BRB No. 13-0455 BLA

STACY L. ELLIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DONALDSON MINING COMPANY	)	
	)	
and	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 07/09/2014
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Richard A. Seid (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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5580) of Administrative Law Judge Thomas M. Burke rendered on a

subsequent claim[1] filed 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 credited claimant with twenty-six years of coal mine employment, including sixteen years in underground coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Part 718 and 725. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), based on his determination that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis thereunder, and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the applicability of amended Section 411(c)(4) to this case. Employer additionally argues that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption under amended Section 411(c)(4), and erred in his weighing of the medical opinion evidence relevant to rebuttal. Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response letter, urging the Board to reject employer's arguments regarding the applicability of amended Section 411(c)(4) and the proper standard for rebuttal.[3]

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[1] Claimant, Stacy L. Ellis, filed his first application for benefits on December 11, 2003, which was finally denied on August 6, 2004 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on August 7, 2009, which is the subject of this appeal. 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 by showing that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-six years of coal mine employment, with sixteen of those years in underground coal mine employment, total respiratory disability at 20

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer maintains that the provisions of amended Section 411(c)(4) are not applicable in cases where an employer is liable for benefits, as the plain language of 30 U.S.C. §921(c)(4) provides limitations on rebuttal evidence which apply only to claims brought against "the Secretary." Recognizing that this argument has previously been rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), employer requests the Board to hold this case in abeyance pending a final determination by the United States Court of Appeals for the Fourth Circuit on this issue. Employer's Brief at 6. However, as the court's mandate is final in *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013)(Niemeyer, J., concurring), employer's request is moot.

We also reject employer's argument that the administrative law judge's application of amended Section 411(c)(4) was premature in the absence of implementing regulations, as the statute is self-executing.[5] *See Fairman v. Helen Mining Co.*, 24 BLR

C.F.R. §718.204(b), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3-4, 10-11.

[4] 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 West Virginia. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[5] We note that, subsequent to the issuance of the administrative law judge's Decision and Order in this case, new regulations implementing the 2010 legislative changes were published, with an effective date of October 25, 2013. *See* 78 Fed. Reg. 59,102 (Sept. 25, 2013). These new regulations clarify that they apply to all claims filed after January 1, 2005, and pending on or after March 23, 2010. 77 Fed. Reg. 19,456, 19,460 (Mar. 30, 2012). Relevant to this claim, the new regulations provide that employer may rebut the amended Section 411(c)(4) presumption by:

> (i) Establishing both that the miner does not, or did not, have:
> (A) Legal pneumoconiosis as defined in §718.201(a)(2); and
> (B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (*see* §718.203); or

1-227 (2011). Because the present claim was filed after January 1, 2005, and was pending on March 23, 2010, we affirm the administrative law judge's finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013).

Employer next maintains that the administrative law judge provided invalid reasons for finding that the opinions of Drs. Zaldivar and Basheda were insufficient to affirmatively rebut the amended Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in requiring employer to rule out the existence of legal pneumoconiosis, and in failing to separately determine whether claimant's disabling impairment was caused by pneumoconiosis. Employer's Brief at 8-23.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. After finding that employer successfully rebutted the presumption of clinical pneumoconiosis, the administrative law judge accurately summarized the conflicting medical opinions of record. Decision and Order at 6-9. While Drs. Gaziano and Rasmussen diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema, and opined that both smoking and pneumoconiosis were significant contributing causes of claimant's disabling respiratory impairment, Drs. Zaldivar and Basheda found insufficient evidence of legal pneumoconiosis and concluded that coal dust exposure did not cause or contribute to claimant's disability. Decision and Order at 6-9; Director's Exhibit 11; Claimant's Exhibits 4-6; Employer's Exhibits 1, 5-7. The administrative law judge reviewed the underlying bases for the physicians' conclusions, and acted within his discretion in finding that the opinions of Drs. Zaldivar and Basheda were entitled to little weight, as he determined that neither physician had rendered an adequately explained and reasoned opinion. Decision and Order at 14-16; *see Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). In so finding, the administrative law judge determined that Dr. Zaldivar's opinion, that claimant's disabling lung condition is unrelated to coal dust exposure, but is due to

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(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.

§718.305(d) (to be codified at 20 C.F.R. §718.305(d)), 78 Fed. Reg. 59,115 (Sept. 25, 2013).

"smoker's emphysema and damage accrued in the lungs from extensive surgery to the pancreas, and by cardiac disease," was predicated largely upon a CT scan of claimant's abdomen that was obtained at the time of his pancreatic surgery. Dr. Zaldivar explained that he excluded coal dust exposure as a cause of claimant's lung condition because the CT scan showed emphysema but no abnormalities consistent with nodules indicating dust retention. The administrative law judge noted that Dr. Gaziano disagreed with Dr. Zaldivar's analysis. Dr. Gaziano stated that although the CT scan illustrated portions of claimant's lung, it was not a high resolution CT scan of claimant's entire lung as is required for a definitive diagnosis of occupational pneumoconiosis. Decision and Order at 14; Claimant's Exhibits 4, 6; Employer's Exhibits 1, 7. As the preamble to the amended regulations acknowledges that a miner's disabling pulmonary condition can be caused by coal dust exposure in the absence of findings of clinical pneumoconiosis, the administrative law judge permissibly found that Dr. Zaldivar's opinion was "not sufficient to rule out coal dust exposure as a causative factor" in claimant's pulmonary condition. Decision and Order at 14-15; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-592 (1984).

In evaluating the probative value of Dr. Basheda's opinion, that claimant's disabling pulmonary condition is not related to coal dust exposure, but is caused solely by smoking-induced COPD, the administrative law judge acted within his discretion in finding that the opinion was based on generalities derived from various studies and medical theories the physician cited, rather than findings specific to claimant. Decision and Order at 15; *see Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); *accord Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Dr. Basheda discussed studies showing a greater statistical probability of developing disabling obstruction from smoking, rather than coal dust, and indicated that claimant's hyperinflation and diffusion impairment with airway obstruction are classic findings for smoking-induced COPD. Employer's Exhibits 5, 6. However, as Dr. Rasmussen opined that the pattern of claimant's impairment, *i.e.*, marked impairment in oxygen transfer during light exercise with only mildly reduced spirometry, was also typical for coal dust-induced COPD, the administrative law judge rationally concluded that Dr. Basheda's findings did not necessarily eliminate claimant's twenty-six years of coal dust exposure as a contributing cause of his disabling pulmonary condition. Decision and Order at 15; *see* 65 Fed. Reg. 79,941-42 (Dec. 20, 2000); *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 1-61 (4th Cir. 1995). Thus, the administrative law judge permissibly determined that Dr. Basheda's opinion was entitled to diminished weight.

As substantial evidence supports the administrative law judge's credibility determinations, and the standard he applied on rebuttal is consistent with the statute, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have

pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). While employer is correct in arguing that the administrative law judge did not consider legal pneumoconiosis and total disability causation separately when determining whether employer rebutted the amended Section 411(c)(4) presumption, we agree with the Director's contention that remand is not required. The administrative law judge's rationale in finding that the opinions of Drs. Zaldivar and Basheda were not credible is applicable to both issues, and employer has not identified any harm resulting from the administrative law judge's consideration of these issues together. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).[6] Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[6] Contrary to employer's argument, since Drs. Zaldivar and Basheda did not diagnose pneumoconiosis, their opinions could not establish rebuttal by showing that claimant has mild pneumoconiosis which is not a materially contributing factor to his impairment. Employer's Brief at 13; *see also Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).