BRB No. 13-0046 BLA

HAROLD H. BOSTIC	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 09/25/2013
	)	
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 of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-05070) of Administrative Law Judge Christine L. Kirby (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as

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[1] Claimant filed his first claim in December 1980. Director's Exhibit 1. It was finally denied by a claims examiner on June 19, 1981, because claimant failed to establish total disability due to pneumoconiosis. *Id.* Claimant filed his second claim in November 1990, but he withdrew it before a hearing was held by the Office of Administrative Law Judges. Claimant filed his third claim (a duplicate claim) in January

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge accepted employer's concession that claimant has 15 or more years of qualifying coal mine employment,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, based on employer's concession that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Further, the administrative law judge accepted employer's concession that claimant was entitled to invocation of 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 also found 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 legal pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The

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1993. *Id*. On July 28, 1994, Administrative Law Judge Fletcher E. Campbell, Jr. issued a Decision and Order denying benefits, based on claimant's failure to establish any of the elements of entitlement. *Id*. The Board affirmed Judge Campbell's denial of benefits. *Bostic v. Clinchfield Coal Co.*, BRB No. 94-3761 BLA (May 31, 1995)(unpub.). The denial became final because claimant did not pursue this claim any further. Claimant filed his fourth claim (a duplicate claim) in October 1996. Director's Exhibit 1. On August 26, 1997, Administrative Law Judge Edward J. Murty, Jr. issued a Decision and Order denying benefits, based on claimant's failure to establish any of the elements of entitlement. *Id*. The Board affirmed Judge Murty's denial of benefits. *Bostic v. Clinchfield Coal Co.*, BRB No. 97-1793 BLA (Sept. 22, 1998)(unpub.). Because claimant did not pursue this claim any further, the denial became final. Claimant filed his fifth claim (a duplicate claim) in January 2000. Director's Exhibit 2. It was finally denied by a claims examiner on April 5, 2000, based on claimant's failure to establish any of the elements of entitlement and, thus, a material change in conditions. *Id*. Claimant filed his sixth claim (a subsequent claim) in February 2004. Director's Exhibit 3. It was finally denied by a claims examiner on September 19, 2007, because claimant filed an untimely request for modification. *Id*. Claimant filed this claim (a subsequent claim) on October 5, 2009. Director's Exhibit 5.

[2] Administrative Law Judge Christine L. Kirby (the administrative law judge) noted that the parties stipulated at the hearing that claimant has 23 years of coal mine employment. Decision and Order at 3.

Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 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.

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 acceptance of employer's concession that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) because claimant established 15 or more years of qualifying coal mine employment and total respiratory disability at Section 718.204(b).

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[3] Because 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 is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 1-3, 6.

With regard to rebuttal of the presumption at amended Section 411(c)(4),[5] we affirm the administrative law judge's unchallenged finding that employer established the absence of clinical pneumoconiosis[6] at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 absence of legal pneumoconiosis.[7] The administrative law judge considered treatment records[8] and the reports of Drs. Al-Khasawneh, Gallai, Fino, and Castle. The opinions of

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[5] Employer asserts that, while the administrative law judge ultimately found pneumoconiosis, she erred in failing to weigh all of the evidence of pneumoconiosis together at 20 C.F.R. §718.202(a)(1)-(4), consistent with the holding of the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). We hold that employer's assertion lacks merit. 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 properly found that "the burden shifts to the party opposing entitlement (in this case, [e]mployer) to demonstrate by a preponderance of the evidence either: (1) [that] the miner's disability does not, or did not, arise out of coal mine employment; or (2) [that] the miner does not, or did not, suffer from pneumoconiosis." Decision and Order at 6; *see* 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Thus, we reject employer's assertion that the administrative law judge erred in failing to weigh all of the evidence of pneumoconiosis together at 20 C.F.R. §718.202(a)(1)-(4).

[6] 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).

[7] 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).

[8] The administrative law judge found that, although some of the treatment records contained assessments of coal workers' pneumoconiosis (CWP), they were not helpful to either confirm or rebut the presence of legal CWP, as they were conclusory and lacking an explanation of the basis for the assessments. No party challenges the administrative

Drs. Al-Khasawneh and Gallai, that claimant has legal pneumoconiosis, do not support rebuttal of the presumption. Director's Exhibit 13; Claimant's Exhibits 4, 6. By contrast, the opinions of Drs. Fino and Castle, that claimant does not have legal pneumoconiosis, are supportive of a finding of rebuttal of the presumption. Director's Exhibit 14; Employer's Exhibits 7, 11-13. The administrative law judge found that the opinions of Drs. Al-Khasawneh and Gallai were well-reasoned and supported by the evidence. The administrative law judge, however, gave diminished weight to the opinions of Drs. Fino and Castle because she found that they were not well-reasoned. The administrative law judge therefore found that employer failed to establish that claimant does not have legal pneumoconiosis.[9]

Employer asserts that the administrative law judge erred in discounting the opinions of Drs. Fino and Castle. Specifically, employer argues that the administrative law judge erred in finding that the opinions of Drs. Fino and Castle were inconsistent with the regulatory definition of pneumoconiosis and not well-reasoned. We disagree.

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 her discretion, evaluate medical expert opinions in conjunction with the Department's discussion of sound medical science in the preamble to the revised regulations. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012). In this case, the administrative law judge permissibly discounted the opinions of Drs. Fino and Castle because they were inconsistent with the Department's definition of legal pneumoconiosis.[10] *See Looney*, 678 F.3d at 311-12, 25

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law judge's weighing of the treatment records.

[9] The administrative law judge reasonably determined, "[a]lthough I have examined the medical opinions submitted in [c]laimant's previous claims, I give the most weight to the most recent opinions as they are more indicative of [c]laimant's current condition." Decision and Order at 12 n.7; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc).

[10] In considering Dr. Fino's opinion, the administrative law judge stated, "I find that this opinion is contrary to the position of the Department of Labor [(the Department)] that CWP is a latent and progressive condition." Decision and Order at 13. Further, the administrative law judge noted that "Dr. Fino also stated that his opinion as to the lack of legal CWP was influenced by the lack of oxygen transfer impairment which is typically seen in almost all coal-dust related lung conditions." *Id*. The administrative law judge

BLR at 2-125; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Peabody Coal Co. v. Groves*, 277 F.3d 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. Fino and Castle because they were not well-reasoned.[11] *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); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Fino and Castle.[12] The Board cannot reweigh the evidence or substitute its

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therefore determined, "[t]o the extent that Dr. Fino is stating that a coal miner cannot have CWP in the absence of an [arterial blood gas study] with qualifying values, I find that his opinion is contrary to the position of [the Department] that: a) [pulmonary function tests] and [arterial blood gas studies] measure different things; and b) they are used to determine level of disability rather than presence of pneumoconiosis." *Id*. Regarding Dr. Castle's observation that, "when CWP causes a respiratory impairment, it generally does so by causing [a] mixed obstructive and restrictive ventilatory defect," the administrative law judge stated, "I also find that this generalization is contrary to the position of [the Department] that pneumoconiosis may cause an obstructive impairment, despite the absence of a restrictive impairment." *Id*.

[11] In considering Dr. Fino's opinion that claimant does not have legal pneumoconiosis due to the reversibility of his condition, the administrative law judge stated, "[Dr. Fino] did not elaborate on the evidence that he was relying upon to show reversibility. Nor did he specify the nature or date of the reversibility to which he was referring." Decision and Order at 13. The administrative law judge therefore found that Dr. Fino's opinion was not well-reasoned or well-documented. Further, the administrative law judge stated that Drs. Fino and Castle did not adequately explain why they eliminated coal dust exposure as a contributing cause of claimant's respiratory impairment. *Id*.

[12] Employer asserts that the administrative law judge erred in criticizing Dr. Castle for failing to explain the etiology of claimant's clinical emphysema because the doctor never diagnosed this condition. Because the administrative law judge provided an alternate valid basis for discounting Dr. Castle's opinion, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983), we hold that any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As discussed *supra*, the administrative law judge permissibly discounted Dr. Castle's opinion because it was inconsistent with the Department's

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.[13]

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] did not reach the causation issue, because she asserts that she found the opinions [of] Drs. Al-Khasawneh and Gallai established legal pneumoconiosis due to coal mine employment and the opinions of Drs. Castle and Fino were not 'convincing.'" Employer's Brief at 18.

Contrary to employer's assertion, the administrative law judge properly addressed the issue of disability causation. The administrative law judge considered the opinions of Drs. Al-Khasawneh, Gallai, Fino and Castle.[14] The administrative law judge stated that "[t]he well-reasoned and well-supported opinions of Drs. Al-Khasawneh and Gallai establish that [c]laimant has legal CWP." Decision and Order at 14. The administrative law judge also stated, "I accord the opinions of Drs. Fino and Castle less weight *with regard to disability causation* for the reasons discussed above and because they

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definition of legal pneumoconiosis. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012).

[13] Employer also asserts that the administrative law judge erred in crediting the opinions of Drs. Al-Khasawneh and Gallai that claimant has legal pneumoconiosis. In view of our holding that the administrative law judge permissibly discounted the opinions of Drs. Fino and Castle 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. Al-Khasawneh and Gallai. *Larioni,* 6 BLR at 1-1278.

[14] Dr. Al-Khasawneh opined that claimant's legal pneumoconiosis substantially contributed to his pulmonary impairment. Director's Exhibit 13. Dr. Gallai did not render an opinion regarding the issue of disability causation. Claimant's Exhibits 4, 6. By contrast, Dr. Fino opined that coal dust exposure did not contribute to claimant's disabling respiratory impairment. Employer's Exhibit 13. Dr. Fino further opined that, even if he assumed that claimant has coal workers' pneumoconiosis, it has not contributed to his disability. Director's Exhibit 14; Employer's Exhibit 13. Similarly, Dr. Castle opined that claimant was not totally disabled as a result of a coal dust-induced lung disease. Employer's Exhibits 7, 11, 12. Dr. Castle opined that claimant's disability was entirely due to a tobacco smoke-induced airway obstruction. *Id.*

concluded that [c]laimant suffered from neither clinical nor legal CWP." *Id*. (emphasis added). The administrative law judge therefore found that "[e]mployer has not rebutted the presumption of total disability due to coal dust exposure by showing that [c]laimant's respiratory disability does not arise out of coal mine employment." *Id*.

As discussed *supra*, in considering whether employer established the absence of legal pneumoconiosis, the administrative law judge permissibly discounted the opinions of Drs. Fino and Castle because they were inconsistent with the Department's definition of legal pneumoconiosis. *See Looney*, 678 F.3d at 311-12, 25 BLR at 2-125; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *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. Fino and Castle because they were not well-reasoned. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Swiger*, 98 F. App'x at 237; *Clark*, 12 BLR at 1-155. Moreover, the administrative law judge properly determined that, because Drs. Fino and Castle did not diagnose legal pneumoconiosis, their opinions were not credible as to the issue of disability causation. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Thus, we reject employer's assertion that the administrative law judge erred in failing to reach the issue of causation.[15]

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.

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.

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[15] Employer further asserts that the administrative law judge erred in crediting the opinions of Drs. Al-Khasawneh and Gallai with regard to the issue of disability causation. Specifically, employer asserts that the administrative law judge substituted her opinion for those of the physicians. Employer argues that the administrative law judge erred "by speculating that Dr. Gallai's and Dr. Al-Khasawneh's opinions that claimant had a chronic dust disease of the lung arising out of [his] coal mine employment would not change if they had been apprised of claimant's true smoking history." Employer's Brief at 18. In view of our holding that the administrative law judge permissibly discounted the opinions of Drs. Fino and Castle that coal dust exposure did not contribute to claimant's disabling respiratory impairment, we need not address employer's assertion that the administrative law judge erred in crediting the opinions of Drs. Al-Khasawneh and Gallai. *See Larioni*, 6 BLR at 1-1278.

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