BRB No. 13-0082 BLA

DONALD HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING CORPORATION	)	DATE ISSUED: 09/27/2013
	)	
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 on Remand – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Richard A. Seid (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2008-BLA-5439) of Administrative Law Judge Michael P. Lesniak rendered on a subsequent claim filed on June 13, 2007, 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 its previous decision, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the newly submitted evidence was

sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *Hall v. U.S. Steel Mining Corp.*, BRB No. 10-0220 BLA, slip op. at 2 n.2 (Jan. 27, 2011)(unpub.). However, the Board vacated the administrative law judge's determination that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and disability causation at 20 C.F.R. §718.204(c). *Id*. at 7-8. The Board instructed the administrative law judge to initially consider whether claimant established at least fifteen years of the type of coal mine employment necessary to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] *Id*. at 8. The Board also instructed the administrative law judge to reconsider his findings regarding the existence of legal pneumoconiosis and weigh all evidence relevant to the existence of pneumoconiosis together, in accordance with the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[2] *Id*.

On remand, the administrative law judge determined that claimant established twenty-two years of qualifying coal mine employment and, therefore, invoked the amended Section 411(c)(4) presumption. The administrative law judge further found that employer did not rebut the presumption by establishing that claimant does not have legal pneumoconiosis or that his total disability did not arise out of his coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established at least fifteen years of underground coal mine employment, and thus, invoked the amended Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not establish rebuttal of the presumption. Claimant did not file a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief and urges

[1] Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis, if claimant establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and 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 record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 1, 2, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

the Board to affirm the administrative law judge's determination that claimant's twenty-two years of coal mine employment are qualifying for purposes of invoking the amended Section 411(c)(4) presumption.

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. 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. Invocation of the Amended Section 411(c)(4) Presumption – Length of Coal Mine Employment

At the hearing, employer stipulated that all of claimant's work constituted coal mine employment under the Act; claimant testified that he worked for twenty-two years as a coal mine electrician, repairing mining equipment. Transcript of March 27, 2012 Hearing at 7, 9. Claimant further testified that his job required him to work underground at the mine site approximately thirty percent of the time, with the remainder of the time spent at a repair shop that was "completely off-site." *Id*. at 7-8, 24. Claimant indicated that, at times, he would spend six to eight consecutive hours underground. *Id.* at 8-9. Claimant also noted that, because he was "underground quite a bit," he carried boots, coveralls, a hard hat, a mine belt and a self-rescuer in his car. *Id*. at 22.

The administrative law judge found that, because claimant was a surface worker at an underground mine, he was not required to establish that his working conditions aboveground were substantially similar to those in an underground mine. Decision and Order on Remand at 7, citing *Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011). The administrative law judge further noted that the facts before him were similar to those presented in *Ward v. North Star Contractors, Inc.*, BRB Nos. 11-0589 BLA and 11-0589 BLA-A (June 27, 2012)(unpub.), which involved a miner who visited an underground mine site daily and went into the mine to clean and maintain batteries. The administrative law judge relied on the Board's holding in *Ward* that, even when the miner "spent a majority of his time on the surface, away from the mine site," he was "not required to show comparability of conditions regarding the other duties. . . ." *Id*., quoting *Ward*, slip op. at 5. The administrative law judge concluded, therefore, that claimant's entire twenty-two year tenure as a coal mine electrician was qualifying coal mine employment for the purposes of invoking the amended Section 411(c)(4) presumption.

Employer argues that the administrative law judge erred in finding that claimant was not required to establish that his working conditions were substantially similar to those in an underground mine. In support of this argument, employer contends that the administrative law judge improperly relied on *Muncy* because, in that case, the miner's

surface coal mine employment was at an underground mine while, in this case, claimant's aboveground work was completely off-site. Employer also alleges that the actual length of claimant's qualifying coal mine employment is seven years, based on claimant's testimony that "he would only go underground twice a month to repair equipment, or approximately 30% of his time." Employer's Brief in Support of Petition for Review at [12] (unpaginated).

The Director responds and maintains that employer has erroneously focused on the location where claimant spent the majority of his work time, rather than on the type of mine at which he worked. Relying on the Board's decisions in *Muncy* and *Alexander v. Freeman United Coal Mining Co*., 2 BLR 1-497, 1-501 (1979), the Director asserts that, because claimant was employed by an underground coal mine operator, he was not required to show comparability of environmental conditions in order to invoke the amended Section 411(c)(4) presumption.

Amended Section 411(c)(4) initially creates a requirement that a party seeking the benefits of the presumption establish that the miner was "employed for fifteen years or more in one or more underground coal mines." 30 U.S.C. §921(c)(4). The statute then provides, "[t]he Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment *in a coal mine other than an underground mine* were substantially similar to those in an underground mine." *Id*. (emphasis added). In *Alexander*, the Board held that because Section 411(c)(4) distinguishes between "'an underground mine' and a 'mine other than an underground mine,' . . . *the type of mine (underground or surface), rather than the location of the particular worker (surface or below the ground)*, is the element which determines whether a claimant is required to show comparability of conditions." *Alexander*, 2 BLR at 1-502, *quoting* 30 US.C. §921(c)(4) (emphasis added). In *Muncy*, the Board explained that Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) and that the amended Section 411(c)(4) contains language identical to that which the Board interpreted in *Alexander*. *Muncy*, 25 BLR at 1-29. The Board also noted that the regulatory definitions of "coal mine" and "underground coal mine" remained the same in all relevant respects. *Id*. The Board held, therefore, that *Alexander* applies to cases arising under amended Section 411(c)(4), as it has not been superseded or overruled. *Id*. Accordingly, the Board vacated the administrative law judge's determination that he was required to exclude the fifteen months the miner spent working aboveground at an underground mine in conditions that were not as dusty as those in the underground mine. *Id*.

In the present case, the administrative law judge found that claimant was not required to prove that he worked in conditions substantially similar to conditions in an underground mine, based on claimant's testimony that he worked at an underground mining operation, and employer's stipulation that this work constituted coal mine

employment under the Act. We affirm the administrative law judge's determination, as it is consistent with the Board's holding in *Alexander*, as reiterated in *Muncy*, that the type of mine, rather than the location of the miner, is the element that determines whether a claimant is required to show comparability of conditions. *Muncy*, 25 BLR at 1-29; *Alexander*, 2 BLR at 1-502. Thus, we affirm the administrative law judge's determination that claimant established a sufficient number of years of underground coal mine employment to invoke the amended Section 411(c)(4) presumption, as it is rational and in accordance with law. In addition, based on the administrative law judge's unchallenged finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4).

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

After finding that claimant invoked the Section 411(c)(4) presumption, the administrative law judge stated that the burden shifted to employer to rebut the presumption by establishing that claimant does not have pneumoconiosis or is not totally disabled by it. Decision and Order on Remand at 7. The administrative law judge found that employer failed to rebut the presumption by either method. *Id*. at 8-12.

Regarding the absence of pneumoconiosis, the administrative law judge initially noted that, although he had previously determined that claimant does not have clinical pneumoconiosis, employer "must still affirmatively establish that [claimant] does not suffer from legal pneumoconiosis . . . ."[3] Decision and Order on Remand at 8. The administrative law judge considered the medical opinions of Drs. Kaplan and Fino, who diagnosed chronic obstructive pulmonary disease (COPD) caused entirely by cigarette smoking; the administrative law judge determined that their opinions were insufficient to establish rebuttal of the presumed existence of legal pneumoconiosis. *Id*. at 9-11. The administrative law judge discredited Dr. Kaplan's opinion on the ground that he did not explain why he excluded coal dust exposure as a contributing cause of claimant's COPD,

[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. 20 C.F.R. §718.201(a)(2).

in light of his comment that miners with dust-induced obstruction frequently also suffer from the effects of cigarette smoking. *Id*. at 10. The administrative law judge further explained that, "beyond his theory regarding a correlation between the degree of [coal workers' pneumoconiosis] and [the] likelihood that [claimant's] obstruction arose from coal dust exposure, Dr. Kaplan provided no other rationale for discounting coal dust exposure as contributing to [claimant's] impairment." Decision and Order on Remand at 10. With respect to Dr. Fino's opinion, the administrative law judge found that it was entitled to little weight, as Dr. Fino's statement that "coal mine dust had no more than an average [e]ffect on [claimant's] lungs, which is a clinically insignificant amount of FEV1 loss," is contrary to the science credited by the Department of Labor (DOL) in the preamble to the revised definition of legal pneumoconiosis. Decision and Order on Remand at 11, quoting Employer's Exhibit 2 at 9. The administrative law judge concluded that "the opinions of Drs. Kaplan and Fino are insufficient to establish that [claimant] does not suffer from legal pneumoconiosis." Decision and Order on Remand at 11.

Employer argues that, contrary to the administrative law judge's findings, the opinions of Drs. Kaplan and Fino are well-documented and well-explained. Employer further alleges that the administrative law judge failed to weigh all of the medical evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) together in accordance with *Williams*.

Employer's contentions are without merit. The administrative law judge acted within his discretion as fact-finder in determining that Dr. Kaplan's opinion was entitled to little weight, as he did not provide an adequate explanation for his opinion that coal dust exposure could not be a contributing cause of claimant's COPD/industrial bronchitis. *See Lango v. Director, OWCP*, 104 F.3d 573, 578, 21 BLR 2-12, 2-21 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Similarly, the administrative law judge permissibly discredited Dr. Fino's opinion on the ground that his belief that coal dust inhalation causes, on average, a clinically insignificant amount of FEV1 loss, conflicts with the DOL's statement in the preamble to the revised regulations, that Dr. Fino's conclusion regarding average loss in FEV1 does "not stand up to scrutiny." Decision and Order on Remand at 11, quoting 65 Fed. Reg. 79,941 (Dec. 20, 2000); *see Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011).

We also reject employer's argument that the administrative law judge erred in considering "the chest x-ray evidence and medical opinions separately without weighing them together to determine [whether] pneumoconiosis is present." Employer's Brief in Support of Petition for Review at [20] (unpaginated). Although we instructed the administrative law judge to weigh all of the evidence relevant to the existence of

pneumoconiosis together, in accordance with *Williams*, we did so in the context of the administrative law judge's reconsideration of whether claimant established the existence of pneumoconiosis without benefit of the amended Section 411(c)(4) presumption. *Hall*, BRB No. 10-0220 BLA, slip op. at 8. Moreover, employer does not explain how the administrative law judge's consideration of x-ray evidence establishing the absence of clinical pneumoconiosis would alter his finding that the opinions of Drs. Kaplan and Fino were insufficient to prove that claimant's chronic obstructive impairment was unrelated to coal dust exposure, i.e., the absence of legal pneumoconiosis. We affirm, therefore, the administrative law judge's finding that employer failed to establish rebuttal of the presumed fact that claimant has legal pneumoconiosis.

Regarding the issue of total disability causation on rebuttal, the administrative law judge relied on his credibility determinations on the issue of legal pneumoconiosis to conclude that the opinions of Drs. Kaplan and Fino were insufficient to establish the absence of a causal connection between claimant's total respiratory disability and his coal mine employment. Decision and Order on Remand at 11-12. Because we have affirmed the credibility determinations on which the administrative law judge relied, we affirm his conclusion that employer failed to rebut the amended Section 411(c)(4) presumption by proving that claimant's total disability did not arise out of his mine employment.[4] We further affirm, therefore, the award of benefits.

[4] Because employer bears the burden of proof on rebuttal, and we have held that the administrative law judge permissibly discredited the opinions of its experts, we need not reach employer's arguments that the administrative law judge erred in crediting the opinions of Drs. Begley and Schaaf that claimant has legal pneumoconiosis and is totally disabled by it. *See Defore v. Alabama By-Products*, 12 BLR 1-27 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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