BRB No. 13-0189 BLA

JOHNNY L. THOMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SWAMP FOX DEVELOPMENT, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/20/2013
	)	
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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (The Law Office of Roger D. Forman, L.C.), Buckeye, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Jeffrey S. Goldberg (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-5889) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on May 12, 2010.[1]

After crediting claimant with twenty-five years of coal mine employment,[2] the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2010 claim on the merits. Having found that claimant worked for more than fifteen years in underground coal mine employment, and that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). The administrative law judge also found

[1] Claimant's initial claim, filed on April 19, 1995 was finally denied because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant's second claim, filed on October 4, 2007, was finally denied because the evidence did not establish that claimant suffered from a totally disabling pulmonary impairment. Director's Exhibit 2.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction 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).

[3] 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 case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also contends that the administrative law judge erred in crediting claimant with fifteen years of underground coal mine employment and, therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that the administrative law judge erred in applying Section 411(c)(4) to this case.[4]

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).

Application of the Section 411(c)(4) Presumption

Employer asserts that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights. Further, employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contentions are substantially similar to the ones that the Board rejected in 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), and we reject them for the reasons set forth in that decision. *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

Employer also argues that the application of Section 411(c)(4) is premature, because the Department of Labor (DOL) has not yet promulgated regulations implementing the amendments to the Act. We reject this argument. The mandatory

[4] Because employer does not challenge the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), or his finding pursuant to 20 C.F.R. §725.309(d), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

Length of Coal Mine Employment

Employer contends that the administrative law judge erred in finding that claimant established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer's contention lacks merit. Under Section 411(c)(4), a claimant must establish that he was employed for at least fifteen years in an underground coal mine, or in a coal mine "other than an underground mine" in work conditions that "were substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Claimant testified that he worked underground in the coal mines for twenty-five years. Hearing Transcript at 14. Relying upon this uncontradicted testimony, the administrative law judge credited claimant with twenty-five years of underground coal mine employment.[5] Decision and Order at 2, 12. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Because the administrative law judge's credibility determination is based on substantial evidence, we affirm the administrative law judge's finding that claimant spent twenty-five years in underground coal mine employment. We, therefore, affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

[5] It is noteworthy that employer provided its experts in the current claim with coal mine employment histories of twenty-five years (Dr. Zaldivar), and twenty-four years (Dr. Tuteur). Decision and Order at 7-8.

After finding that employer disproved the existence of clinical pneumoconiosis,[6] the administrative law judge addressed whether employer also disproved the existence of legal pneumoconiosis.[7] The administrative law judge considered the opinions of Drs. Rasmussen, Zaldivar, and Tuteur, submitted in the current claim, and the opinion of Dr. Repsher, submitted in a prior claim. Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of emphysema due to both coal mine dust exposure and cigarette smoking, as well as pulmonary fibrosis due to coal mine dust exposure. Employer's Exhibit 3 at 35-36. Conversely Drs. Repsher, Zaldivar, and Tuteur opined that claimant does not suffer from legal pneumoconiosis. Dr. Repsher diagnosed severe emphysema, which he opined was due to cigarette smoking, and not coal mine dust exposure. Director's Exhibit 2. Dr. Zaldivar diagnosed emphysema and pulmonary fibrosis, each of which he opined was entirely due to cigarette smoking. Employer's Exhibit 1. Dr. Tuteur diagnosed chronic obstructive pulmonary disease (COPD)/emphysema due entirely to cigarette smoking. Employer's Exhibit 10.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge accorded less weight to Dr. Repsher's opinion because he found that it was premised on assumptions that were inconsistent with the Act and the regulations. Decision and Order at 16. The administrative law judge accorded less weight to Dr. Zaldivar's opinion because he found that the doctor failed to adequately explain how he eliminated coal mine dust exposure as a contributor to claimant's pulmonary diseases. *Id.* at 14-15. The administrative law judge also accorded less weight to Dr. Tuteur's opinion, regarding the cause of claimant's emphysema, because he found that it was based upon generalities. *Id.* at 15. On the other hand, the administrative law judge found that Dr. Rasmussen's diagnosis of legal pneumoconiosis was entitled to greater weight, based upon "his background in the study and treatment of coal dust induced lung diseases." *Id.* at 16. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge failed to provide a proper basis for discrediting the opinions of Drs. Repsher, Zaldivar, and Tuteur. We disagree. Dr. Repsher opined that claimant suffers from a form of emphysema caused by cigarette

[6] "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 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).

smoking, while coal mine dust exposure causes focal emphysema. Director's Exhibit 2. The administrative law judge reasonably found that Dr. Repsher's opinion was entitled to less weight, as it is contrary to the DOL's determination that coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms. *See* 65 Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013)(Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3d Cir. 2011).

In excluding coal mine dust exposure as a cause of claimant's emphysema and pulmonary fibrosis, Dr. Zaldivar explained that it is known that smoking causes both diseases. Employer's Exhibit 1. The administrative law judge permissibly discounted Dr. Zaldivar's opinion, that claimant's emphysema and fibrosis are due solely to cigarette smoking, because the physician failed to adequately explain how he eliminated claimant's twenty-five years of coal mine dust exposure as a cause of, or significant contributor to, those diseases.[8] *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 14-15.

In excluding coal mine dust as a contributing factor in claimant's disabling COPD/emphysema, Dr. Tuteur cited to medical studies and statistics indicating that claimant had a twenty percent chance of developing COPD from smoking, as opposed to less than a three percent chance of developing it from coal mine dust exposure. Employer's Exhibit 10 at 7-8. The administrative law judge permissibly gave less weight to Dr. Tuteur's causation opinion because the doctor improperly applied generalizations without addressing claimant's specific condition. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); Decision and Order at 15. Because the administrative law judge rationally found that Dr. Tuteur did not explain the basis for his opinion, in light of the specifics of claimant's case, we affirm the administrative law judge's finding that Dr. Tuteur's opinion does not rebut the presumption that claimant's coal mine dust exposure was a causative factor in claimant's disabling COPD/emphysema. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

[8] The administrative law judge accurately noted that Dr. Zaldivar acknowledged that the studies that he relied in support of his opinion, that emphysema and fibrosis are due to cigarette smoking, did not did account for the extent of the participants' coal mine dust exposure. Decision and Order at 15; Employer's Exhibit 12 at 44-46.

As the administrative law judge's bases for discrediting the opinions of Drs. Repsher, Zaldivar, and Tuteur are rational and supported by substantial evidence, these findings are affirmed.[9] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000). Therefore, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Employer contends that the administrative law judge did not address whether employer could establish rebuttal by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). Contrary to employer's contention, the administrative law judge found that employer failed to show that claimant's "totally disabling pulmonary condition is not significantly related to coal dust exposure." Decision and Order at 17. Although the administrative law judge did not provide a detailed explanation for his determination, it was not necessary in this case. Because the administrative law judge did not find the opinions of Drs. Repsher, Zaldivar, and Tuteur credible on the issue of legal pneumoconiosis, he could not credit their opinions on the causation of total disability absent "specific and persuasive reasons for concluding that the doctor[s'] judgment on the question of disability causation does not rest upon [their] disagreement with the [administrative law judge's] finding . . . ." *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

[9] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Repsher, Zaldivar, and Tuteur, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Accordingly, the administrative law judge's Decision and Order 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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REGINA C. McGRANERY
Administrative Appeals Judge