

BRB No. 13-0253 BLA

HOWARD RAY LEWIS)
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 Claimant-Respondent)
)
 v.)
) DATE ISSUED: 09/19/2013
 BLEDSON COAL CORPORATION)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-5286) of Administrative Law Judge Daniel F. Solomon 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 claim filed on November 1, 2010.¹

¹ Although claimant filed a claim on December 5, 2008, it was subsequently withdrawn by claimant, and, therefore, is considered not to have been filed. See 20 C.F.R. §725.306(b); Decision and Order at 1 n.1; Director's Exhibit 1.

After crediting claimant with more than fifteen years of underground coal mine employment,² the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently 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 that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method. *Id.* at 3-6.

² The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3; Hearing Transcript at 23. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth 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).

⁴ Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After finding that employer disproved the existence of clinical pneumoconiosis,⁵ the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis.⁶ The administrative law judge considered Dr. Jarboe's opinion. Dr. Jarboe opined that claimant does not suffer from legal pneumoconiosis. Director's Exhibit 15; Employer's Exhibit 3. Dr. Jarboe opined that claimant suffers from a totally disabling pulmonary impairment caused by a combination of obesity and asthma. *Id.* Dr. Jarboe opined that claimant's asthma is a disease of the general population, and is not due to coal mine dust exposure. *Id.* The administrative law judge discredited Dr. Jarboe's opinion, because he found that Dr. Jarboe failed to adequately explain why coal dust mine dust exposure did not contribute to claimant's asthma. Decision and Order at 5. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id.*

Employer contends that the administrative law judge erred in his consideration of Dr. Jarboe's opinion. We disagree. The administrative law judge permissibly questioned Dr. Jarboe's opinion, that claimant's asthma is not due to coal mine dust exposure, because the physician failed to adequately explain why claimant's asthma was not aggravated by his 34.11 years of coal mine dust exposure.⁷ *See Morrison*, 644 at 479, 25 BLR at 2-8; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 5. The administrative law judge, therefore, acted within his discretion in discounting Dr. Jarboe's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Because the administrative law judge provided a valid reason for discrediting Dr. Jarboe's opinion, the only opinion supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

⁵ "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).

⁶ "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).

⁷ The administrative law judge found that Dr. Jarboe characterized claimant's asthma as a disease of the general population, and for that reason improperly assumed that asthma could not constitute "legal pneumoconiosis." Decision and Order at 5.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer established rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). The administrative law judge rationally discounted Dr. Jarboe's opinion, that claimant's disabling pulmonary impairment did not arise out of his coal mine employment, because Dr. Jarboe, contrary to the administrative law judge's finding, did not diagnose legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 6. Therefore, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge