BRB No. 13-0307 BLA

CURTIS R. STOVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOLA COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/18/2014
	)	
and	)	
	)	
WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
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 Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Kathleen H. Kim (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 Awarding Benefits (2010-BLA-05528) of Administrative Law Judge Lystra A. Harris with respect to a claim filed on June 3, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established 23.06 years of surface coal mine employment, with at least fifteen years in conditions substantially similar to those in an underground mine. The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718 and found that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(ii), (iv) and, therefore invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge also determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination that claimant worked at least fifteen years in surface coal mine employment in conditions substantially similar to those in an underground mine and her application of amended Section 411(c)(4) to a responsible operator. Employer further asserts that, even assuming the rebuttal provisions were properly applied, the administrative law judge erred in determining that employer did not rebut the presumption. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that the Board should reject employer's contentions that the amended presumption does not apply to responsible operators. In addition, the Director urges the Board to reject employer's assertion that the "rule out" standard cannot be applied in assessing whether employer rebutted the presumption.[2]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in

[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine 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), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(b)).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(ii), (iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

accordance with applicable law.[3] 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

To invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of "employment in one or more underground coal mines," or employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). To prove that working conditions at a surface mine were substantially similar to those in an underground mine, a claimant must provide sufficient evidence of dust exposure in his or her work environment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then for the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979). A claimant's unrebutted testimony can support a finding of substantial similarity. *Summers*, 272 F.3d at 479, 22 BLR at 2-275.

The administrative law judge relied on claimant's Social Security earnings records, and the formula provided at 20 C.F.R. §725.101(a)(32)(iii) to determine that claimant established 23.06 years of aboveground employment at surface mines. Decision and Order at 6-8. Relying on claimant's testimony and his CM-911(a) form,[4] the administrative law judge noted that claimant held a variety of positions at the surface, including greasing, running a high wall drill, driving trucks, working on the powder crew, and performing preventative maintenance. *Id*. at 8. The administrative law judge also noted claimant's testimony that his work loading and hauling coal from section mines was in conditions "where 'dry coal poured out' causing the environment to become 'extremely dusty.'" *Id*., quoting Hearing Transcript at 24. The administrative law judge indicated that claimant reported that when he was a preventative maintenance employee and greaser, he "worked on site at the coal mines in order to stay as close to the equipment on production, which exposed him to dust." Decision and Order at 8. The

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 3, 6; Hearing Transcript at 24. 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 (1989)(en banc).

[4] The CM-911(a) form is entitled "Employment History." *See* Director's Exhibit 3.

administrative law judge also observed that Dr. Rasmussen confirmed the latter duties in his report when he stated "that [c]laimant 'fueled and lubricated and inspected pieces of equipment carrying heavy oil cans and climbing on vehicles and pulling heavy hose.'" *Id*., quoting Director's Exhibit 11.

The administrative law judge further noted that claimant testified that he performed some of his duties near drill benches, which exposed him to rock and coal dust, even on rainy days. Decision and Order at 8. Based on claimant's testimony, and observations by Drs. Rosenberg and Zaldivar that claimant reported that dust entered the closed cabs on equipment he was operating and that the windows to the cab remained open in the summer if it was not air conditioned, the administrative law judge stated, "[e]ven when the [c]laimant drove various [kinds of] equipment[,] . . . he remained exposed to dust and was not always in enclosed cabs." *Id*. The administrative law judge concluded:

> Based on [c]laimant's uncontroverted testimony that he worked in this type of dust environment for 23.06 years, I find that the [c]laimant has demonstrated that he worked for at least 15 years in conditions "substantially similar" to that of underground coal mine employment. *See Freeman*, 272 F.3d 473[, 479, 22 BLR 2-265, 2-275] (finding "substantially similar conditions" where miner described, in detail, the dusty conditions in his work areas); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4, 1-7 (1987) (a claimant is not required to demonstrate that the environmental conditions at the surface mine are similar to the "most dusty area of an underground coal mine").

Id.

Employer argues that, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), the administrative law judge did not make the required comparative analysis between claimant's surface mine work and conditions underground. Employer maintains that, in contrast to the facts in *Summers*, 272 F.3d at 480, 22 BLR at 2-276, where the United States Court of Appeals for the Seventh Circuit upheld the administrative law judge's finding that the miner worked for at least fifteen years in conditions substantially similar to those in an underground coal mine, claimant did not describe working in "awful conditions" at the surface. Employer's Brief at 11. In addition, employer contends that the current case is distinguishable from *Leachman*, 855 F.2d at 510-12, as claimant "did not offer any testimony regarding the comparability of [the] dust [conditions] he encountered as a surface coal miner to underground coal mines." *Id*. Employer further states that the administrative law judge did not consider Dr. Rasmussen's statement that claimant "probably had relatively little coal dust exposure . . . . [S]urface miners, by and

large, don't have as much exposure as underground miners but he did have around [twenty-five] years of that exposure." Employer's Brief at 12-13, quoting Employer's Exhibit 5 at 30. Employer argues that the administrative law judge's finding, that claimant worked, on average, in dusty conditions, was not sufficient to address whether those conditions were substantially similar to those in an underground coal mine. Additionally, employer asserts that the administrative law judge selectively analyzed the evidence in determining that claimant was exposed to coal dust when he was a preventative maintenance employee, when he worked on rainy days, and when he operated equipment with enclosed cabs.

Employer's allegations are without merit. Although employer attempts to distinguish this case from *Summers*, by alleging that claimant did not describe "awful conditions," employer misinterprets the holding in that case. In *Summers*, the Seventh Circuit held that claimant sufficiently described how the duties he performed at the surface of the mine resulted in dust exposure and described the extent of the exposure. The court noted that "[t]his unrebutted testimony, on its own terms, would have been sufficient for the [administrative law judge], with his expertise and knowledge of the industry, to compare [claimant's] working conditions to those prevalent in underground mines." 272 F.3d at 480, 22 BLR at 2-276. Contrary to employer's contention, the court's holding was not premised upon the description of a certain degree of dust exposure, nor did it require that certain conditions be present aboveground to meet claimant's burden. *Id*. In addition, contrary to employer's allegation, the claimant in *Leachman* did not provide any testimony comparing his dust exposure at the surface to that in an underground coal mine.[5] *See Leachman*, 855 F.2d at 510-12.

Employer also does not explain the significance of the administrative law judge's failure to specifically mention Dr. Rasmussen's comment on the amount of coal dust exposure that surface miners are generally exposed to, particularly when Dr. Rasmussen also indicated that "surface miners, by and large, don't have as much exposure as underground miners, but he did have around 25 years of that kind of exposure which you

[5] The United States Court of Appeals for the Seventh Circuit quoted the administrative law judge's finding that "[w]hile [Leachman] testified to coal dust exposure during the course of his work he offers no testimony as to the conditions which prevail in an underground coal mine." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 510-511 (7th Cir. 1988). The court agreed with the position of the Director, Office of Workers' Compensation Programs, that the administrative law judge "improperly placed on the claimant the burden of producing evidence of conditions prevailing in an underground mine," and held that, "in order to qualify for the presumption of §411(c)(4), a surface miner must only establish that he was exposed to sufficient coal dust in his surface mine employment." *Id*. at 512.

can't negate, so I believe it was enough to be significant." Employer's Exhibit 5 at 30; *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."). Employer's contentions that the administrative law judge selectively analyzed the evidence and did not make adequate findings are also without merit. In discussing claimant's work as a preventative maintenance employee and greaser, his work around the drill benches, and in noting that claimant generally worked in dusty conditions, the administrative law judge cited to the relevant portions of the hearing transcript and acted within her discretion in determining that claimant's uncontradicted testimony, as supported by notations in the physicians' opinions, supported her finding that claimant's surface coal mine employment took place in conditions that were substantially similar to those in an underground mine. *See Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Muncy*, 25 BLR at 1-29. Further, the administrative law judge permissibly evaluated the evidence concerning claimant's exposure to coal dust when operating equipment and determined that it supported a finding that claimant worked in dusty conditions that were substantially similar to those in underground coal mine employment. *Id*. Consequently, we affirm the administrative law judge's finding that the claimant invoked the presumption at amended Section 411(c)(4) by establishing at least fifteen years of qualifying coal mine employment and total disability at 20 C.F.R. §718.204(b)(2).

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

Employer initially contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 17-24. This argument is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring).[6] We, therefore, reject it here for the reasons set forth in that decision.[7] *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn*

[6] Because the Fourth Circuit has already issued a decision in *Owens*, employer's request to hold the case in abeyance pending the court's decision in that case is moot. *See Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring).

[7] The Department of Labor (DOL) dismissed this same argument in the comments to the regulations implementing amended Section 411(c)(4). 78 Fed. Reg. 59,101, 59,109 (Sept. 25, 2013). The DOL explained that the 1978 revision of the definition of pneumoconiosis, to include any chronic lung disease or impairment arising out of coal mine employment, eliminated the concern, expressed by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), regarding the application of the rebuttal provisions to responsible operators. *Id*.

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, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Employer further maintains that the administrative law judge relied on a mistaken belief that coal dust exposure always causes an obstructive impairment to discredit the opinions of Drs. Rosenberg and Zaldivar concerning the existence of legal pneumoconiosis.[8] Employer argues that the administrative law judge's analysis was "problematic" because the administrative law judge relied on her finding concerning legal pneumoconiosis when discrediting the opinions of Drs. Rosenberg and Zaldivar as to total disability causation. *Id*. at 44. Employer also alleges that the administrative law judge's weighing of the evidence made it difficult to determine the standard that she was applying and that "[c]omparing and weighing the rebuttal evidence against the other evidence of record before determining whether it is sufficient to rebut the presumption impermissibly dilutes the strength of the evidence."[9] *Id*. at 45.

Contrary to employer's contention, the administrative law judge did not discredit the opinions of Drs. Rosenberg and Zaldivar based on a mistaken belief that coal dust exposure always causes an obstructive impairment, which constitutes legal pneumoconiosis. Rather, the administrative law judge acted within her discretion in determining that their opinions were not well reasoned because they did not explain why claimant's "exposure to coal mine dust for over two decades would not have any pulmonary or respiratory impact."[10] Decision and Order at 26; *see Harman Mining Co.*

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[8] In order to rebut the amended Section 411(c)(4) presumption, employer must either disprove the existence of pneumoconiosis, both clinical and legal, or establish that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

[9] The administrative law judge found "that the preponderance of the evidence supports a finding that the [c]laimant is totally disabled due to pneumoconiosis and therefore the [e]mployer has failed its burden of rebutting total disability due to pneumoconiosis pursuant to [20 C.F.R.]§718.305." Decision and Order at 28.

[10] Dr. Rosenberg stated that he did not diagnose legal pneumoconiosis because "to be out of the coal mines for 14, 15 years, and still have coughing and whatnot, that's not going to relate to past coal mine dust exposure, and he really doesn't have any obstruction." Employer's Exhibit 12 at 22. Dr. Zaldivar stated that "[t]here is no evidence in this case to justify a diagnosis of legal pneumoconiosis. The reason is that the mild restriction of vital capacity is best explained by obesity and that the dramatic

v. Director, OWCP [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). Because the administrative law judge permissibly determined that the opinions of Drs. Rosenberg and Zaldivar, the only evidence supportive of a finding that claimant does not have legal pneumoconiosis, were not well reasoned, it is not necessary to address employer's arguments concerning the administrative law judge's consideration of the contrary opinions of Drs. Rasmussen, Klayton, and Baker. *See Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Consequently, we affirm the administrative law judge's determination that employer did not rebut the presumption that the miner has legal pneumoconiosis.[11] 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(1)(i)(A)).

Employer also asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of the miner's disabling respiratory impairment.[12] Employer maintains that it need only prove that pneumoconiosis was not a contributing cause of claimant's disability. However, contrary to employer's assertion, the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that the party opposing entitlement must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R. §]718.201." 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(ii)). The Department of Labor (DOL) has explained that the "no part" standard recognizes that the courts have interpreted Section 411(c)(4) "as requiring

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drop in the diffusion capacity and blood gases in a period of a year or less is . . . not related to his previous work in the coal mines." Employer's Exhibit 10.

[11] Because we have affirmed the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis, we need not address employer's challenges to the administrative law judge's admission of a rebuttal reading of the January 13, 2010 x-ray and her finding that employer did not rebut the presumed existence of clinical pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(1)(i)); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Morrison*, 644 F.3d at 489, 25 BLR at 2-8.

[12] Employer states "[t]he physicians' opinions offered by [employer] were enough to establish rebuttal under the contributing-cause standard, even though [they] would not establish rebuttal under the rule-out standard." Employer's Brief at 29. As indicated *infra*, we affirm the administrative law judge's use of the rule out standard.

the party opposing entitlement to 'rule out' coal mine employment as a cause of the miner's disabling respiratory or pulmonary impairment." 78 Fed. Reg. 59,105 (Sept. 25, 2013); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The DOL also explicitly chose not to use the "contributing cause" standard set forth in 20 C.F.R. §718.204(c), and stated that the application of a different standard on rebuttal "is warranted by the statutory section's underlying intent and purpose," which "effectively singled out" totally disabled miners who had fifteen years of qualifying coal mine employment "for special treatment." 78 Fed. Reg. 59,106-07 (Sept. 25, 2013). Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

Finally, contrary to employer's contention, the administrative law judge acted within his discretion in giving less weight to the opinions of Drs. Rosenberg and Zaldivar concerning rebuttal of the presumed fact of disability causation because they did not diagnose legal pneumoconiosis. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *see Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071, BLR (6th Cir. 2013). Consequently, we affirm the administrative law judge's determination that employer failed to rebut the presumption by establishing that the miner's disability did not arise out of, or in connection with his coal mine employment, and we further affirm the award of benefits. 30 U.S.C. §921(c)(4), *see* 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(1)(ii)); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 489, 25 BLR 2-1, 2-8 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order 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