BRB No. 12-0655 BLA

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| BERKLEY LEE RADABAUGH | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: 09/24/2013 |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2009-BLA-5536) of Administrative Law Judge Michael P. Lesniak, rendered on a miner's claim filed on July 3, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the second time. In his initial Decision and Order dated September 22, 2010, the administrative law judge awarded benefits, finding that claimant invoked 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), and that employer failed to rebut that presumption.[1] Upon consideration of employer's appeal, the Board rejected employer's arguments regarding the applicability of amended Section 411(c)(4). *See Radabaugh v. Consolidation Coal Co.*, BRB No. 11-0144 BLA, slip op. at 3-4 (Oct. 27, 2011) (unpub.) Based on the administrative law judge's unchallenged findings that claimant established more than fifteen years in underground coal mine employment and a totally disabling respiratory impairment, the Board affirmed the administrative law judge's determination that claimant invoked the presumption. *Id*. at 3 n.3, 4. However, the Board agreed with employer that, in addressing whether employer had rebutted the presumption, the administrative law judge mischaracterized relevant evidence and did not explain the bases for his credibility determinations in accordance with the Administrative Procedure Act (APA).[2] *Id*. at 7-8. Accordingly, the Board vacated the award and remanded the case to the administrative law judge for further consideration. *Id*. at 8.

In his Decision and Order on Remand – Awarding Benefits, issued on August 29, 2012, the administrative law judge determined that the opinions of employer's experts were insufficient to establish, either that claimant does not suffer from pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, coal mine employment. Thus, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption.

On appeal, employer asserts that the administrative law judge applied an improper rebuttal standard and did not rationally weigh the evidence on rebuttal. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject

[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, amended Section 411(c)(4) provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if claimant establishes at least fifteen years in underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[2] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all 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 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

employer's assertion that the administrative law judge applied an improper rebuttal standard.[3]

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 this case, the issue on remand was whether employer successfully rebutted the amended Section 411(c)(4) presumption. The Board previously affirmed the administrative law judge's unchallenged finding that employer disproved the existence of clinical pneumoconiosis. *Radabaugh*, slip op. at 4 n.6. On remand, in addressing whether employer disproved the existence of legal pneumoconiosis,[5] the administrative law judge reconsidered the opinions of employer's experts, Drs. Basheda and Bellotte, each of whom opined that claimant's disabling chronic obstructive pulmonary disease (COPD) was due to smoking and not to coal dust exposure.[6] Decision and Order on

[3] We reject employer's continued argument that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator, as this argument was rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *aff'd on other grounds*, F.3d , 2013 WL 3929081 (4th Cir. July 31, 2013)(No. 11-2418)(Niemeyer, J., concurring). *See also Radabaugh v. Consolidation Coal Co.*, BRB No. 11-0144 BLA, slip op. at 3-4 (Oct. 27, 2011).

[4] Because the record indicates that claimant's last coal mine employment was in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 12-13; Director's Exhibit 4.

[5] "'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).

[6] Dr. Basheda opined that claimant has "[s]evere chronic obstructive pulmonary disease (COPD) secondary to tobacco dependence with a clinical history of an 'asthmatic component.'" Employer's Exhibit 8. Dr. Bellotte opined that claimant has a severe pulmonary impairment attributable to multiple conditions, including COPD with chronic bronchitis and emphysema, due to claimant's smoking history. Employer's Exhibits 1, 11. He also opined that claimant's obesity is causing some atelectasis, which can

Remand at 7. The administrative law judge discredited Dr. Basheda's opinion for two reasons. First, the administrative law judge rejected Dr. Basheda's explanation that coal dust-related COPD can be distinguished from smoking-related COPD, because he considered Dr. Basheda's estimates for the potential loss of FEV1, caused by smoking versus coal dust exposure, to be inconsistent with the preamble to the revised regulations. *Id*. Second, the administrative law judge found that Dr. Basheda expressed a view, "contrary to the plain language of the regulation" at 20 C.F.R. §718.201(c), that legal pneumoconiosis is not usually latent and progressive. *Id*.

With respect to Dr. Bellotte, the administrative law judge found that he did not adequately explain why he excluded coal dust exposure as a cause for claimant's respiratory impairment. Decision and Order on Remand at 7. The administrative law judge also rejected Dr. Bellotte's opinion, to the extent that he cited to the FEV1 calculations by Dr. Basheda to support his conclusions. *Id*. Thus, the administrative law judge determined that employer failed to satisfy its burden to affirmatively establish that claimant does not have legal pneumoconiosis. *Id*.

Additionally, because neither Dr. Basheda, nor Dr. Bellotte, diagnosed legal pneumoconiosis, the administrative law judge determined that their opinions were not credible on the issue of disability causation. Decision and Order at 8. Thus, the administrative law judge concluded that "employer cannot rule out a causal connection between [claimant's] disability and his coal mine employment," and that it failed to rebut the amended Section 411(c)(4) presumption. *Id.*

Employer contends that the administrative law judge applied an improper rebuttal standard in requiring employer to "rule out" a connection between claimant's disabling COPD and his coal dust exposure. Employer's Brief in Support of Petition for Review at 7. Employer maintains that, under the appropriate standard, employer must show only that pneumoconiosis did not have a material adverse effect on claimant's respiratory or pulmonary condition, or that pneumoconiosis did not materially worsen a totally disabling respiratory or pulmonary impairment that was caused by a disease or exposure unrelated to coal mine employment.

Contrary to employer's contention, the administrative law judge explained correctly that, in order to rebut the presumption at amended Section 411(c)(4), employer must establish either that claimant "does not suffer from pneumoconiosis" or that claimant's "total disability was not caused by coal mine employment." Decision and

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contribute to his hypoxemia. *Id.* He concluded that the severe impairment is not due to pneumoconiosis. *Id*.

Order on Remand at 5; *see* 30 U.S.C. §921(c)(4); 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has specifically stated that, in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). We therefore reject employer's argument that the administrative law judge applied an incorrect legal standard by requiring employer to "provide an affirmative showing" that claimant does not suffer from legal pneumoconiosis, or to "effectively . . . rule out" any contribution to claimant's disabling respiratory or pulmonary impairment by coal mine dust exposure. Decision and Order on Remand at 6; *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

We also reject employer's contention that the administrative law judge mischaracterized Dr. Basheda's opinion as being contrary to the regulations and the preamble.[7] Employer's Brief in Support of Petition for Review at 10-11. As a basis for excluding coal dust exposure as a causative factor for claimant's disabling COPD, Dr. Basheda specifically stated:

> Although coal workers' pneumoconiosis can be described as a latent and progressive disease, this progression is usually seen with parenchymal lung disease, that is, simple coal workers' pneumoconiosis progressing to progressive massive fibrosis. *It would be unusual for the patient to have progressive obstructive lung disease after removal from the mines.* This progressive disease after leaving the coal mines can best be explained by continued cigarette smoking resulting in progressive airway obstruction and increasing respiratory symptoms.

Employer's Exhibit 8 at 11 (emphasis added). We see no error in the administrative law judge's finding that Dr. Basheda's rationale is "generally contrary to the plain language of the [r]egulations, which embrace the position that both clinical and legal pneumoconiosis may be progressive."[8] Decision and Order on Remand at 7, *citing* 20

[7] An administrative law judge may, within his discretion, evaluate medical expert opinions in conjunction with the Department of Labor's discussion of sound medical science in the preamble to the revised regulations. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012).

[8] Employer also argues that the administrative law judge erred in discrediting Dr. Basheda's opinion since his views on the progression of pneumoconiosis are based on

C.F.R. §718.201(c); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Furthermore, the administrative law judge noted correctly that the Department of Labor (DOL) has taken the position, contrary to Dr. Basheda's opinion, that "a miner who may be asymptomatic and without significant impairment at retirement can develop a significant impairment after a latent period." Decision and Order at 7, quoting 65 Fed. Reg. 79,971 (Dec. 20, 2000). Therefore, we affirm the administrative law judge's decision to assign "little weight" to Dr. Basheda's opinion, that claimant does not have legal pneumoconiosis, as he has expressed views at odds with the regulations and the preamble. Decision and Order on Remand at 7; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004).

With regard to Dr. Bellotte, the administrative law judge noted correctly that he testified that claimant does not have legal pneumoconiosis, "based primarily upon the fact that [c]laimant has so many other reasons to have his pulmonary impairment." Decision and Order on Remand at 7, quoting Employer's Exhibit 11 at 8. The administrative law judge reasonably found that "[t]his element of his opinion is not probative; just because [claimant's] other medical conditions could explain his impairment, such an observation falls short of affirmatively establishing that [claimant] did not suffer from legal pneumoconiosis." Decision and Order on Remand at 7; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Additionally, the administrative law judge permissibly determined that Dr. Bellotte's opinion was insufficient to satisfy employer's burden of proof since Dr. Bellotte "failed to address why coal dust exposure could not have *exacerbated* [claimant's] impairment to a significant degree." Decision and Order on Remand at 7; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we affirm the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by affirmatively establishing that claimant does not have legal pneumoconiosis.

Lastly, we reject employer's contention that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of disability causation.

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advancements in science and medicine since publication of the preamble. Employer's Brief in Support of Petition for Review at 10. However, employer has not identified any testimony or statement by Dr. Basheda that invalidates the science underlying the preamble relevant to whether pneumoconiosis is latent and progressive, other than general citation to literature that post-dates the preamble. Therefore, this argument has no merit. *See Cochran*, 718 F.3d at 325.

As noted by the administrative law judge, Drs. Basheda and Bellotte opined that claimant is not totally disabled as a result of his coal dust exposure. Decision and Order on Remand at 8. The administrative law judge, however, permissibly rejected the opinions of Drs. Basheda and Bellotte, relevant to the etiology of claimant's disabling COPD, as neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that the disease has been established. *See 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 on Remand at 8 n.11.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Looney* 678 F.3d at 314, 25 BLR at 2-130; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with proof that claimant does not have pneumoconiosis, or that his disabling respiratory impairment did not arise out of, or in connection with, coal mine employment.[9] *See* 30 U.S.C. §921(c)(4); 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

[9] Employer contends that the administrative law judge did not properly explain why he found Dr. Basheda's calculations regarding the relative FEV1 loss to be contrary to the preamble. Employer also argues that the administrative law judge erroneously required Dr. Bellotte "to establish that [claimant] would not have been totally disabled from his pulmonary condition alone." Employer's Brief in Support of Petition for Review at 12, quoting Decision and Order on Remand at 8. However, it is not necessary that we address the merits of employer's arguments since we have affirmed the administrative law judge's decision to accord less weight to employer's experts on other grounds. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge