BRB No. 11-0184 BLA

RUBERT LEE MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 10/27/2011
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2008-BLA-05165) of Administrative Law Judge Janice K. Bullard denying benefits on a subsequent claim filed on March 19, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). [1] Adjudicating this claim pursuant to 20

[1] Claimant's initial claim, filed in 1995, was denied by the district director because the evidence was insufficient to establish any element of entitlement. Director's Exhibit 1. Claimant took no further action until he filed the current subsequent claim on March 19, 2007. Director's Exhibits 1, 3.

C.F.R. Part 718, the administrative law judge accepted the parties' stipulation to at least 39.9 years of coal mine employment and determined that at least fifteen years of this employment were underground. The administrative law judge determined that the new evidence submitted in support of the subsequent claim was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as claimant had more than fifteen years of qualifying coal mine employment, his claim was filed after January 1, 2005, and was pending on March 23, 2010, and claimant established that he has a totally disabling respiratory impairment.[2] The administrative law judge determined, however, that employer rebutted the fifteen-year presumption by affirmatively proving that claimant does not have either clinical or legal pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that employer established rebuttal of the fifteen-year presumption by affirmatively proving that he does not have legal pneumoconiosis. In response, employer urges affirmance of the denial of benefits. Claimant has filed a reply brief in which he argues that employer was required to prove, in the absence of radiographic evidence of coal workers' pneumoconiosis, that coal dust exposure had no additive effect on his obstructive impairment. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not submit a substantive response unless requested to do so by the Board.[3]

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were adopted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[3] We affirm, as unchallenged on appeal, the administrative law judge's acceptance of the parties' stipulation to at least 39.9 years of underground coal mine employment and his findings that the new evidence was sufficient to establish total disability at 20 C.F.R §718.204(b), that claimant invoked the rebuttable presumption set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), and that the evidence of record, as a whole, established that claimant does not have clinical pneumoconiosis at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 finding that employer established rebuttal of the fifteen-year presumption by affirmatively proving that claimant does not have legal, pneumoconiosis,[5] the administrative law judge determined that the preponderance of the evidence supports the opinions of Drs. Crisalli and Zaldivar, who concluded that claimant's totally disabling chronic obstructive pulmonary disease (COPD) was caused by asthma and cigarette smoke-induced emphysema and bronchitis. Decision and Order at 20; Director's Exhibit 14; Employer's Exhibits 4, 6, 10, 11. The administrative law judge credited, as persuasive, the explanations by Drs. Crisalli and Zaldivar regarding how smoking and coal dust exposure cause different types of emphysema and found that their identification of asthma as a causal factor is supported by the treatment records and Dr. Porterfield's statement that claimant has COPD with an asthmatic component. Decision and Order at 20-21. The administrative law judge further found that there is no evidence that claimant's asthma is related to his coal mine employment and gave weight to Dr. Crisalli's opinion, that occupational "asthma would diminish upon the removal of the inflammatory agent." *Id.* at 21. The administrative law judge also concluded that claimant's substantial smoking history supported the diagnoses of emphysema, caused solely by cigarette smoking, rendered by Drs. Crisalli and Zaldivar. *Id*.

In contrast, the administrative law judge found that Dr. Rasmussen did not provide a well-documented explanation for his conclusion that claimant's emphysema is related to coal dust exposure, or for his conclusion that the objective test results do not allow for a distinction to be made between smoking and coal dust exposure as causes of COPD. Decision and Order at 21; Claimant's Exhibits 7, 10. Although the administrative law judge credited Dr. Rasmussen's interpretation of the medical literature, specifically "the study of the autopsied miners," the administrative law judge found that it was insufficient to fully support his opinion that legal pneumoconiosis was present. Decision and Order at 21. The administrative law judge then found that, although Dr. Mullins's opinion

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

[5] Legal pneumoconiosis is defined under 20 C.F.R. §718.201(a)(2) as "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).

supports Dr. Rasmussen's opinion, her diagnosis of legal pneumoconiosis is entitled to less weight, as she did not have the opportunity to review the whole record. *Id*.; Director's Exhibit 12.

Claimant argues that the administrative law judge erred in crediting the opinions of Drs. Crisalli and Zaldivar, without considering that they relied on views that are contrary to the medical literature cited by Dr. Rasmussen, and accepted by the Department of Labor (DOL).[6] Claimant's contention has merit. Drs. Crisalli and Zaldivar acknowledged that coal dust exposure can cause emphysema, but opined that the type of emphysema caused by coal dust is different from the type of emphysema caused by cigarette smoking. Dr. Crisalli stated that coal dust causes "a focal-type of emphysema . . . which relates to the coal dust macule and it's a microscopic finding . . . [not] seen on chest x-rays." Employer's Exhibit 10 at 10. Dr. Crisalli further indicated that, when "a coal dust macule is formed[,] [i]t is that macule that produces the *nodular* densities that one sees *on x-rays*. . . . [t]hat is focal emphysema related to that macule. It is seen under a microscope. You cannot see it on an x-ray." *Id*. at 17 (emphasis added). Similarly, Dr. Zaldivar stated:

> Insofar as whether to be able to eliminate clinical pneumoconiosis, according to most B-readers, there is no evidence of pneumoconiosis radiographically, which means that there is no dust deposited within the lungs that could cause the damage. And the damage caused by smoking and asthma is chemical damage, as opposed to the airway obstruction produced from deposition of coal dust or any dust[,] which is the local

[6] Claimant indicates specifically that Drs. Crisalli and Zaldivar both opined that coal mine dust exposure solely causes focal emphysema, which relates to the presence of coal dust macules; that Dr. Crisalli disputes the view that clinical pneumoconiosis and coal mine dust exposure are independent factors that can lead to or contribute to emphysema; and that Dr. Crisalli concluded that the medical literature does not suggest that emphysema is a major component of the impairment related to coal dust exposure. Claimant's Brief at 3, *citing* Employer's Exhibit 14 at 27, 29-34, 39; Employer's Exhibit 24 at 24, 26-28. Claimant also notes that Dr. Crisalli took issue with the Ruckley study cited by Dr. Rasmussen, alleging that it showed a positive association between coal mine dust and significant emphysema only in miners with progressive massive fibrosis. Claimant's Brief at 3 n.5, *citing* Employer's Exhibit 14 at 32. Claimant contends that the Department of Labor (DOL) cited the Ruckley study in support of the amended definition of legal pneumoconiosis, noting that it showed "emphysematous changes in 72% of miners who smoked, 65% of ex-smokers, and 42% of nonsmoking miners" and "47% of the miners 'with no fibrotic lesions had emphysema.'" Claimant's Brief at 3, *quoting* 65 Fed. Reg. 79,942 (Dec. 20, 2000).

> reaction to the dust at the site of the deposition. And there is no evidence in this case that there was any deposition of dust within the lungs.

Employer's Exhibit 13 at 7. It appears, therefore, that Drs. Crisalli and Zaldivar may have relied on the absence of x-ray evidence of clinical pneumoconiosis to exclude coal dust exposure as a cause of claimant's COPD. As claimant has indicated, this view is contrary to the scientific literature upon which DOL relied in amending the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2).[7] Accordingly, we must vacate the

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[7] DOL cited a study showing that coal dust causes macrophages in the lungs to release substances that damage the enzymes that normally protect the lungs from an inflammatory reaction and that this damage can compromise the structure of the lung, resulting in emphysematous changes. 65 Fed. Reg. 79,942-43 (Dec. 20, 2000). In addition, DOL noted:

> Allowing for decrements due to age and smoking history, Attfield and Hodous demonstrated a clear relationship between dust exposure and a decline in pulmonary function of about 5 to 9 milliliters a year, even in miners with no radiographic evidence of clinical coal workers' pneumoconiosis.
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> Smokers who mine have additive risk for developing significant obstruction. The risk of chronic bronchitis clearly increases with increasing dust exposure; again[,] smokers who mine have an additive risk of developing chronic bronchitis. The message from the Marine study is unequivocal: Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking.
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> ***
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> [D]ust-induced emphysema and smoke[-]induced emphysema occur through similar mechanisms—namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with a decrease in protective enzymes in the lung.
>
> In addition to the risk of simple CWP and PMF, epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of *lung function*, especially FEV1 and the ratio of FEV1/FVC. Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present.

administrative law judge's decision to accord determinative weight to the opinions of Drs. Crisalli and Zaldivar under 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *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, 257, 24 BLR 2-369, 383 (3d Cir. 2011); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997).

On remand, the administrative law judge must reevaluate the medical opinions relevant to the existence of legal pneumoconiosis[8] and determine whether they are reasoned, documented, and consistent with DOL's view of the prevailing scientific literature.[9] *See Obush*, 24 BLR at 1-125-26; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7; *Lane*, 105 F.3d at 174, 21 BLR at 2-48. The administrative law judge must also assess whether the medical opinion evidence adequately addresses the etiology of claimant's obstructive impairment, including the residual, disabling impairment demonstrated on claimant's post-bronchodilator pulmonary function studies. *See Underwood v. Elkay Mining, Inc.* 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *see also Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 487 F.3d 350, 23 BLR 2-472 (6th Cir. 2007).

In light of our decision to vacate the administrative law judge's crediting of the opinions of Drs. Crisalli and Zaldivar at 20 C.F.R. §718.202(a)(4), we must also vacate the administrative law judge's finding that employer established rebuttal of the fifteen-year presumption, by affirmatively proving that claimant does not have legal

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65 Fed. Reg. 79,940-43 (Dec. 20, 2000) (internal citations omitted).

[8] With respect to the administrative law judge's weighing of Dr. Rasmussen's opinion at 20 C.F.R. §718.202(a)(4), the Fourth Circuit and the Board have indicated that opinions in which a physician states that he or she is unable to apportion the effects of cigarette smoking and coal dust exposure on a miner's impairment are not necessarily unreasoned. *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004).

[9] We reject employer's argument that using the preamble to the amended regulations, when measuring the credibility of a medical opinion, violates the Administrative Procedure Act 5, U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a). *See 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, 257, 24 BLR 2-369, 383 (3d Cir. 2011).

pneumoconiosis. On remand, the administrative law judge must reconsider whether employer has rebutted the presumption of total disability due to pneumoconiosis by proving that claimant does not have legal pneumoconiosis or that his disabling impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge