BRB No. 12-0066 BLA

CARL D. PRICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUINTANA COAL COMPANY a/k/a and d/b/a BLACK HAWK MINING COMPANY, INCORPORATED	)	DATE ISSUED: 10/31/2012
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits and the Decision and Order on Reconsideration of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell, LLP), Washington, DC, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges

PER CURIAM:

Employer/carrier (employer) appeals[1] the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration (2010-BLA-5189) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim[2] filed on March 9, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Based on the filing date of this subsequent claim, the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act,[3] which provides for a rebuttable presumption of total disability due to pneumoconiosis, if a miner 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 that he or she has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). The administrative law judge credited claimant with seventeen and one-quarter years of coal mine employment, based upon a stipulation of the parties, and found that claimant established at least fifteen years of surface coal mine work in conditions that were substantially similar to those in an underground mine.[4] Because the administrative law judge also determined that the newly submitted evidence was sufficient to establish a

[1] On September 23, 2011, employer appealed the August 29, 2011 Decision and Order Awarding Benefits. That appeal was assigned BRB No. 11-0865 BLA. Subsequent to the filing of that appeal, a Decision and Order on Reconsideration was issued on October 5, 2011. Employer filed a second appeal, and it was assigned BRB No. 12-0066 BLA. On November 23, 2011, the Board dismissed BRB No. 11-0865 BLA, and instructed the parties to file all pleadings under BRB No. 12-0066 BLA. *Carl D. Price v. Quintana Coal Co.*, BRB Nos. 11-0865 BLA and 12-0066 BLA (Nov. 23, 2011) (unpub. Order).

[2] Claimant filed an initial claim for benefits on August 24, 1989, which was denied by Administrative Law Judge Bernard J. Gilday, Jr. on January 3, 1992, because the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. Judge Gilday did not address the other elements of entitlement. *Id*. Claimant took no action with regard to the denial until filing his current subsequent claim on March 9, 2007. Director's Exhibit 3.

[3] On March 23, 2010, amendments to the Black Lung Benefits Act, contained in Section 1556 of the Patient Plan and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), were enacted, which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010.

[4] Claimant testified that all but six months of his coal mine work was above ground. November 16, 2010 Hearing Transcript (HT) at 21.

totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant was entitled to the presumption at amended Section 411(c)(4).

With regard to the issue of rebuttal, the administrative law judge determined that employer failed to rebut the amended Section 411(c)(4) presumption by establishing either that claimant does not have pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. The administrative law judge also concluded that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Accordingly, benefits were awarded. Pursuant to a motion for reconsideration filed by the Director, Office of Workers' Compensation Programs, the administrative law judge issued a Decision and Order on Reconsideration, modifying the award to reflect that benefits were to commence in March 2007, the month in which claimant filed his subsequent claim.[5]

On appeal, employer argues that the administrative law judge erroneously excluded an x-ray reading by Dr. Westerfield, on the ground that it exceeded the evidentiary limitations at 20 C.F.R. §725.414. Employer also contends that the administrative law judge erred in finding that claimant satisfied his burden to establish that the dust exposure in his surface coal mine employment was substantially similar to that found in underground coal mine employment. Employer further alleges that the administrative law judge erred in weighing the medical evidence, relevant to rebuttal of the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director has filed a limited response, arguing that claimant satisfied his burden to show that his surface coal mine employment was in conditions substantially similar to those in an underground mine. Employer filed a reply brief reiterating its contentions.[6]

[5] In his initial decision, the administrative law judge found that, because the record did not establish when claimant became totally disabled due to pneumoconiosis, benefits should commence as of the month in which the claim was filed. Decision and Order at 24. However, the administrative law judge incorrectly stated the month/year of filing of the subsequent claim as May 2007, when the correct month/year is March 2007. *Id*. at 25.

[6] The administrative law judge's finding of seventeen and one-quarter years of coal mine employment is affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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.[7] 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).

I. AMENDED SECTION 411(c)(4) PRESUMPTION

A. Qualifying Coal Mine Employment

In order to invoke the amended Section 411(c)(4) presumption, a miner must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). In this case, claimant testified that "only six months of his coal mine employment [were] underground as a welder." Decision and Order at 15; *see* Hearing Transcript (HT) at 21. The administrative law judge therefore considered whether claimant's additional work at a surface mine qualified him for the amended Section 411(c)(4) presumption. Decision and Order at 15. The administrative law judge found that claimant worked at surface mines as a welder, with seven to eight years being at the tipple, where claimant was required to walk the beltline. Decision and Order at 16. The administrative law judge explained his determination that claimant established fifteen years of comparable surface coal mine employment:

> . . . It is clear from the Claimant's testimony that he was continually exposed to heavy volumes of dust during his work in surface mines. His testimony regarding the dust levels at the tipple inarguably supports a finding that his working conditions were substantially similar to underground mining. Even outside of his experience at the tipple, however, he described conditions which were extremely dusty and which he testified were at times even worse than those he experienced underground. He described dust attaching to his false teeth and being difficult to clean. This testimony is consistent with the typical testimony of underground coal miners, who likewise complain of breathing dusty air and emerging from the mines at the end of the day covered in a thick layer [of] dust that is difficult to remove from skin and clothes. Based on this evidence, I find that the Claimant has met his burden of establishing that the work he

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); HT at 15.

> performed above ground as a welder was substantially similar in terms of dust exposure to the work performed by underground coal miners.

Id.; *see* HT at 23-33.

Employer states that, "[c]ontrary to the administrative law judge's finding, a mere showing of dusty conditions in surface mine employment is insufficient to carry claimant's burden of proof." Employer's Brief in Support of Petition for Review at 11. Employer further asserts that it was "error for the administrative law judge to lump all of claimant's surface coal mine employment together" in considering whether claimant established comparable conditions. *Id* at 13. Employer maintains that claimant's testimony is overly broad and does not establish dusty conditions during all periods of his surface coal mine employment. *Id*. Employer also contends that the administrative law judge improperly considered evidence outside the record, insofar as the administrative law judge compared claimant's testimony to that of a typical underground coal miner. *Id*. at 14. Employer's arguments, however, are rejected as they are without merit.

In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is required only to proffer sufficient evidence of dust exposure in his or her work environment. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *see also Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 876 (3d Cir. 1986) ("The term 'substantially similar conditions' refers to conditions in which a worker inhales a similar quantity of dust from the coal mine environment as do miners."). Once a miner has provided evidence or testimony regarding the nature of his or her dust exposure in surface coal mine employment, it is then the function of the administrative law judge, "with his expertise and knowledge of the industry, to compare [the miner's] working conditions to those prevalent in underground mines." *Summers*, 272 F.3d at 480, 22 BLR at 2-726.

In this case, the administrative law judge found that claimant established that he "was continually exposed to heavy volumes of dust during his work in surfaces mines." Decision and Order at 16. As noted by the administrative law judge, claimant worked at surface mines as a welder and would usually perform his duties under a parts trailer. *Id*. Claimant described that when trucks passed, the dust kicked up "real bad." *Id*. at 16, *quoting* HT at 23. The administrative law judge found that claimant worked as a welder at the tipple for seven to eight years in dust conditions that claimant described as "pitiful" and the worst he had ever seen in his life. *Id*. The administrative law judge credited claimant's testimony that, aside from his work at the tipple, claimant was "constantly bothered with dust," regardless of where he worked in his surface coal mine work. Decision and Order at 16, *quoting* HT at 31-32. The administrative law judge

specifically observed that, when claimant was "[a]sked directly if his surface mining experience, aside from working around the tipple, was as dusty as underground mines, [claimant] responded that it was and that at times it was worse." Decision and Order at 16; *see* HT at 32.

Because assessing the credibility of a witness is committed to the administrative law judge's discretion, we affirm the administrative law judge's determination that claimant established fifteen years of surface coal mine employment in dust conditions that were substantially similar to those of an underground mine. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-167 (1986). We specifically reject employer's argument that the administrative law judge improperly considered evidence outside of the record. We see no error in the administrative law judge's observation that claimant's testimony regarding the dust conditions at the surface mine was consistent with that of an underground miner, as the administrative law judge may rely upon his expertise and knowledge of the coal mine industry in reaching his findings. *See Summers*, 272 F.3d at 480, 22 BLR at 2-726; *Phillips*, 794 F.2d at 876; Decision and Order at 16. We, therefore, affirm the administrative law judge's determination that claimant established fifteen years of qualifying coal mine employment. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark,* 12 BLR at 1-151. Because employer does not challenge the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment, we also affirm the administrative law judge's determination that claimant invoked the amended Section 411(c)(4) presumption.

B. Rebuttal of the Amended Section 411(c)(4) Presumption

Initially, the administrative law judge explained that employer could rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) with "evidence establishing [that the claimant] does not have pneumoconiosis, or that his total disability is not due to pneumoconiosis." Decision and Order at 18-19. The administrative law judge further stated that the focus of his rebuttal analysis would be on the evidence relevant to disability causation, noting that "the presence of legal pneumoconiosis and the cause of any [respiratory or pulmonary] disability substantially overlap." *Id*. at 19. The administrative law judge also noted that his finding of total disability was based on a qualifying blood gas study obtained by Dr. Forehand on October 21, 2010, and Dr. Forehand's 2010 opinion that the study showed a totally disabling respiratory or pulmonary impairment.[8] Decision and Order at 21; Claimant's Exhibit 1.

[8] The administrative law judge acknowledged that claimant's most recent pulmonary function study results, obtained by Dr. Forehand on October 21, 2010, were

The administrative law judge then considered the opinions of employer's experts, Drs. Dahhan and Westerfield. Dr. Dahhan determined that the pulmonary function study that he obtained on May 19, 2007, revealed a totally disabling pulmonary impairment caused by cigarette smoking and asthma. Director's Exhibit 16. The administrative law judge found that Dr. Dahhan's opinion was insufficient to rebut the amended Section 411(c)(4) presumption, as Dr. Dahhan did not have the opportunity to review the results of the qualifying October 21, 2010 blood gas study and, therefore, offered no opinion as to the cause of claimant's totally disabling hypoxemia. Decision and Order at 19.

Dr. Westerfield reviewed medical evidence, including the October 21, 2010 blood gas study, and discussed the results in a report dated November 22, 2010. Employer's Exhibit 3. Dr. Westerfield noted that claimant had normal arterial blood gas studies on April 9, 2007 and May 19, 2007, at the age of 73. *Id*. He also noted that claimant has "a history of atrial fibrillation," which required a cardiac pacemaker, and that claimant is "under treatment for congestive heart failure." *Id*. With regard to the October 21, 2010 blood gas study results, Dr. Westerfield stated that "[w]hat has happened to [claimant] in the past three years is development of cardiac failure with resultant inability to pump blood and oxygen around his body, particularly with exertion." *Id*. Dr. Westerfield opined that "it is more likely than not [that] the decrease in [claimant's] oxygenation is due to his cardiac dysfunction and not due to lung disease." *Id*. Dr. Westerfield also noted age and obesity as secondary factors for the qualifying exercise blood gas study results. *Id*.

In weighing Dr. Westerfield's opinion, the administrative law judge found that the record does not contain any treatment records from a cardiologist between 2007 and 2010 to corroborate Dr. Westerfield's statement that claimant was "under treatment" for congestive heart failure. Decision and Order at 22. The administrative law judge noted that, in contrast to Dr. Westerfield's findings, Dr. Forehand indicated that claimant was not in congestive heart failure when the 2010 blood gas studies were obtained and that Dr. Forehand specifically attributed claimant's qualifying blood gas study results to lung disease. *Id*. However, the administrative law judge also explained that, "even without consideration of Dr. Forehand's opinion," Dr. Westerfield's opinion was insufficient to establish rebuttal:

> . . . I have considered Dr. Westerfield's statements attributing the origin of the Claimant's recent qualifying blood gas studies, upon which I have based my finding of total disability. Although willing to give Dr.

"normal or near normal" and specifically stated: " My finding of total disability was not based upon the pulmonary function study evidence." Decision and Order at 21.

> Westerfield credit for his expertise as a pulmonologist, I am not persuaded by his opinion linking the blood gas studies to the Claimant's heart condition given his failure to adequately explain the basis for his statement that the Claimant was in treatment for congestive heart failure and that his heart condition had worsened over the last three years due to cardiac failure. As noted, in the absence of contemporaneous treatment records of the Claimant's cardiac condition, it is not clear upon what foundation Dr. Westerfield is basing his conclusions regarding the present condition of the Claimant's heart.

Id. Additionally the administrative law judge noted that Dr. Westerfield did not cite any objective means of identifying the decrease in oxygenation due to age and weight, as opposed to lung disease. *Id*. Thus, the administrative law judge concluded that employer failed to rebut the amended Section 411(c)(4) presumption with proof that claimant's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment.

Employer argues that the administrative law judge did not properly weigh Dr. Dahhan's opinion, as Dr. Dahhan provided a reasoned and documented explanation of his diagnosis of a totally disabling obstructive impairment that is unrelated to coal dust exposure. Regarding Dr. Westerfield's opinion, employer contends that the administrative law judge erred "in accepting at face value" Dr. Forehand's statement that claimant is not in congestive heart failure. Employer's Brief in Support of Petition for Review at 25. Employer also alleges that the administrative law judge erred in overlooking weaknesses in claimant's evidence and by imposing a "heavier burden" on Dr. Westerfield to explain his opinion. *Id*. Employer's arguments are without merit.

It is employer's burden to affirmatively show that claimant's disabling respiratory or pulmonary impairment is unrelated to coal dust exposure, therefore, the sufficiency of claimant's evidence is not at issue. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011). Whether employer has met its burden is an issue for the administrative law judge to determine, based upon an assessment of the credibility of the evidence submitted by employer, and the reviewing authority must defer to the administrative law judge's rational findings. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002);*Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002). In the present case, the administrative law judge acted within his discretion as fact-finder in concluding that Dr. Dahhan's opinion is insufficient to rebut the amended Section 411(c)(4) presumption, as Dr. Dahhan did not provide a specific opinion regarding the cause of claimant's totally disabling hypoxemia. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000); *Tennessee Consol. Coal Co.*

v. Crisp, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). With respect to Dr. Westerfield's opinion, the administrative law judge rationally concluded that it was insufficient to rebut the amended Section 411(c)(4) presumption, as Dr. Westerfield did not credibly rule out coal dust exposure as a cause of claimant's totally disabling impairment. *See Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). We, therefore, affirm the administrative law judge's finding.

We also reject employer's argument that the administrative law judge erred in failing to separately consider whether it rebutted the amended Section 411(c)(4) presumption by disproving the existence of either clinical or legal pneumoconiosis. Because employer failed to establish that claimant's disabling respiratory or pulmonary impairment did not did not arise out of, or in connection with, coal dust exposure, employer is precluded from establishing that claimant does not have legal pneumoconiosis.[9] *See Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-22; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Since employer is unable to disprove that claimant has legal pneumoconiosis, it was not necessary for the administrative law judge to further consider whether employer established the absence of clinical pneumoconiosis.[10]

We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4).[11] *See* 30 U.S.C. §921(c)(4). We further affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

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[9] 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).

[10] Because employer is precluded from establishing rebuttal with proof only that claimant does not have clinical pneumoconiosis, it is not necessary to address employer's argument that the administrative law judge erred in excluding Dr. Westerfield's negative reading for pneumoconiosis of the x-ray dated October 18, 2010. *See* Employer's Brief in Support of Petition for Review at 8.

[11] We reject employer's assertion that the administrative law judge erred in failing to consider the medical evidence in the prior claim. The administrative law judge specifically noted the evidence from the prior claim did not alter his finding that claimant was entitled to benefits pursuant to amended Section 411(c)(4). Decision and Order at 24.

Accordingly, the Decision and Order Awarding Benefits and the Decision and Order on Reconsideration are affirmed.

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