BRB No. 14-0057 BLA

EDWARD WARF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CENTURY OPERATIONS LLC	)	DATE ISSUED: 05/29/2014
	)	
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Michelle S. Gerdano (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 appeals the Decision and Order Awarding Benefits (2011-BLA-6126) of Administrative Law Judge Linda S. Chapman, rendered on a claim filed on August 27, 2010, 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-nine years of underground coal mine employment and found that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, invoked the

presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge concluded that employer did not rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in relying on the preamble to the regulations in evaluating the credibility of the physicians' opinions on rebuttal. Employer also maintains that the administrative law judge applied an improper rebuttal standard and did not rationally weigh the evidence. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, asserting that the administrative law judge reasonably considered the preamble in resolving the conflict in the medical opinion evidence and applied the correct rebuttal standard.[2]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[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 surface coal mine employment in conditions substantially similar to those of 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).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2) and invocation of the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] It is the practice of the Board to apply the law of the United States Court of Appeals for the Circuit in which a miner most recently performed coal mine employment. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc). The record reflects that claimant worked in West Virginia, Virginia, Tennessee and Kentucky, within the appellate jurisdiction of the United States Courts of Appeals for the Fourth and Sixth Circuits, respectively. Because the record does not indicate in which state claimant last engaged in coal mine employment, we will apply the law of both circuits, as they are compatible in regard to the issues raised on appeal in this case. *Shupe*, 12 BLR at 1-202; *see* Director's Exhibits 3-6.

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not suffer from either clinical[4] or legal pneumoconiosis,[5] or that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069-70 (6th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). The administrative law judge found that the x-ray evidence and CT scan evidence are insufficient to establish the absence of clinical pneumoconiosis and, therefore, employer did not rebut the presumed existence of clinical pneumoconiosis. Decision and Order at 15. The administrative law judge also found that Drs. Rosenberg and Dahhan did not adequately explain their bases for finding that claimant's disabling chronic obstructive pulmonary disease (COPD) is not due, at least in part, to coal dust exposure. *Id.* at 15-18. Because "none of the medical evidence rules out a causal relationship between [claimant's] disabling respiratory impairment and his coal mine employment," the administrative law judge concluded that employer did not sustain its burden to rebut the amended Section 411(c)(4) presumption. *Id*. at 18.

Employer's allegations of error concern solely the administrative law judge's finding that employer failed to establish that claimant's disabling COPD was not related to coal mine employment. Accordingly, we affirm, as unchallenged on appeal, the administrative law judge's determination that employer failed to rebut the presumed existence of clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because employer failed to rebut the presumption of clinical pneumoconiosis, the first method of rebuttal is foreclosed, and the only issue germane to this appeal is whether the administrative law judge erred in finding that employer did not establish the second method of rebuttal, by affirmatively proving that claimant's disability did not

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[4] Pursuant to 20 C.F.R. §718.201(a)(1):

> "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 tissue to that deposition caused by dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(1).

[5] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

arise out of, or in connection with, coal mine employment. *See Ogle*, 737 F.3d at 1069-70; *Barber*, 43 F.3d at 901, 19 BLR at 2-67.

Employer argues that the administrative law judge impermissibly relied on the preamble to the regulations when determining the credibility of the opinions of Drs. Rosenberg and Dahhan, in violation of the Administrative Procedure Act (APA).[6] Employer asserts that, because the preamble was not subject to notice and comment rulemaking, the discussion in the preamble is entitled to no weight. Employer's allegations of error are without merit.

Both the United States Courts of Appeals for the Fourth and Sixth Circuits have acknowledged that the preamble sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-151 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *see also J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Moreover, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12; *Looney*, 678 F.3d at 315-16, 25 BLR at 2-129-32. Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *See Banks*, 690 F.3d at 489, 25 BLR at 2-151; *Looney*, 678 F.3d at 315-16, 25 BLR at 2-129-32.

Employer further contends that the administrative law judge applied an inappropriate method of assessing rebuttal insofar as she "looked at each medical report and determined whether each tended to rebut the presumption of total disability due to pneumoconiosis, rather than looking at the evidence as a whole and determining whether the preponderance of the evidence" established rebuttal. Brief on Behalf of Defendant-Employer at 6-7. In support of this argument, employer states that the administrative law judge should have considered and rejected the opinions of Drs. Baker and Habre, who concluded that claimant's disabling COPD was due to both coal dust exposure and smoking, while crediting the opinions in which Drs. Rosenberg and Dahhan indicated that claimant's condition is unrelated to coal dust exposure. *See* Director's Exhibit 9;

[6] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Claimant's Exhibit 1. Contrary to employer's argument, because employer bears the burden of proof on rebuttal, the administrative law judge observed correctly that Drs. Baker and Habre "do not assist the Employer in establishing that coal mine dust exposure was not a factor in [claimant's] disabling respiratory impairment." Decision and Order at 16; *see Ogle*, 737 F.3d at 1069-70; *Barber*, 43 F.3d at 901, 19 BLR at 2-67. Thus, the administrative law judge did not err in focusing her analysis on the opinions of Drs. Rosenberg and Dahhan.

Regarding the administrative law judge's weighing of these opinions, employer maintains that she erred in requiring Drs. Rosenberg and Dahhan to "rule out" any relationship between claimant's disabling respiratory impairment and coal dust exposure. Brief on Behalf of Defendant-Employer at 7. Contrary to employer's argument, the "rule out" standard that the administrative law judge applied is consistent with the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, and 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."[7] 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(ii)). In addition, the Fourth Circuit has held that an employer must "effectively . . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure in order to meet its rebuttal burden. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The Sixth Circuit has held that in order to meet its rebuttal burden, employer must "rule out" coal mine employment as a cause of the miner's disability. *Ogle*, 737 F.3d at 1071 (holding that there is no meaningful difference between the "play[ed] no part" standard and the "rule-out" standard). Therefore, the administrative law judge applied the correct rebuttal standard in this case.

With respect to the administrative law judge's weighing of Dr. Rosenberg's opinion,[8] employer argues that the administrative law judge mischaracterized the

[7] The Department of Labor has explained that the "no part" standard recognizes that the courts have interpreted Section 411(c)(4) "as requiring 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).

[8] Dr. Rosenberg cited claimant's pulmonary function studies, which showed "a markedly decreased FEV1 . . . in association with a severe reduction of his FEV1/FVC," and explained that "this pattern of obstruction is inconsistent with one related to past coal mine dust exposure and the presence of [coal workers' pneumoconiosis]." Employer's Exhibit 7 at 6; *see also* Employer's Exhibits 8, 9. Dr. Rosenberg explained that "while the FEV1 [value] decreases in relationship to coal mine dust exposure, the FEV1/FVC [ratio] is generally preserved," which Dr. Rosenberg contrasted with smoking related-

physician's rationale for excluding coal dust exposure as a causative factor for claimant's disabling respiratory impairment. Employer also contends that the administrative law judge erroneously rejected Dr. Rosenberg's statement that claimant "has a severe reduction of his diffusing capacity measurement, which . . . supports the existence of a diffuse emphysematous process, the type of emphysema related to smoking and not past coal mine dust exposure." Employer's Exhibit 7 at 6; *see also* Employer's Exhibits 8, 9. Employer maintains that Dr. Rosenberg's opinion is consistent with the preamble because Dr. Rosenberg detailed the basis for his finding and conceded that diffuse emphysema may occur with "advanced clinical [coal workers' pneumoconiosis.]" Employer's Exhibit 8 at 11-12; *see* Brief on Behalf of Defendant-Employer at 6.

Employer allegations are without merit. The administrative law judge rationally found Dr. Rosenberg's statement, that claimant's markedly decreased FEV1 and FEV1/FVC ratio are inconsistent with legal pneumoconiosis, to be unpersuasive, as the regulations "allow a claimant to establish disability on the basis of a qualifying FEV1 [value] accompanied by [a qualifying] FEV1/FVC value," and because "the [DOL], in consultation with the National Institute of Occupational Safety and Health (NIOSH), concluded that coal mine dust exposure may cause COPD, with associated decrements in FEV1/FVC[.]" Decision and Order at 17; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 315-16, 25 BLR at 2-129-32. Moreover, the administrative law judge permissibly determined that, "even if the '*general pattern'* of obstruction in miners results in a preserved FEV1/FVC ratio, as claimed by Dr. Rosenberg, this does not explain why, in [claimant's] *particular case*, his pattern of obstruction has no relationship to his exposure to coal mine dust." Decision and Order at 18 n. 12 (emphasis added); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

In addition, the administrative law judge reasonably rejected Dr. Rosenberg's opinion, that claimant's severely reduced diffusing capacity was inconsistent with coal dust-induced emphysema, because "the basis of this conclusion is not consistent with the [DOL] scientific findings" set forth in the preamble which cite, "with approval[,] a study that found centrilobular emphysema – a diffuse form of emphysema – to be 'significantly more common' among coal workers than non-coal workers[.]" Decision and Order at 18, *quoting* 65 Fed. Reg. 79,941 (Dec. 20, 2000); *see Looney*, 678 F.3d at 315-16, 25 BLR at 2-129-32; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11. Furthermore, the administrative law judge rationally found that Dr. Rosenberg's statement "does not

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COPD, where "the FEV1/FVC ratio is generally reduced." Employer's Exhibit 7 at 4; *see also* Employer's Exhibits 8, 9.

adequately explain why [claimant's] emphysema, in particular, was not at all aggravated by his significant history of coal dust exposure." Decision and Order at 18; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

Employer also contends that the administrative law judge erred in finding that Dr. Dahhan's opinion was insufficient to rule out coal dust exposure as a contributing cause of claimant's disabling COPD.[9] We disagree. The administrative law judge permissibly found that Dr. Dahhan did not adequately explain why claimant's "slight improvement after bronchodilators" necessarily ruled out coal mine dust exposure as a cause of claimant's COPD, when two pulmonary function studies indicated that claimant's respiratory impairment was still disabling after the administration of bronchodilators. Decision and Order at 16, *quoting* Employer's Exhibit 5; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). In addition, the administrative law judge rationally found that Dr. Dahhan's reliance on statistics regarding the loss in FEV1 typically caused by coal dust exposure, does not rule it out as a causal factor in claimant's respiratory impairment because claimant "is not a statistic" and because these "estimates say nothing about whether [claimant's] significant coal dust exposure, in particular, was a factor, in addition to his cigarette smoking, in his totally disabling respiratory impairment." Decision and Order at 16; *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Moreover, the administrative law judge noted that Dr. Dahhan did not explain "why, even if it was a 'trivial' loss of FEV1, [claimant's] significant history of coal dust exposure played no role in his disabling respiratory impairment." Decision and Order at 16; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Looney*, 678 F.3d at 305, 25 BLR at 2-115; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. The Board

[9] Dr. Dahhan excluded coal dust exposure as a cause of claimant's disabling COPD because claimant "demonstrates slight improvement after the administration of bronchodilators," and because claimant was treated with multiple bronchodilators, both of which are "inconsistent with the permanent fixed adverse [e]ffect of coal dust on the respiratory system." Employer's Exhibit 5; *see* Decision and Order at 16. Dr. Dahhan cited the fact that claimant "has lost over 2000cc of his FEV1[,] which is an amount that cannot be accounted for by the obstructive impact of coal dust on the respiratory system that is estimated by Dr. Attfield and [his] associate to be 5-9cc loss in FEV1 per year of coal dust exposure." Employer's Exhibit 5; *see* Decision and Order at 16. Dr. Dahhan characterized the loss of FEV1 due to coal dust exposure to be a "trivial amount" in claimant's case, considering the overall loss of FEV1. *Id*.

cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that employer failed to prove that claimant's respiratory disability did not arise out of, or in connection with, coal mine employment. *See* 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).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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