BRB No. 13-0114 BLA

JAMES G. BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/30/2013
	)	
A A & W COALS, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (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/carrier (employer) appeals the Decision and Order (2010-BLA-5390) of Administrative Law Judge Joseph E. Kane 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 June 27, 2006.[1]

After crediting claimant with twenty-three 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 2006 claim on the merits. Because the administrative law judge credited claimant with over fifteen years of qualifying coal mine employment, and found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended 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. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of

[1] Claimant filed two prior claims, each of which was finally denied. Director's Exhibits 2, 3. His more recent prior claim, filed on December 5, 2001, was denied on May 23, 2003, for failure to establish any element of entitlement. Director's Exhibit 3.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (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).

Workers' Compensation Programs, has filed a limited response, asserting that the administrative law judge did not err in relying on the preamble to discredit the opinions of employer's physicians. In a reply brief, employer reiterates its previous contentions.[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).

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 administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 25. The administrative law judge found that employer failed to establish rebuttal by either method.

In evaluating whether employer disproved the existence of legal pneumoconiosis,[5] the administrative law judge considered the opinions of Drs. Rosenberg and Jarboe. Drs. Rosenberg and Jarboe each diagnosed chronic obstructive pulmonary disease (COPD)/emphysema due to cigarette smoking. Employer's Exhibits 3-8, 12, 13, 19, 20, 23. Moreover, Drs. Rosenberg and Jarboe each opined that claimant's COPD/emphysema was not due to his coal mine dust exposure. *Id.*

The administrative law judge discounted the opinions of Drs. Rosenberg and Jarboe because he found that each was premised on assumptions that were contrary to the scientific views endorsed by the Department of Labor (DOL) in the preamble to the revised regulations. Decision and Order at 30-33. The administrative law judge further discounted the opinions of Drs. Rosenberg and Jarboe because neither physician adequately explained how they eliminated claimant's twenty-three years of coal mine

[4] Because employer does not challenge the administrative law judge's findings of over fifteen years of qualifying coal mine employment, that the evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309(d), and that claimant invoked the Section 411(c)(4) presumption, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] "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).

dust exposure as a contributor to claimant's COPD/emphysema. *Id.* The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 33.

Employer argues that the administrative law judge erred in finding that the opinions of Drs. Rosenberg and Jarboe were insufficient to disprove the existence of legal pneumoconiosis. We disagree. The administrative law judge determined that the opinions of Drs. Rosenberg and Jarboe, that claimant's COPD/emphysema is unrelated to coal mine dust exposure, are inconsistent with scientific studies approved by the DOL in the preamble to the amended regulations. Drs. Rosenberg and Jarboe each eliminated coal mine dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC, a characteristic that each explained is indicative of a cigarette smoke-induced lung disease, but not one caused by coal mine dust. The administrative law judge, however, accurately noted that this view is contrary to scientific evidence endorsed by the DOL, which recognizes that coal mine dust can cause clinically significant obstructive lung disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 30-31. We reject employer's assertion that the administrative law judge erred in referring to the preamble to the amended regulations, when weighing the medical opinions relevant to rebuttal of the Section 411(c)(4) presumption. Contrary to employer's assertion, it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles accepted by DOL, and to consider the preamble to the revised regulations in assessing the credibility of the medical experts' opinions in this case. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004). Consequently, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Jarboe, as to the cause of claimant's COPD/emphysema, because the doctors relied on an assumption that is contrary to the DOL's position regarding the medical science. *Id.* As the administrative law judge's basis for discrediting the opinions of Drs. Rosenberg and Jarboe is rational and supported by substantial evidence, it is affirmed.

The administrative law judge also provided additional, valid reasons for discounting the opinions of Drs. Rosenberg and Jarboe. Dr. Rosenberg opined that claimant suffers from a diffuse form of emphysema caused by cigarette smoking, while coal mine dust exposure causes a more localized form of emphysema. Employer's Exhibits 6-8, 12, 19, 22. The administrative law judge reasonably found Dr. Rosenberg'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 Fed. Reg. at 79,940-43; *Obush*, 24 BLR at 1-125-26. The administrative law judge further noted that Dr. Jarboe relied on the absence of radiographic evidence of clinical pneumoconiosis in opining that claimant's emphysema is not related to coal mine dust exposure. Decision and Order at 31; Employer's Exhibits 5, 13, 20, 23. The administrative law judge appropriately found such reliance to be inconsistent with the definition of legal pneumoconiosis, and the DOL's recognition that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. at 79,971; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; Decision and Order at 31. Consequently, we affirm the administrative law judge's additional reasons for according less weight to the opinions of Drs. Rosenberg and Jarboe.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Jarboe, the only opinions 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 legal pneumoconiosis.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge next 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 reasonably found that the same reasons that he provided for discrediting the opinions of Drs. Rosenberg and Jarboe, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 34. Because the opinions of Drs. Rosenberg and Jarboe are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011).

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.

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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