015), *citing Toler v. Associated Coal Corp*., 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 25. As the opinions of Drs. Rosenberg and Fino are the only opinions supportive of employer's burden, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii).

[12] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 8-13.

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

RYAN GILLIGAN
Administrative Appeals Judge