BRB No. 13-0097 BLA

HALCY HATFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	DATE ISSUED: 09/24/2013
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 Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2011-BLA-05906) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this claim on April 28, 2010.[1] Director's Exhibit 3.

[1] This is claimant's second claim for benefits. His prior claim, filed on November 15, 2005, was denied by the district director on July 5, 2006, for failure to establish any element of entitlement. Director's Exhibit 1.

In his Decision and Order issued October 31, 2012, the administrative law judge noted the recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground or substantially similar coal mine employment, and establishes that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 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 shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

The administrative law judge credited claimant with twenty-two years of coal mine employment, of which seventeen years and 4.4 months were substantially similar to underground coal mine employment.[2] The administrative law judge also found that new evidence established claimant's total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge thus concluded that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d), and considered his claim on its merits. Based on claimant's years of qualifying coal mine employment and his total disability, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant had at least fifteen years of qualifying coal mine employment, and thus erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer failed to rebut the Section

[2] Claimant's last coal mine employment was in West Virginia. Director's Exhibit 8. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

411(c)(4) presumption.[3] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

Qualifying 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 of coal mine 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." *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). 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 noted that claimant indicated he had thirty years of coal mine employment, in his answers to employer's interrogatories, and that he testified to twenty-three years of coal mine employment at the hearing. Employer's Exhibit 7; Hearing Transcript (Tr.) at 12-13; Decision and Order at 4. Relying on employer's stipulation that it employed claimant for twenty-two years, the administrative law judge credited claimant with twenty-two years of coal mine employment. Tr. at 10; Decision and Order at 4.

Because claimant worked at a surface mine, the administrative law judge considered whether claimant established that his coal mine employment was substantially similar to underground coal mine employment. Tr. at 18; Decision and Order at 15.

[3] Employer does not challenge the administrative law judge's findings that claimant established a totally disabling respiratory impairment and a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant testified that he worked as a heavy equipment operator for seven years, and then as a heavy equipment mechanic for fourteen years, at employer's surface mine. Tr. at 29. According to claimant, employer ultimately bought out all of the residents who lived in the hollow below the mine, because of "so much dust and stuff that went right down in the hollow on them." Tr. at 20. Claimant testified that during his seven years as a heavy equipment operator, he spent the first "three or four years" of that time operating bulldozers with open cabs, and that the air flow of the fans on the motors would be reversed in the winter, bringing heat and dust into the cabs. Tr. at 21-22, 29-30. Claimant further testified that he worked in closed cabs for the remaining three or four years of his time as a heavy equipment operator. Tr. at 29-30.

The administrative law judge found that "operating equipment with open cabs at a strip mine, especially with the fans, is comparable to underground coal mine employment, but that operating such equipment with closed cabs is not." Decision and Order at 15. Therefore, the administrative law judge found that 3.5 years of claimant's employment as a heavy equipment operator was substantially similar to underground coal mine employment. *Id*.

Employer contends that the only basis for the administrative law judge's finding was claimant's testimony that fans blew dust into the cabs in the winter, and therefore argues that only claimant's wintertime employment as a heavy equipment operator should be credited as substantially similar to underground coal mine employment. Employer's Brief at 10-11. We disagree. Contrary to employer's contention, the administrative law judge's finding did not depend on what season it was or whether fans were blowing air into claimant's cab. Decision and Order at 15. Instead, the administrative law judge drew a distinction between claimant's time in open cabs and his time in closed cabs, and reasonably concluded, based on claimant's testimony, that his operation of equipment with open cabs at a strip mine was comparable to underground employment. *See Summers*, 272 F.3d at 480, 22 BLR at 2-275-76; *Leachman*, 855 F.2d at 512; Decision and Order at 15. Therefore, we affirm the administrative law judge's finding that 3.5 years of claimant's employment as a heavy equipment operator was substantially similar to underground coal mine employment.

Next, the administrative law judge considered claimant's fourteen years of work as a heavy equipment mechanic. Tr. at 29. Claimant testified that he repaired equipment wherever it broke down, and that "it was dusty," with "no place to get in out of it," if the equipment he repaired broke down on a haul road or in a coal pit or rock pit. Tr. at 19-21. Claimant further testified that when it rained, "you didn't have the dust, you had mud"; that during the winter, "most of the time you had snow or rain or sleet and mud," but that, "[i]f it was dry . . . you had the dust"; and that when employer sprayed down the haul roads with water, conditions were not quite as dusty. Tr. at 22, 30. Claimant also

testified that, about every two months, he would work "a shift or two" indoors, performing repairs in a shop. Tr. at 27-28.

Noting that "there [was] no testimony as to equipment breaking down in places other than dust-laden pits or haul roads, and no testimony as to how often it rained during the winter – or the non-winter – months, nor how often the company sprayed down the haul roads," the administrative found that, except for the shifts worked in the repair shop, claimant's work as a heavy equipment mechanic was substantially similar to underground coal mine employment. Decision and Order at 16. Excluding 5.6 months for the shifts claimant worked in the shop, the administrative law judge credited claimant with thirteen years and 4.4 months of qualifying coal mine employment during his time as a heavy equipment mechanic.[4] *Id.*

Employer argues that the administrative law judge's finding is unsupported by the record, because the miner testified that rain reduced the amount of dust, and that precipitation fell "most of the time" during winter, reducing the amount of dust. Employer's Brief at 14; Hearing Transcript at 22, 30. Employer contends that the miner's testimony does not support a finding that his time as a heavy equipment mechanic was substantially similar to underground coal mine employment, because "dust conditions underground are never lessened by precipitation." Employer's Brief at 14. This argument lacks merit. Claimant needed to establish only that the conditions of his employment were "substantially similar" to those in an underground mine, not that the conditions were identical to conditions in an underground mine. *See McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4, 1-6-7 (1987). We therefore reject employer's argument that the administrative law judge was required to exclude surface coal mine employment that occurred during precipitation.

Employer also contends that the administrative law judge improperly placed the burden of disproving substantial similarity on employer when he noted that there was no testimony regarding where equipment broke down, how often it rained, and how often employer sprayed down the haul roads. Employer's Brief at 15. We disagree. Claimant's burden was to produce sufficient evidence of the conditions of his surface mine employment; it was then for the administrative law judge to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines. *Leachman*, 855 F.2d at 512. The administrative law judge acted within his discretion when, in making that comparison, he noted the absence of evidence

[4] The administrative law judge appears to have made a mathematical error in his calculation of claimant's qualifying coal mine employment during the fourteen years spent as a heavy equipment mechanic. Subtracting 5.6 months from fourteen years results in thirteen years and 6.4 months.

that might have weighed against a finding of substantial similarity. *See Summers*, 272 F.3d at 479, 22 BLR at 2-275; *McGinnis*, 10 BLR at 1-6-7. We therefore affirm the administrative law judge's finding that at least thirteen years and 4.4 months of claimant's employment as a heavy equipment mechanic was substantially similar to underground coal mine employment.

Adding that total to the qualifying coal mine employment from claimant's time as a heavy equipment operator, the administrative law judge credited claimant with seventeen years and 4.4 months of qualifying coal mine employment under Section 411(c)(4).[5] *Id*. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant had at least fifteen years of qualifying coal mine employment. As we have also affirmed the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The administrative law judge found that employer did not establish rebuttal by either method.

After finding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis.[6] The administrative law judge considered the opinions of Drs. Rosenberg and Zaldivar. Decision and Order at 17-19.

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[5] Although he initially determined that 3.5 years of claimant's time as a heavy equipment operator constituted qualifying coal mine employment, the administrative law judge's calculation indicates that he ultimately gave claimant credit for four years of qualifying employment for that period. Decision and Order at 15-16. Employer points out the error, but because it does not alter the ultimate determination that claimant had at least fifteen years of qualifying coal mine employment, the error is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986); Employer's Brief at 11-12.

[6] To rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, employer must affirmatively prove the absence of both clinical and legal pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*,

In his report, Dr. Rosenberg diagnosed claimant with disabling chronic obstructive pulmonary disease (COPD), but concluded that it was not related to coal mine dust exposure. Employer's Exhibit 4. Dr. Rosenberg opined that the pattern of claimant's obstruction, reflected in a "markedly reduced FEV1 with an associated severe reduction of his FEV1/FVC ratio," is not characteristic of obstruction due to coal mine dust exposure, but is a "classic" pattern of smoking-related COPD. *Id*. at 7. Dr. Rosenberg also noted that claimant showed a response to bronchodilators, which was also consistent with smoking-related COPD and inconsistent with legal pneumoconiosis. *Id*. Dr. Rosenberg reiterated his conclusions during his deposition, and testified that claimant's impairment is due to smoking, compounded by complications from heart surgery. Employer's Exhibit 6 at 14-19.

In his report, Dr. Zaldivar opined that "[t]here is no evidence in this case to justify a diagnosis of legal pneumoconiosis." Employer's Exhibit 1 at 5. He diagnosed claimant with emphysema that he opined was "entirely the result of [claimant's] previous smoking habit." *Id*. at 5-6. During his deposition, Dr. Zaldivar attributed claimant's impairment and emphysema to smoking and bronchospasm. Employer's Exhibit 5 at 31, 36. He further testified that he could exclude coal mine dust as a cause of claimant's impairment, because "his smoking history is sufficient to cause the same pulmonary impairment that he now has," and opined that coal dust and smoking do not affect lungs in the same way, because "[t]he cellular damage is entirely different in smoking from coal workers' pneumoconiosis." *Id*. at 31-32.

The administrative law judge discounted Dr. Rosenberg's opinion because he found the physician's reasoning for excluding coal mine dust exposure as a cause of claimant's COPD to be inconsistent with the medical science set forth in the preamble to the regulations, which recognizes that coal mine dust can cause significant obstructive disease, as shown by a reduced FEV1/FVC ratio. Decision and Order at 18, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Further, the administrative law judge found that Dr. Zaldivar's opinion was not well-reasoned, because Dr. Zaldivar was "unclear and conclusory" in opining that coal dust and smoking cause different cellular damage, "without describing how he knew that Claimant was suffering from the smoking-induced

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644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). Clinical pneumoconiosis is defined as "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). 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).

kind of cellular damage." *Id*. at 18. Additionally, the administrative law judge found that Dr. Zaldivar's reasoning was contrary to the medical science set forth in the preamble to the regulations, which reflects the Department of Labor's conclusion that dust-induced and smoke-induced emphysema occur through similar mechanisms.[7] *Id*. at 19, *citing* 65 Fed. Reg. at 79,943.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Zaldivar. Employer contends that Drs. Rosenberg and Zaldivar explained how they were able to distinguish claimant's smoking-induced emphysema from emphysema caused by coal mine dust exposure, and that their opinions are not contrary to the preamble's recognition that smoke-induced emphysema and dust-induced emphysema occur through similar mechanisms. Employer's Brief at 19-20. Employer also argues that, because Drs. Rosenberg and Zaldivar relied on medical literature that was published after the preamble was published in 2000, the administrative law judge erred in not considering their opinions "in light of modern medical literature." Employer's Brief at 20-21. These arguments lack merit.

The preamble sets forth how the Department of Labor (DOL) has chosen to resolve questions of scientific fact. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801, 25 BLR 2-203, 2-209-10 (6th Cir. 2012). An administrative law judge, therefore, may evaluate expert opinions in conjunction with DOL's discussion of sound medical science set forth in the preamble. *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

In this case, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Zaldivar, because he found the physicians' reasoning to be inconsistent with the studies that recognize that coal dust-induced and smoke-induced emphysema occur through similar mechanisms, and that coal mine dust can cause significant obstructive disease, as shown by a reduced FEV1/FVC ratio. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, BLR (4th Cir. 2013)(Traxler, C.J., dissenting); *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130. Contrary to employer's contention, the fact that Drs. Rosenberg and Zaldivar cited recent medical literature

[7] Additionally, the administrative law judge discounted Dr. Zaldivar's opinion because he relied on a smoking history of 108 pack-years, which was in excess of the administrative law judge's own finding of eighteen pack-years, and which Dr. Zaldivar based on an interrogatory response that the administrative law judge determined was inaccurate, when he weighed the documentary evidence and testimony regarding claimant's smoking history. Decision and Order at 4, 18.

"addressing the various effects of smoking on the lungs," Employer's Brief at 20, did not require the administrative law judge to conclude that advancements in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs, that was endorsed by DOL in the preamble. *See Cochran*, 718 F.3d at 324 (observing that neither of the employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the Preamble"). We therefore affirm the administrative law judge's finding that the opinions of Drs. Rosenberg and Zaldivar were not sufficiently credible to disprove the existence of legal pneumoconiosis.[8] Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

Employer argues that the administrative law judge failed to adequately address whether employer could establish rebuttal by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment, pursuant to 30 U.S.C. §921(c)(4). Employer's Brief at 26-28. Contrary to employer's contention, the administrative law judge found that, for the same reasons he gave when considering the existence of legal pneumoconiosis, "[e]mployer's physicians' opinions on the subject of the causation of [c]laimant's totally disabling respiratory impairment are not credible enough to rebut the presumed causal relationship between [c]laimant's disability and his coal mining." Decision and Order at 19. Although the administrative law judge did not provide a detailed explanation for his determination, it was not necessary in this case. Because the administrative law judge did not find the opinions of Drs. Rosenberg and Zaldivar to be credible on the issue of legal pneumoconiosis, he could not credit their opinions on the causation of total disability, absent "specific and persuasive reasons for concluding that the doctor[s'] judgment on the question of disability causation d[id] not rest upon [their] disagreement with the [administrative law judge's] finding . . . ." *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We therefore affirm the administrative law judge's determination that employer failed to establish that claimant's disabling impairment is unrelated to his coal mine employment. 30 U.S.C. §921(c)(4).

We affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Therefore, we affirm the award of benefits.

[8] Because we have affirmed the administrative law judge's credibility determinations regarding the opinions of Drs. Rosenberg and Zaldivar on the grounds stated above, we need not address employer's additional arguments that the administrative law judge erred in discrediting those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 22-26.

Accordingly, the administrative law judge's Decision and Order Granting 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