

BRB No. 14-0104 BLA

PHILLIP E. HESS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DOMINION COAL CORPORATION/ SUN COAL)	DATE ISSUED: 09/30/2014
)	
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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Rita Roppolo (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand – Award of Benefits (2010-BLA-5118) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a

subsequent claim¹ 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 is before the Board for the second time. In his original Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Parts 718 and 725, and credited claimant with at least twenty years of underground coal mine employment. The administrative law judge found that the newly submitted evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the entire record, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² The administrative law judge further found that, while employer established that claimant does not suffer from legal pneumoconiosis, employer failed to establish rebuttal of the presumption with affirmative proof that claimant does not have clinical pneumoconiosis, or that his totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. Accordingly, benefits were awarded.

On appeal, the Board affirmed, as unchallenged, the administrative law judge's determinations that claimant established at least twenty years of underground coal mine employment, total respiratory disability at Section 718.204(b), a change in an applicable condition of entitlement at Section 725.309, and invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). The Board further affirmed, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have clinical pneumoconiosis, and his finding that Dr. Fino's opinion was poorly reasoned and insufficient to establish rebuttal. However, the Board vacated his finding that, because Dr. Castle concluded that claimant does not have

¹ Claimant, Phillip E. Hess, filed his first application for benefits on October 7, 1998, which was finally denied on August 6, 2004 because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant filed the current claim for benefits on October 30, 2008. Director's Exhibit 3.

² 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, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

clinical pneumoconiosis, his opinion was insufficient to rebut the presumed fact of disability causation. As an impairment does not necessarily result from the mere presence of clinical pneumoconiosis, the Board could not discern the administrative law judge's reasoning, in light of his finding that Dr. Castle "presented a documented, reasoned, and probative determination that [claimant] does not have legal pneumoconiosis," [2011] Decision and Order at 30, and "reasonably determined that [claimant's] totally disabling respiratory impairment was due to smoking." *Hess v. Dominion Coal Corp.*, BRB No. 12-0211 BLA (Feb. 5, 2013) (unpub.); [2011] Decision and Order at 29. Consequently, the Board vacated the award of benefits, and remanded the case for the administrative law judge to reassess Dr. Castle's opinion and provide a valid rationale for his rebuttal findings under amended Section 411(c)(4). *Hess*, slip op. at 7.

On remand, the administrative law judge reevaluated Dr. Castle's opinion, and found that it lacked sufficient probative value to rebut the presumed fact of disability causation pursuant to amended Section 411(c)(4). Accordingly, benefits were awarded.

In the present appeal, employer contends that the administrative law judge erred in finding that the opinion of Dr. Castle did not establish rebuttal of the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's rebuttal findings. Employer has filed a combined reply brief in support of its position.

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that Dr. Castle's failure to diagnose clinical pneumoconiosis rendered his opinion insufficiently probative to establish rebuttal of the presumed fact of disability causation at amended Section 411(c)(4). Employer asserts that, although Dr. Castle offered an alternate etiology for claimant's x-ray abnormalities, he classified the x-ray as Category 1 and acknowledged that the abnormalities "could be pneumoconiosis," Director's Exhibit 17. Thus, employer argues that Dr. Castle's opinion is not inconsistent with the administrative law judge's finding that the x-ray evidence was "in equipoise" and

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. Director's Exhibit 3; see *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

“inconclusive” on the issue of clinical pneumoconiosis. Employer’s Brief at 16-17; [2011] Decision and Order at 20. Employer also maintains that the administrative law judge’s determination, that Dr. Castle’s opinion was sufficient to establish that claimant does not have legal pneumoconiosis, is tantamount to a determination that claimant’s disabling respiratory impairment did not arise out of, or in connection with, employment in a coal mine and, as such, affirmatively establishes rebuttal pursuant to the plain language of the statute at Section 411(c)(4)(B). Employer argues that the administrative law judge erred “by finding that the ‘no part’ causation standard of Section 718.305⁴ is different from the ‘any impairment arising out of coal mine employment’ causation standard of Section 718.201” to preclude Dr. Castle’s opinion from establishing rebuttal. Employer’s Brief at 13.

After consideration of the administrative law judge’s Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to employer’s arguments, Dr. Castle repeatedly opined that claimant did not have coal workers’ pneumoconiosis, or clinical pneumoconiosis. In his narrative April 9, 2009 report, Dr. Castle acknowledged that claimant’s chest x-ray revealed “primarily linear, irregular type opacities which would be classified as noted on the ILO classification sheet,” but concluded that, because “this type of opacity is not typical of coal workers’ pneumoconiosis,” claimant “most likely does not have radiographic findings of coal workers’ pneumoconiosis,” and instead, the abnormalities “are due to respiratory bronchiolitis interstitial lung disease due to tobacco smoking.” Director’s Exhibit 17. During his October 13, 2010 deposition, Dr. Castle testified that the linear, irregular type x-ray opacities located primarily in claimant’s middle and lower lung zones “did not resemble coal workers’ pneumoconiosis.” Employer’s Exhibit 8 at 29. Likewise, when asked for his opinion within a reasonable degree of medical certainty, Dr. Castle unequivocally testified that claimant does not have coal workers’ pneumoconiosis. Employer’s Exhibit 8 at 32. After delineating the Board’s remand instructions, the administrative law judge explained that he had previously found Dr. Castle’s opinion sufficient to rebut the presumed fact of legal pneumoconiosis, as defined at 20 C.F.R. §718.201(a)(2), (b), because the physician credibly demonstrated that claimant’s totally disabling respiratory impairment from smoke-induced airway obstruction and bullous emphysema, with a possible asthmatic component, was not significantly related to, or substantially aggravated by, coal mine dust exposure. Decision and Order on Remand at 6. However, the administrative law judge observed that “employer’s burden under the second type of rebuttal according to 20 C.F.R. §718.305(d) is to demonstrate that ‘no part’ of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis.” Decision and Order on

⁴ Employer does not challenge the standards for rebuttal established by the regulations implementing the statutory presumption.

Remand at 6; 20 C.F.R. §718.305(d)(ii). Since employer failed to rebut the presumed fact of clinical pneumoconiosis, and Dr. Castle opined that claimant does not have clinical pneumoconiosis, the administrative law judge acted within his discretion in concluding that “Dr. Castle was not in a position to provide a probative opinion that no part of [claimant’s] totally disabling impairment was due to clinical pneumoconiosis.” Decision and Order on Remand at 7; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 2-306 (4th Cir. 1994). As substantial evidence supports the administrative law judge’s credibility determination, we affirm his findings that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption and that claimant is entitled to benefits.

Accordingly, the Decision and Order on Remand – Award of Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge