BRB No. 12-0659 BLA

BOGER STANLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG HILL COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 09/19/2013
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

William A. Lyons and W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5201) of Administrative Law Judge Joseph E. Kane rendered on a claim filed on January 25,

2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with at least 20 years of underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge also found that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[1] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

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 enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010). The amendments, in pertinent part, 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 if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[1] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibit 3. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Initially, we affirm the administrative law judge's application of Section 1556 of the PPACA to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We also affirm the administrative law judge's unchallenged finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on his determination that claimant established at least 20 years of underground coal mine employment and total respiratory disability at Section 718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With regard to rebuttal of the presumption at amended Section 411(c)(4),[2] we affirm the administrative law judge's unchallenged finding that employer established the absence of clinical pneumoconiosis[3] at 20 C.F.R. §718.202(a).[4] *See Skrack*, 6 BLR at 1-711.

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by showing the

[2] After finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge stated that "the burden shifts to the employer to rebut the presumption by establishing either (a) that [c]laimant did not have pneumoconiosis; or (b) that his respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment." Decision and Order at 21-22; *see* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

[3] Clinical pneumoconiosis is defined as "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).

[4] Although employer does not challenge the administrative law judge's finding that it established the absence of clinical pneumoconiosis at 20 C.F.R. §718.202(a) overall, employer asserts that the administrative law judge should have found that the existence of clinical pneumoconiosis was not established at Section 718.202(a)(1). In view of our disposition of the administrative law judge's finding regarding the issue of clinical pneumoconiosis, we need not address employer's assertion that the administrative law judge should have found that the existence of clinical pneumoconiosis was not established at Section 718.202(a)(1). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

absence of legal pneumoconiosis.[5] The administrative law judge considered the reports of Drs. Rasmussen, Baker, Dahhan, and Rosenberg.[6] The opinions of Drs. Rasmussen, and Baker, that claimant has legal pneumoconiosis,[7] do not support rebuttal of the presumption. By contrast, the opinions of Drs. Dahhan and Rosenberg, that claimant does not have legal pneumoconiosis, are supportive of a finding of rebuttal of the presumption.[8] The administrative law judge gave full probative weight to the opinions of Drs. Rasmussen and Baker because he found that they were well-reasoned and well-documented. The administrative law judge gave little weight to the opinions of Drs. Dahhan and Rosenberg because he found that they were not well-reasoned. The administrative law judge therefore concluded, "although this is a presumption case and the burden is on [e]mployer to rebut the existence of legal pneumoconiosis, I find that in addition to failing to meet [e]mployer's burden, the medical opinion [evidence] establishes the existence of legal pneumoconiosis by a preponderance of the evidence." Decision and Order at 31.

Employer asserts that the administrative law judge erred in discounting the opinions of Drs. Dahhan and Rosenberg because they were not well-reasoned. Specifically, employer argues that the administrative law judge erred in finding that the

[5] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] Employer asserts that "[the administrative law judge] noted the existence of but did not address the post-hearing evidence of Dr. Rosenberg." Employer's Brief at 19. Contrary to employer's assertion, in addition to admitting Dr. Rosenberg's December 20, 2010 report into the record as Employer's Exhibit 9, the administrative law judge summarized and specifically considered the doctor's report in weighing the medical opinion evidence. Decision and Order at 4, 14-15, 29. Thus, we reject employer's assertion that the administrative law judge failed to consider Dr. Rosenberg's post-hearing report.

[7] Dr. Rasmussen diagnosed chronic obstructive pulmonary disease and emphysema related to coal dust exposure. Director's Exhibit 16; Claimant's Exhibit 6. Similarly, Dr. Baker diagnosed chronic obstructive pulmonary disease related to coal dust exposure. Claimant's Exhibit 2.

[8] Drs. Dahhan and Rosenberg opined that claimant does not have legal pneumoconiosis. Employer's Exhibits 1, 4, 9. Drs. Dahhan and Rosenberg opined that claimant's obstructive lung disease was related to smoking. Employer's Exhibits 1, 5, 9.

opinions of Drs. Dahhan and Rosenberg were contrary to the Act. Contrary to employer's argument, the administrative law judge did not find that the opinions of Drs. Dahhan and Rosenberg were contrary to the Act, as he did not find that they relied on generalities to foreclose the possibility that simple pneumoconiosis can be totally disabling, that pneumoconiosis can cause obstructive impairments, or that pneumoconiosis can progress after a miner's exposure to coal dust ceases. Rather, the administrative law judge found that the opinions of Drs. Dahhan and Rosenberg were inconsistent with the regulatory definition of pneumoconiosis. The preamble to the revised regulations sets forth how the Department of Labor (the Department) has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may, within his discretion, evaluate medical expert opinions in conjunction with the Department's discussion of sound medical science in the preamble to the revised regulations. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). In this case, the administrative law judge permissibly discounted the opinions of Drs. Dahhan and Rosenberg because they were inconsistent with the Department's definition of legal pneumoconiosis.[9] *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 311-12, 25 BLR at 2-125; *Peabody Coal Co. v. Groves*, 277 F.3d

[9] In considering Dr. Dahhan's opinion, the administrative law judge noted that "Dr. Dahhan disagreed with Dr. Rasmussen that coal dust and smoking cause identical forms of emphysema" and that the doctor opined that "coal dust only causes a type of emphysema called 'focal emphysema' when the coal macule is present." Decision and Order at 28. The administrative law judge determined that "Dr. Dahhan is essentially saying that coal dust only causes emphysema when clinical pneumoconiosis is present, and because [c]laimant does not have clinical pneumoconiosis, his emphysema necessarily could not have been caused by coal dust inhalation." *Id*. In addition, the administrative law judge stated that "[Dr. Dahhan's] opinion that coal dust, alone, could not have caused such a great decrease in pulmonary function does not speak to whether [c]laimant's impairment was 'significantly related to, or substantially aggravated by[,]' his coal mine employment." *Id*. The administrative law judge determined that "Dr. Dahhan seems to imply that coal dust exposure is incapable of causing a disabling obstructive impairment." *Id*. Regarding Dr. Rosenberg's opinion that claimant's chronic obstructive pulmonary disease was entirely related to smoking, the administrative law judge noted that "Dr. Rosenberg first stated that 'while the FEV1 decreases in relationship to coal mine dust exposure, the ratio of FEV1/FVC…generally is preserved,' while 'this parameter is decreased in smoking-related forms of obstructive lung disease.' (EX 1, 9)." *Id*. at 29. The administrative law judge stated that "Dr. Rosenberg then observed that [c]laimant's FEV1/FVC was decreased, and therefore, concluded that his obstructive impairment was caused by smoking rather than coal dust exposure." *Id*.

829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); 65 Fed. Reg. 79,938-79,944 (Dec. 20, 2000). In addition, the administrative law judge permissibly discounted the opinions of Drs. Dahhan and Rosenberg because they did not adequately explain why partial reversibility in the results of a portion of claimant's pulmonary function studies necessarily eliminated a diagnosis of legal pneumoconiosis.[10] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Further, the administrative law judge permissibly discounted Dr. Dahhan's opinion because "Dr. Dahhan does not explain why both coal mine dust and cigarette smoking could not have contributed to [c]laimant's pulmonary impairment." Decision and Order at 28; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Dahhan and Rosenberg because they were not well-reasoned. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis.[11]

[10] The administrative law judge noted that "[Dr. Dahhan] stated that [c]laimant's lung disease was responsive to bronchodilators, which, in Dr. Dahhan's opinion, is 'inconsistent with the permanent fixed adverse affect [sic] on coal dust on the respiratory system.'" Decision and Order at 27. The administrative law judge, however, determined that "[c]laimant's impairment was not completely reversible, and the Sixth Circuit Court has held that a physician who cites a miner's responsiveness to bronchodilator treatment in support of his opinion must explain why this precludes a diagnosis of legal pneumoconiosis." *Id*. at 27-28. The administrative law judge further stated that, "like Dr. Dahhan, Dr. Rosenberg failed to address [c]laimant's residual impairment or explain why partial reversibility establishes that [c]laimant's COPD was caused entirely by smoking." *Id*. at 29.

[11] Employer also asserts that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Baker that claimant has legal pneumoconiosis. In view of our holding that the administrative law judge permissibly discounted the opinions of Drs. Dahhan and Rosenberg that claimant does not have legal pneumoconiosis, we need not address employer's assertion that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Baker. *See Larioni*, 12 BLR at 1-1278.

Finally, employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of total disability due to pneumoconiosis. Specifically, employer asserts that "[the administrative law judge], upon determining legal pneumoconiosis in favor of the [c]laimant, indicated that it was not necessary to analyze disability causation because legal pneumoconiosis had been established." Employer's Brief at 19. Employer also asserts that "[the administrative law judge] did not fairly weigh the evidence under [the Administrative Procedure Act (APA)]." *Id.* at 29. Employer argues that the administrative law judge mischaracterized and selectively analyzed the opinions of Drs. Dahhan and Rosenberg. We disagree.

The APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge noted that "[t]he issue of whether [c]laimant's disability is related to pneumoconiosis is essentially the same as the issue of whether he suffers from legal pneumoconiosis, with the expert opinions on one issue also addressing the other." Decision and Order at 32. Moreover, the administrative law judge stated that "[t]he Board has noted that 'there is considerable overlap between the issues of the existence of legal pneumoconiosis and total disability due to pneumoconiosis, as both concern an inquiry into whether a causal relationship exists between coal dust exposure and the miner's impairment.'" *Id.* (footnote omitted). Nevertheless, in considering whether employer established the absence of disability causation, the administrative law judge considered the opinions of Drs. Rasmussen, Baker, Dahhan, and Rosenberg.[12] The administrative law judge stated, "[f]or the reasons already stated, I find the opinions of Drs. Baker and Rasmussen to be worthy of greater weight than the contrary opinions of [Drs.] Dahhan and Rosenberg." *Id.* The administrative law judge further stated, "Drs. Dahhan and Rosenberg agreed that [c]laimant was totally disabled, but believed his disability was due to [sic] entirely to smoking for reasons I have already discredited." *Id.*

[12] Dr. Rasmussen opined that coal dust exposure and cigarette smoking contributed significantly to claimant's pulmonary impairment. Director's Exhibit 16; Claimant's Exhibit 6. Dr. Baker opined that claimant's coal dust exposure fully contributed to his pulmonary impairment. Claimant's Exhibit 2. By contrast, Dr. Dahhan opined that coal dust exposure does not contribute to claimant's pulmonary impairment. Employer's Exhibits 3, 4. Similarly, Dr. Rosenberg opined that claimant's disabling respiratory impairment was caused by smoking, and not coal dust exposure. Employer's Exhibits 1, 9.

As discussed *supra*, in considering whether employer established the absence of legal pneumoconiosis, the administrative law judge permissibly discounted the opinions of Drs. Dahhan and Rosenberg because they were inconsistent with the Department's definition of pneumoconiosis. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 311-12, 25 BLR at 2-125; *Groves*, 277 F.3d at 836, 22 BLR at 2-330; *J.O.* [*Obush*], 24 BLR at 1-125; 65 Fed. Reg. 79,938-79,944 (Dec. 20, 2000). Additionally, the administrative law judge permissibly discounted the opinions of Drs. Dahhan and Rosenberg because they did not adequately explain why partial reversibility in the results of a portion of claimant's pulmonary function studies necessarily eliminated a diagnosis of legal pneumoconiosis. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Swiger*, 98 F. App'x at 237; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Moreover, the administrative law judge permissibly discounted Dr. Dahhan's opinion because the doctor did not explain why both coal mine dust and cigarette smoking could not have contributed to claimant's disabling pulmonary impairment. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-330. Thus, we reject employer's assertion that the administrative law judge's weighing of the evidence on disability causation violated the APA. We, therefore, affirm the administrative law judge's finding that employer failed to establish that coal dust exposure did not contribute to claimant's disabling respiratory impairment. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Furthermore, because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge