BRB No. 14-0063 BLA

ROLLIN E. LINXWILER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WABASH MINE HOLDING COMPANY	)	DATE ISSUED: 10/06/2014
	)	
Employer-Petitioner	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Dominique V. Sinesi (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5679) of Administrative Law Judge Alice M. Craft, rendered on a claim filed on May 21, 2008, 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 accepted the parties' stipulation that claimant worked for twenty-six years in underground coal mine employment. Based on this stipulation, the filing date of the claim, and her determination that claimant

established a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer asserts that the 2013 regulations are unconstitutional and violate the Administrative Procedure Act (APA), 5 U.S.C. et. seq., incorporated into the Act by 30 U.S.C. §932(a). Employer also asserts that the administrative law judge applied an incorrect legal standard and erred in weighing the evidence relevant to rebuttal of the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, urging the Board to reject employer's arguments with respect to application of the 2013 regulations. The Director also asserts that the administrative law judge applied the proper rebuttal standard. Employer has filed a reply brief, reiterating its arguments.

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.[2] 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. Application of the 2013 Regulations

Employer argues that the revised 2013 regulations, implementing amended Section 411(c)(4) are unconstitutional because they "violate the due process clause, constitute a 'taking' and further violate the [APA] due to evidentiary limitations, expanded definitions, limited defenses, shifted burdens of proof as well as setting heightened rebuttal standards that are contrary to law." Employer's Brief in Support of Petition for Review at 5. We disagree. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has upheld the applicability

[1] Under amended Section 411(c)(4), 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 impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] As claimant's coal mine employment was in Indiana, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2; Hearing Transcript at 8, 13.

and constitutionality of the 2010 amendments to the Act. *See Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Furthermore, employer's constitutional arguments have been rejected by the Board. *See Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5 (2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). Because employer's arguments regarding the constitutionality of the revised 2013 regulations, specifically 20 C.F.R. §718.305, are fundamentally arguments as to the constitutionality of the 2010 amendments to the Act, they are rejected for the reasons set forth in *Keene*. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010); Director's Brief at 3.

Employer also maintains that the revised regulation at 20 C.F.R. §718.305 gives a miner an improper presumption that he or she suffers from legal pneumoconiosis,[3] contrary to the 2001 regulations, which "were enacted on the premise that 'legal pneumoconiosis' would not be presumed" and that a miner was required to prove all elements of his or her claim. Employer's Brief in Support of Petition for Review at 5. However, the Director notes correctly that "[t]his argument is specious because it ignores the fact that the legal landscape governing entitlement under [the Act] has changed since the enactment of the 2001 regulations." Director's Brief at 3. Congress has changed the entitlement criteria and amended Section 411(c)(4), as implemented by 20 C.F.R. §718.305, "reinstates a presumption of total disability due to clinical and legal pneumoconiosis for certain claims," such as this one, that was filed after January 1, 2005. *Id.*, *citing* 30 U.S.C. § 936(a) (authority of the Secretary of Labor to prescribe rules and regulations necessary for enforcement of the Act); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 733, 25 BLR 2-405, 424 (7th Cir. 2013). Because the administrative law judge determined that claimant met the necessary eligibility requirements for invocation,[4] he is entitled to a presumption that he is totally disabled due

[3] 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). Legal pneumoconiosis "includes 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).

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

to both clinical and legal pneumoconiosis. *See Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345, 25 BLR 2-549, 2-568 (10th Cir. 2014).

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

A. Standard of Proof

Under the implementing regulations, because claimant invoked the amended Section 411(c)(4) presumption, the burden of proof shifted to employer to rebut the presumption by "establishing both that [claimant] does not have" clinical and legal pneumoconiosis or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201."[5] 20 C.F.R. §718.305(d)(1)(i), (ii); *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). In considering rebuttal, the administrative law judge found that employer failed to disprove the existence of both clinical and legal pneumoconiosis. She also determined that employer failed to disprove the causal relationship between claimant's respiratory disability and his legal pneumoconiosis.

Employer argues that the administrative law judge applied an incorrect rebuttal standard and states that it "should only have *to prove by a preponderance of the evidence* that [claimant] does not have the disease or was not totally disabled due to the disease in order to rebut the presumption." Employer Brief's in Support of Petition for Review at 7 (emphasis added). The administrative law judge specifically acknowledged, however, that employer "may rebut the presumption by establishing *by a preponderance of the evidence* that [claimant] does not have pneumoconiosis, or that his totally disabling respiratory or pulmonary impairment is wholly unrelated to pneumoconiosis." Decision and Order at 23 (emphasis added). As discussed *infra*, the administrative law judge

[5] Based on the actual terms of 20 C.F.R. §718.305(d)(1)(i)(A), employer is incorrect in alleging that the regulation requires employer to "rule out" the existence of legal pneumoconiosis.

permissibly concluded that employer did not satisfy its burden of proof by a preponderance of the evidence.[6]

B. Legal Pneumoconiosis

The record reflects that both of employer's physicians, Drs. Repsher and Renn, opined that claimant has severe chronic obstructive pulmonary disease (COPD), which renders claimant totally disabled from a respiratory or pulmonary standpoint. Director's Exhibits 14, 25; Employer's Exhibit 14. The administrative law judge found that their opinions, attributing claimant's disabling COPD to smoking and not coal dust exposure, were unpersuasive, in part, because they expressed views that were contrary to the preamble to the 2001 regulations. Employer contends that the administrative law judge misapplied the preamble to the regulations in rejecting the opinions of Drs. Repsher and Renn that claimant does not have legal pneumoconiosis. Specifically, employer argues that the administrative law judge's analysis of the preamble is erroneously "premised on a belief that coal dust exposure is a cause or additive cause . . . in every miner diagnosed with COPD." Employer's Brief in Support of Petition for Review at 15. Contrary to employer's assertion, the administrative law judge has discretion to determine the credibility of a medical opinion and may utilize the scientific evidence accepted by the Department of Labor (DOL) in making that determination. *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97 (7th Cir. 2008); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harmon Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305 (4th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

In addition, contrary to employer's argument, the administrative law judge did not mischaracterize the opinions of Drs. Repsher and Renn, in finding that they were insufficiently reasoned and at odds with the scientific evidence set forth in the preamble. The administrative law judge summarized correctly Dr. Renn's beliefs that "cigarette smoking is the most common and powerful cause of COPD;" that "13 [percent] of chronic smokers develop potentially catastrophic COPD," while "87 [percent] have normal pulmonary function;" and "a majority of non-smoking, non-asthmatic miners with

[6] Employer's acceptance of a rebuttal standard requiring it to prove by a preponderance of the evidence that claimant does not have pneumoconiosis, or was not totally disabled due to pneumoconiosis, negates any need for the Board to address employer's argument that it bears only the burden of production, and not the burden of persuasion, on rebuttal.

simple clinical pneumoconiosis have normal pulmonary function and diffusing capacity."[7] Decision and Order at 19; *see* Director's Exhibit 14. The administrative law judge rationally found that Dr. Repsher expressed "skepticism" as to whether coal dust exposure, in the absence of smoking, may result in clinically significant COPD, and she permissibly rejected his opinion on the ground that his views are inconsistent with the scientific evidence accepted by the DOL showing that coal dust causes clinically significant COPD even in the absence of smoking. Decision and Order at 28; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. The administrative law judge concluded, within her discretion, that Dr. Repsher failed to adequately explain why coal dust exposure was not a contributing or aggravating factor in claimant's obstructive disease. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 28.

The administrative law judge also observed correctly that Dr. Rephser excluded coal dust exposure as a cause of claimant's COPD, based on the results of the pulmonary function testing, which he described as being inconsistent with impairment due to coal dust exposure because there was a significant reduction in the FEV1 value. Decision and Order at 19, 28. The administrative law judge properly found that Dr. Repsher's reasoning is contrary to the position of the DOL that "coal dust exposure may cause [COPD], with associated decrements in FEV1 and the FEV1/FVC ratio." *Id*. at 28; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103. The administrative law judge further rejected permissibly the opinions of both Dr. Renn and Dr. Repsher, because they did not account for claimant's twenty-six years of coal mine employment and the scientific evidence cited by the DOL, indicating that the effects of smoking and coal dust exposure are additive. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Furthermore, the administrative law judge noted that Dr. Renn cited to claimant's pulmonary function testing and "excluded coal dust as a contributing factor [for claimant's COPD] because [c]laimant's obstructive impairment was responsive to bronchodilators, and coal dust exposure causes a fixed impairment." Decision and Order at 29; *see* Director's Exhibit 25; Employer's Exhibit 14. The administrative law judge noted, however, that claimant's "obstruction was only partially reversible, as the results did not return to normal after the administration of bronchodilators." Decision and Order at 29. Because Dr. Renn "did not address the *irreversible component* of the obstruction," we affirm the administrative law judge's finding that Dr. Renn's opinion is not well

[7] As noted by the administrative law judge, Dr. Repsher believes that "the vast majority" of non-smoking coal miners have "no or clinically insignificant loss of FEV1." Decision and Order at 19; *see* Director's Exhibit 14.

reasoned.[8] Decision and Order at 29 (emphasis added); *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 Fed. App'x. 227, 237 (4th Cir. May 11, 2004) (unpub.). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing, by a preponderance of the evidence, that claimant does not have legal pneumoconiosis.[9] *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990).

C. Disability Causation

Employer also asserts on appeal that the administrative law judge erred in her consideration of whether employer rebutted the presumed fact of disability causation. The administrative law judge, however, permissibly rejected the opinions of Drs. Repsher and Renn, that claimant's respiratory disability was unrelated to legal pneumoconiosis, as neither physicians' opinion, that claimant did not suffer from legal pneumoconiosis, was well reasoned, and their explanations as to the cause of claimant's total respiratory or pulmonary disability rested on their rejection of claimant having the disease. *See Burris*, 732 F.3d at 734, 25 BLR at 425; *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 29-30. Thus, we affirm the administrative law judge's finding that employer failed to establish that that claimant's respiratory disability was not due to pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(1)(ii). We further affirm,

[8] Since we affirm the administrative law judge's findings that the opinions of Drs. Repsher and Renn are inconsistent with the preamble, it is not necessary that we address employer's assertion that the administrative law judge erred in giving less weight to their opinions on the ground that they relied on an inflated smoking history. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[9] Because employer accepts that it is required to disprove the existence of pneumoconiosis, which encompasses both clinical and legal pneumoconiosis, in order to establish the first method of rebuttal of the amended Section 411(c)(4) presumption, and we affirm the administrative law judge's finding that employer did not rebut the presumed fact of legal pneumoconiosis, it is not necessary that we consider employer's arguments relevant to clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 25 BLR 2-405 (7th Cir. 2013).

[10] Employer argues that the administrative law judge erred in crediting the opinions of Drs. Houser and Murthy, that claimant has legal pneumoconiosis. Because

as supported by substantial evidence, the administrative law judge's finding that claimant is entitled to benefits.[11]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's finding that employer's evidence fails to affirmatively establish that claimant does not have legal pneumoconiosis, it is not necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

[11] Employer requests that the Board "reduce the amount of the monthly award by $116.39," to reflect that claimant obtained a settlement, in the amount of $25,000.00, for a state workers' compensation claim. Employer's Brief in Support of Petition for Review at 22. The Board, however, does not have authority to calculate the amount of monthly benefits to which claimant may be entitled, and the computation of benefits will be determined by the district director. 20 C.F.R. §725.502.