BRB No. 12-0034 BLA

LARRY A. DINGESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAINEER COAL DEVELOPMENT COMPANY	)	DATE ISSUED: 11/06/2012
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for employer/carrier.

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2008-BLA-5765) of Administrative Law Judge Thomas M. Burke rendered on a claim filed on October 9, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). After crediting claimant with at least twenty-five years of underground coal mine employment, the administrative law judge determined that claimant established a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Based on these findings, the administrative law judge determined that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[1] 30 U.S.C. §921(c)(4). Further, the administrative law judge found that, although employer established that claimant does not have clinical pneumoconiosis, employer failed to establish that claimant does not have legal pneumoconiosis or that his disability is unrelated to his coal mine employment. The administrative law judge, therefore, found that the Section 411(c)(4) presumption of total disability due to pneumoconiosis was not rebutted. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, by failing to show that claimant does not have legal pneumoconiosis or that claimant's total disability is not related to coal mine employment. Specifically, employer contends that the administrative law judge mischaracterized the opinions of Drs. Zaldivar[2] and Crisalli,[3] and inconsistently evaluated the opinions of Drs. Ranavaya[4] and Gaziano.[5] Additionally, employer contends that the administrative law

[1] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant has a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b), and fifteen or more years of underground, or substantially similar, coal mine employment.

[2] Dr. Zaldivar diagnosed a moderate restriction of claimant's total lung capacity, and opined that claimant's disabling respiratory impairment is due to his treatment for Hodgkin's disease and cardiac dysfunction, and is unrelated to his coal mine employment. Decision and Order at 8-9, 18-19; Employer's Exhibits 1, 5.

[3] Dr. Crisalli, who reviewed claimant's medical documentation, found no evidence of clinical or legal pneumoconiosis, and opined that claimant suffers from a severe restrictive pulmonary impairment caused by his treatment for Hodgkin's disease and pleural effusions. Decision and Order at 10, 18-19; Employer's Exhibit 5.

[4] Dr. Ranavaya, who performed a pulmonary examination, diagnosed legal pneumoconiosis and opined that coal workers pneumoconiosis is "the substantial

judge erred in assigning less weight to the opinions of Drs. Zaldivar and Crisalli on the grounds that they were contrary to the regulations and included consideration of medical data that was not in the record. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the Decision and Order be affirmed, as the administrative law judge properly assessed the evidence supportive of employer's burden on rebuttal, and substantial evidence supports his finding that rebuttal was not established pursuant to Section 411(c)(4).[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[7] 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).

Regarding rebuttal of the Section 411(c)(4) presumption,[8] employer first argues that the administrative law judge erred in rejecting the opinions of Drs. Zaldivar and

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contributing factor and the material cause of claimant's total disability." Decision and Order at 7-8, 18; Director's Exhibit 11.

[5] Dr. Gaziano evaluated claimant, and diagnosed legal pneumoconiosis, severe restrictive impairment, and moderately reduced diffusing capacity. He opined that claimant's coal mine employment contributed "significantly" to his restriction and pulmonary disability. Decision and Order at 18; Employer's Exhibit 7 at 8-10, 12.

[6] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, his determination that over twenty-five years of claimant's employment was underground coal mine employment, his finding that the evidence establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b), and his finding that the Section 411(c)(4) presumption was invoked. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 11-12, 14.

[7] The record reflects that claimant's last coal mine employment was in West Virginia. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Decision and Order at 15 n.8; Director's Exhibit 5 at 5.

[8] In order to establish rebuttal of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4), employer must prove that claimant does not have pneumoconiosis or that he is not totally disabled by it. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

Crisalli as "[n]either physician opined that [a] restrictive impairment could never be a result of pneumoconiosis; [but only] … that [a] restrictive impairment is not a manifestation of *simple* coal workers' pneumoconiosis." Employer's Brief at 9. Employer contends, therefore, that the administrative law judge erred in finding the opinions of Drs. Zaldivar and Crisalli inconsistent with the definition of pneumoconiosis at 20 C.F.R. §718.201(a)(2). Reviewing the opinions of Drs. Zaldivar[9] and Crisalli,[10] however, the administrative law judge found that they were inconsistent with the premise underlying the regulations, i.e., that pneumoconiosis may be manifested by restrictive impairments. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920, 79,937-39 (Dec. 20, 2000)(legal pneumoconiosis can involve an obstructive impairment, a restrictive impairment, or both); Decision and Order at 17-18; Employer's Exhibits 1 at 5, 6; 5 at 6.

The evaluation of ambiguities in the medical evidence, and the resolution of evidentiary conflicts, is for the administrative law judge, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997), and we are not empowered to reweigh the evidence. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). The administrative law judge, as the trier-of-fact, has the discretion to determine whether a medical opinion is supported by accepted scientific evidence, as determined by the Department of Labor when it revised the definition of pneumoconiosis, and to weigh it accordingly. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-225-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

The administrative law judge's determination that the views of Drs. Zaldivar and Crisalli are not in accord with the regulations is rational, and the administrative law judge

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[9] Dr. Zaldivar, disagreeing that coal mine employment contributed to, or is related to, claimant's pulmonary impairment, explained: "in fact there is only a restrictive impairment well explained by the history of radiation[] caused by Hodgkin's disease and [] heart failure…. Simple coal workers' pneumoconiosis does not cause a restrictive pulmonary impairment with restriction of total lung capacity and residual volume…." Employer's Exhibit 1 at 5-6.

[10] Dr. Crisalli stated: "there is nothing to support a diagnosis of coal workers' pneumoconiosis, whether it be medical or legal. [The miner] has a pulmonary functional impairment of a restrictive type. Coal workers' pneumoconiosis causes an obstructive defect. The absence of the obstructive defect in the presence of pulmonary function studies which show severe impairment essentially rules out coal dust related disease as a cause of [the miner's] impairment." Employer's Exhibit 5 at 6.

therefore permissibly assigned "less weight" to their medical opinions. *Id*.; *see Stiltner v. Island Creek Coal Co*., 86 F.3d 337, 20 BLR 2-246 (4th Cir 1996)(medical opinion that pneumoconiosis *never* causes a restrictive impairment conflicts with the Act, while an opinion that restriction is seen in advanced cases of pneumoconiosis does not conflict, because it recognizes that coal dust exposure may result in a restrictive lung disorder); *Warth v. Southern Ohio Coal Co*., 60 F.3d 174, 19 BLR 2-268 (4th Cir. 1995); Decision and Order at 17-18. We conclude, therefore, that the administrative law judge properly evaluated the opinions of Drs. Zaldivar and Crisalli. *See Greene v. King James Coal Mining, Inc*., 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009). As the administrative law judge properly discredited the opinions of Drs. Zaldivar and Crisalli, he rationally found that employer did not meet its burden of establishing the absence of legal pneumoconiosis, or eliminating coal mine dust exposure as a contributing factor in claimant's disabling respiratory impairment. Decision and Order at 22-24, 27-30; 20 C.F.R §718.201; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988).

Next, employer contends that the administrative law judge erred in according less weight to the opinions of Drs. Zaldivar and Crisalli because they considered evidence outside the record. In support of this argument, employer contends that medical treatment records are not subject to the evidentiary limitations of 20 C.F.R. §725.414, and that the February 18, 2009 blood gas study would be admissible within the evidentiary limitations.[11] *See* Employer's Brief at 12-14. The administrative law judge recognized that Drs. Zaldivar and Crisalli reviewed numerous x-rays, CT scans, and treatment records that were not admitted into evidence, and concluded:

> At certain points in their opinions, it is not clear whether their conclusions are partly based on such evidence or solely on the evidence of record. In particular, Dr. Crisalli states that his opinion was based on all the documentation he reviewed. (Employer's Exhibit 5 at 6). He references specific CT scans and chest x-rays not in the record in his reasoning for finding no coal dust related lung disease. (Employer's Exhibit 5 at 6). Employer, in its brief, argues that unlike Dr. Gaziano, Drs. Zaldivar and Crisalli had the benefit of reviewing [c]laimant's medical records. (Employer's Brief p.11). Again, what medical records [e]mployer is referring to is not clear.

Decision and Order at 18. Therefore, the administrative law judge explained that he was unable to identify the extent to which Drs. Zaldivar and Crisalli relied on evidence that

[11] Employer does not address the admissibility of the CT scans and numerous x-rays considered by Drs. Zaldivar and Crisalli. *See* Decision and Order at 18-19; Employer's Brief at 13.

was not in the record in reaching their conclusions. *Id*. Consequently, the administrative law judge found that he could not discern whether the doctors had a sufficient basis, in the admissible evidence of record, for their conclusions regarding the cause of claimant's respiratory impairment. *Id*.

It is employer's burden on rebuttal to affirmatively disprove the existence of pneumoconiosis, or prove that claimant's total respiratory or pulmonary disability is unrelated to his coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9. According to employer, the opinions of Drs. Zaldivar and Crisalli should not have been discredited because the medical treatment records and February 18, 2009 blood gas study "would be admissible" under the evidentiary limitations of 20 C.F.R §725.414. *See* Employer's Brief at 13. We are not persuaded by employer's argument, however.

Irrespective of whether the medical tests and records referenced accord, or would accord, with the evidentiary limitations, they are not of record and employer does not assert that they were ever identified and offered for admission. Therefore, employer's assertion that Drs. Zaldivar and Crisalli "did not consider any evidence that was inadmissible or that exceeded the evidentiary limitations" is not determinative here, as the administrative law judge did not focus on the requirements of the evidentiary rules at Section 725.414. *Id*.

The administrative law judge must base his factual findings and conclusions on the record before him, and the evaluation of the documentary bases underlying conflicting medical opinions rests within his discretion as fact-finder. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-236 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). In this case, the administrative law judge properly determined that he could not accurately evaluate the extent to which Drs. Zaldivar and Crisalli relied on evidence outside the record. Therefore, the administrative law judge permissibly assigned less weight to their opinions. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(en banc); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *see also Dempsey v Sewell Coal Co.*, 23 BLR 1-47 (2004)(en banc). In sum, we agree with the Director that the administrative law judge rationally discredited employer's Section 411(c)(4) rebuttal evidence, *i.e.*, the opinions of Drs. Zaldivar and Crisalli. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-236; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *see also* The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).[12]

[12] As we have rejected employer's argument that the evidence established rebuttal of the Section 411(c)(4) presumption by proving the absence of legal pneumoconiosis,

Lastly, because we have affirmed the administrative law judge's evaluation of employer's Section 411(c)(4) rebuttal evidence, we need not address employer's arguments with respect to the administrative law judge's evaluation of the opinion of Dr. Ranavaya and the assignment of probative weight to Dr. Gaziano's opinion, as reasoned and documented, as any error would be harmless. *See* Decision and Order at 18-19; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). As the administrative law judge properly discredited the two opinions supportive of employer's burden of showing that claimant does not have pneumoconiosis or that his respiratory impairment did not arise out of, or in connection with, employment in a coal mine, we affirm his finding that employer has failed to rebut the presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9. Because substantial evidence supports the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we affirm his award of benefits in this case.

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we also reject employer's argument that claimant's disabling respiratory impairment is unrelated to coal mine employment. *See* 30 U.S.C. §921(c)(4); *Henley v. Cowan and Co.*, 21 BLR 1-147, 1-151 (1999); Employer's Brief at 16.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge