**U.S. Department of Labor**

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

BRB No. 18-0056 BLA

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| GARY L. WILKINS<br><br>Claimant-Respondent<br><br>v.<br><br>HELVETIA COAL COMPANY/ ROCHESTER & PITTSBURGH COAL COMPANY<br><br>and<br><br>HEALTHSMART CASUALTY SOLUTIONS<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 11/29/2018<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-5356) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on March 30, 2016, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established 19.32 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer did not rebut the presumption and he awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption.[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

[1] 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5.

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[4] 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 because claimant invoked the Section 411(c)(4) presumption, he "establish[ed] the presence of legal coal workers' pneumoconiosis." Decision and Order at 16. Having found that claimant established "coal workers' pneumoconiosis" by operation of the legal presumption, the administrative law judge stated that "the single issue to be determined [on rebuttal] is whether [c]laimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." *Id*. at 18.

The administrative law judge noted that employer relied on the opinions of Drs. Basheda and Rosenberg to establish rebuttal of the Section 411(c)(4) presumption. Decision and Order at 18. Both physicians opined that claimant has idiopathic pulmonary fibrosis and that his respiratory or pulmonary disability is unrelated to coal mine dust exposure. Employer's Exhibits 1, 4, 7, 8. The administrative law judge observed that a medical opinion diagnosing a respiratory condition of unknown origin could not rebut the presumption. Decision and Order at 20. He found that "[e]mployer's experts' opinions that [c]laimant's pulmonary impairments are of unknown origin or in need of additional testing – but are not caused by coal mine dust exposure – are unpersuasive." *Id*. He concluded that employer "failed to rebut the legal presumption that coal workers' pneumoconiosis is a 'substantially contributing cause' of [c]laimant's total pulmonary or respiratory disability." *Id*. at 19; *see* 20 C.F.R. §718.204(c)(1).

We agree with employer that the administrative law judge's cursory finding that the opinions of Drs. Basheda and Rosenberg are "unpersuasive" to establish rebuttal of the Section 411(c)(4) presumption does not satisfy the Administrative Procedure Act (APA).[5]

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. 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).

[5] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions

Decision and Order at 20; s*ee Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We also agree with employer that the administrative law judge erred in relying on 20 C.F.R. §718.305(d)(3)[6] to discredit the opinions of Drs. Basheda and Rosenberg. Section 718.305(d)(3) provides that "[t]he presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling *obstructive* respiratory or pulmonary disease of unknown origin." 20 C.F.R. §718.305(d)(3) (emphasis added). Employer correctly asserts that neither Dr. Basheda nor Dr. Rosenberg diagnosed that claimant has an obstructive respiratory or pulmonary disease.[7] Because the administrative law judge misapplied 20 C.F.R. §718.305(d)(3), we vacate his finding that employer did not rebut the Section 411(c)(4) presumption. Thus, we vacate the administrative law judge's award of benefits.

On remand, the administrative law judge is instructed to reconsider whether employer rebutted the Section 411(c)(4) presumption. He must begin his rebuttal analysis by considering whether employer disproved the existence of legal pneumoconiosis.[8] 20 C.F.R. §§718.201(a)(2), (b); 718.305(d)(1)(i)(A). Specifically, the administrative law judge must determine whether employer established that claimant 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); *see* 20 C.F.R. §718.305(d)(1)(i)(A); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Even if employer disproves the existence of legal pneumoconiosis, the administrative law judge must also determine whether

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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), as incorporated into the Act by 30 U.S.C. §932(a).

[6] Although the administrative law judge referenced 20 C.F.R. §718.306 (Appendix A – standards for interpretations of x-rays) to support his discrediting of Drs. Basheda and Rosenberg, it is apparent that he meant to reference 20 C.F.R. §718.305(d)(3). Decision and Order at 20.

[7] Drs. Basheda and Rosenberg opined that claimant has a *restrictive* pulmonary impairment caused by idiopathic pulmonary fibrosis. Employer's Exhibits 1, 4.

[8] The administrative law judge did not apply the correct rebuttal analysis, as he failed to separately consider whether employer disproved the existence of legal pneumoconiosis, prior to reaching the issue of whether employer disproved disability causation. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

employer established that claimant does not have clinical pneumoconiosis, taking into consideration all of the relevant evidence.[9] 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 1-159; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25 (3d Cir. 1997). If the administrative law judge finds that employer established that claimant has neither legal nor clinical pneumoconiosis, employer will have rebutted the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. However, if employer fails to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must then determine whether employer has rebutted the presumption by establishing that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-159.

In rendering his decision on remand, the administrative law judge must explain the bases for his credibility determinations in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[9] The administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1). Decision and Order at 9. He found that there was no biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2). *Id*. Because the administrative law judge found that claimant invoked the Section 411(c)(4) presumption and established a legal presumption of coal workers' pneumoconiosis, he did not consider the medical opinions relevant to the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. at 16. On remand, the administrative law judge must reconsider the x-rays and medical opinions with the burden of proof on employer to establish that claimant does not have clinical pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25 (3d Cir. 1997); *Minich*, 25 BLR at 1-159.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge