

BRB No. 13-0562 BLA

ROBERT JOE McKINNEY )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 MIDWEST COAL COMPANY, formerly ) DATE ISSUED: 07/29/2014  
 known as AMAX COAL COMPANY )  
 )  
 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Vernon L. Plummer, II (Plummer Law Offices), Shelbyville, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Sarah M. Hurley (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 (2008-BLA-5864) of Administrative Law Judge Alice M. Craft, rendered on a claim filed on June 5, 2007,

pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the filing date of the claim, the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>1</sup> The administrative law judge accepted employer's stipulation that claimant has at least fifteen years of qualifying coal mine employment.<sup>2</sup> Based on his additional finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). The administrative law judge further found that employer failed to rebut that presumption. Accordingly, benefits were awarded.

On appeal, employer asserts that the 2013 regulations are unconstitutional and violate the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a). Employer contends that the administrative law judge selectively analyzed the medical evidence and erred in finding that claimant established total disability and is entitled to the amended Section 411(c)(4) presumption. Employer also argues that the administrative law judge applied an incorrect legal standard and erred in weighing the evidence relevant to rebuttal of the presumption.<sup>3</sup> Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, urging the Board to reject employer's arguments with respect to application of the 2013 regulations. The Director also asserts that the administrative law judge applied the proper rebuttal standard, and that the administrative law judge permissibly relied on the preamble to the 2001 regulations in evaluating the medical opinion evidence. Employer has filed reply briefs in response to the arguments of claimant and the Director, reiterating its arguments that benefits were erroneously awarded.

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<sup>1</sup> Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), implemented by 20 C.F.R. §718.305.

<sup>2</sup> The administrative law judge found that claimant had at least forty-two years of coal mine employment. Decision and Order at 3.

<sup>3</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment, based on employer's stipulation. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4; Employer's Post-Hearing Memorandum 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 supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>4</sup> 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).

## **I. Application of the 2013 Regulations**

Employer argues that the 2013 regulations provide a presumption of legal pneumoconiosis, contrary to the 2001 regulations which "were enacted on the premise that legal pneumoconiosis" would not be presumed and that a miner had to prove all elements of his or her claim. Employer's Brief at 5. Employer also states: "The 2013 regulations violate the due process clause, constitute a 'taking' and further violate the [APA] due to evidentiary limitations, expanded definitions, limited defenses, shifted burdens of proof as well as setting heightened rebuttal standards that are contrary to law." *Id.* Employer's arguments are rejected as without merit.

The revised 2013 regulations, specifically 20 C.F.R. §718.305, properly implement the 2010 amendments to the Black Lung Act. See 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010); Director's Brief at 3. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has upheld the applicability and constitutionality of the 2010 amendments to the Act. See *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Employer's constitutional challenges to the 2013 regulations, are similar to those which have been rejected by the Board and the circuit courts in the context of amended Section 411(c)(4). *Id.*; see also *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5 (2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). Employer's remaining statements are general assertions, unsupported by argument. See *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

## **II. Invocation of the Amended Section 411(c)(4) Presumption**

Employer contends that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment for invocation of the amended Section 411(c)(4) presumption. We disagree.

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<sup>4</sup> The record indicates that claimant's coal mine employment was in Indiana. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. See *Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge noted that there are two pulmonary function tests (PFTs) of record. Decision and Order at 18. Dr. Houser examined claimant on behalf of the Department of Labor on October 8, 2007, and the PFT was non-qualifying for total disability,<sup>5</sup> both before and after the use of a bronchodilator. Director's Exhibit 8. The administrative law judge observed that the test was deemed valid by Dr. Gerblich, but invalid by Dr. Repsher. She found that, while Dr. Repsher opined that the tests were not reproducible, "the results were within the [five] percent variation required by the rules" and, thus, she credited Dr. Gerblich's validation report. Decision and Order at 18. The second PFT, dated August 13, 2008, was obtained by Dr. Repsher and was qualifying for total disability. Employer's Exhibit 7. The administrative law judge concluded that it was invalid based on Dr. Repsher's explanation that claimant exhibited poor cooperation and poor effort in performing the test. Decision and Order at 18. Because the only valid pulmonary function test was non-qualifying, the administrative law judge concluded that claimant failed to establish total disability based on the pulmonary function testing. *Id.*

Relevant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three arterial blood gas (ABG) studies. Decision and Order at 18. The July 5, 2004 ABG study produced non-qualifying values at rest and with exercise. Employer's Exhibit 11. The October 8, 2007 ABG study produced non-qualifying values at rest, and qualifying values with exercise. Director's Exhibit 8. The administrative law judge gave no weight to the exercise values, as they were deemed "unacceptable" by Dr. Gerblich, who observed that the "times of the blood draws were not properly recorded." Decision and Order at 18; *see* Director's Exhibit 8. The August 13, 2008 ABG study produced non-qualifying values at rest, and no exercise study was performed. Employer's Exhibit 7. Thus, as the valid ABG evidence was non-qualifying, the administrative law judge found that claimant failed to establish total disability under this subsection. Decision and Order at 18.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),<sup>6</sup> the administrative law judge credited the opinions of Drs. Houser and Rasmussen, that claimant has a totally disabling

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<sup>5</sup> A "qualifying" pulmonary function test or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>6</sup> The administrative law judge found that claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 17.

respiratory impairment, over contrary opinions of Drs. Repsher and Westerfield. Employer argues that the administrative law judge erred in finding the opinions of Drs. Houser and Rasmussen to be reasoned and documented, insofar as the claimant's pulmonary function tests and ABG studies are either non-qualifying or invalid. Employer also notes that the opinions of Drs. Houser and Rasmussen are "inconsistent with [c]laimant's medical records revealing world travels and annual trips to Florida, as well as the objective data in this claim . . . ." Employer's Brief at 11. Employer's arguments are rejected as without merit.

The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv). In this case, the administrative law judge found correctly that Dr. Houser opined that claimant has a moderately severe respiratory impairment, based on the valid pulmonary function tests obtained on October 8, 2007, "[c]laimant's physical performance on the treadmill study, [claimant's] exercise ABG [study] and his FEV1." Decision and Order at 18; *see* Director's Exhibits 8, 27. The administrative law judge acknowledged that Dr. Houser's opinion was "somewhat undermined" by his reliance on the invalid October 8, 2007 ABG study, and by his mistaken statement that he believed claimant's studies were qualifying.<sup>7</sup> Decision and Order at 18. However, the

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<sup>7</sup> In a March 25, 2009 letter, Dr. Houser stated:

The basis for the moderately severe impairment in [claimant's] case was based on the FEV1 1.59 liters (52% of predicted) and pO<sub>2</sub> during exercise 56.3 mmHg.

. . . [Claimant's] physical performance on the treadmill study equals 4 METS. This roughly corresponds to the ability to perform light work. [Claimant] would be physically unable to perform medium or heavy work. In [claimant's] case I believe his pulmonary function studies and ABG (with exercise) each meet the guidelines for disability as established by the Department of Labor.

Director's Exhibit 27.

administrative law judge concluded that Dr. Houser's opinion was consistent with the available evidence, and with claimant's testimony that his last coal mine employment involved some heavy labor, which was greater exertion than Dr. Houser thought claimant was capable of performing. *Id.*

In addition, the administrative law judge correctly noted that Dr. Rasmussen diagnosed a totally disabling respiratory impairment, based on his review of claimant's medical reports and treatment records, and considering claimant's work history. Decision and Order at 18. Contrary to employer's contention, the administrative law judge permissibly determined that the disability opinions of Drs. Houser and Rasmussen are reasoned and documented, and also supported by the evidence, including Dr. Houser's physical examination, and both doctors' understandings of claimant's work history. See *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 896, 22 BLR 2-409, 2-426 (7th Cir. 2002); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-280 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As employer raises no allegation of error with respect to the weight accorded the opinions of Drs. Repsher and Westerfield,<sup>8</sup> we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). See *Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. We further affirm, the administrative law judge's overall determination that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), and that claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

## **II. Rebuttal of the Amended Section 411(c)(4) Presumption**

### **A. Standard of Proof**

Employer argues that the administrative law judge applied an incorrect rebuttal standard by requiring employer to "rule out" coal dust exposure as a causative factor for claimant's disabling respiratory disease. Employer's Brief at 13. Employer also asserts

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<sup>8</sup> The administrative law judge noted that both Dr. Repsher and Dr. Westerfield opined that claimant is totally disabled, but not by a respiratory condition. The administrative law judge found, however, that the overall weight of the objective evidence supported a finding that claimant is totally disabled by a respiratory impairment, and she gave their opinions little weight. Decision and Order at 19. Although employer contends that claimant must establish that his respiratory disability is unrelated to heart disease, the administrative law judge properly addressed the cause of claimant's disabling respiratory disease in her consideration of whether employer rebutted the amended Section 411(c)(4) presumption.

that, while it has the burden of production on rebuttal, the burden of persuasion remains on claimant. Employer's arguments are without merit.

Because claimant invoked the amended Section 411(c)(4) presumption, the burden of proof shifted to employer to rebut the presumption by disproving the existence of both clinical and legal 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), as implemented by 20 C.F.R. §718.305; *Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 733, BLR (7th Cir. 2013); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); see also *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Additionally, 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." 20 C.F.R. §718.305(d)(ii); see also *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069-70 (6th Cir. 2013) (holding that there is no meaningful difference between the "play[ed] no part" standard and the "rule-out" standard); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44 (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). Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

## **B. Legal Pneumoconiosis**

In considering whether employer rebutted the presumed fact of legal pneumoconiosis, the administrative law judge weighed the opinions of Drs. Repsher and Westerfield. Decision and Order at 23-24. Dr. Repsher examined claimant and reviewed medical records. Employer's Exhibits 7, 9. He testified that claimant had a significantly disproportionate decrease in his FEV1, as compared to his FVC, which Dr. Repsher stated is a pattern normally seen in cigarette smoking-induced airways obstruction, rather than coal mine dust-induced obstruction. Employer's Exhibit 9 at 20. Dr. Repsher noted that as claimant has a five pack-year smoking history which ended in 1961, smoking was not the sole cause of his obstructive condition. Employer's Exhibit 9 at 20-21. Rather, Dr. Repsher opined that the best explanation for claimant's impairment was cardiovascular disease, and "probably . . . some underlying asthma," although he noted that asthma was not documented in claimant's records. *Id.* He further testified that he could not "rule [coal mine dust] out absolutely, but to an overwhelming probability," he did not think it was the cause of claimant's impairment. *Id.*

Dr. Westerfield also reviewed claimant's medical records. Employer's Exhibits 8, 9, 10. Dr. Westerfield diagnosed a primarily restrictive impairment, with an element of airway obstruction as well. Employer's Exhibit 10. He noted that cigarette smoking is a common cause of airway obstruction, but because of claimant's limited and remote smoking history, Dr. Westerfield did not think smoking was a substantial contributing factor in claimant's impairment. *Id.* Dr. Westerfield attributed claimant's oxygen impairment to heart disease. In addition, he testified that claimant had an exceptionally obese chest and abdomen which contributed to his restrictive disease shown on pulmonary function testing, as those conditions prevented expansion of the lungs. *Id.* Dr. Westerfield concluded that coal mine dust was not a contributing factor to claimant's impairment because claimant "last worked in coal mining over 14 years ago and he developed symptoms of lung disease only during the last several years." Employer's Exhibit 8.

The administrative law judge concluded that neither Dr. Repsher, nor Dr. Westerfield, adequately explained why claimant does not have legal pneumoconiosis. Contrary to employer's argument, the administrative law judge permissibly relied on the preamble in rejecting Dr. Repsher's explanation that it is possible to distinguish impairment caused by smoking versus coal dust exposure, based on the results of the FEV1/FVC ratio. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). The administrative law judge noted correctly that Dr. Repsher's assertion that a disproportionate reduction in the FEV1/FVC ratio is caused by cigarette smoking-induced obstruction is "contrary to the position of the Department of Labor, which has found that coal dust exposure may cause chronic obstructive pulmonary disease, with associated decrements in FEV1 and the FEV1/FVC ratio . . . ." Decision and Order at 23; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). The administrative law judge also rationally rejected Dr. Repsher's opinion that claimant's condition was caused by smoking and asthma, since claimant smoked only five years and was never treated for asthma, whereas claimant worked for forty-two years in coal mine employment. Decision and Order at 23-24.

With regard to Dr. Westerfield's opinion, the administrative law judge observed correctly that he is the only physician of record to opine that claimant has a predominantly restrictive respiratory impairment, which he attributed to heart disease. Decision and Order at 24. The administrative law judge permissibly gave little weight to Dr. Westerfield's opinion, excluding legal pneumoconiosis, as she found that it is "not consistent with the overall weight of the evidence that [claimant] has obstructive disease which affects his ability to work." *Id.*; *see Stein*, 294 F.3d at 895, 22 BLR at 2-426. The administrative law judge also acted within her discretion in finding that Dr. Westerfield failed to persuasively explain how he ruled out coal dust exposure as a causative factor for claimant's respiratory impairment. *See* 20 C.F.R. §718.305(d)(i), (ii); *Ogle*, 737 F.3d

at 1069-70; *Summers*, 272 F.3d at 483, 22 BLR at 2-281; *Clark*, 12 BLR at 1-155; Decision and Order at 24.

Because determinations regarding the weight of the evidence and the credibility of the physicians are within the sound discretion of the trier-of-fact, we affirm the administrative law judge's findings that the opinions of Drs. Repsher and Westerfield are insufficient to establish that claimant does not have a coal dust-related lung disease. *See Summers*, 272 F.3d at 483, 22 BLR at 2-281; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). Thus, we affirm the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.<sup>9</sup>

### **C. Disability Causation**

Employer contends that the administrative law judge erred in finding that it failed to rebut the presumed fact of disability causation. We disagree. The administrative law judge rejected the opinions of employer's physicians, that claimant's disability was unrelated to his coal dust exposure, as they did not diagnose legal pneumoconiosis. Decision and Order at 24-25. Contrary to employer's argument, an administrative law judge may use the determination that employer has failed to rebut the presumption of pneumoconiosis to discredit, on the issue of disability causation, the opinions of physicians who failed to diagnose pneumoconiosis. *See Ogle*, 737 F.3d at 1069-70; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Because substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by establishing that claimant's disability did not arise out of, or in connection with, his coal mine employment. *See* 30 U.S.C. §921(c)(4); *Burris*, 732 F.3d at 733.

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<sup>9</sup> In order to rebut the amended Section 411(c)(4) presumption, employer must disprove the existence of both clinical and legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Because we affirm the administrative law judge's finding that employer did not disprove the presumed fact that claimant has legal pneumoconiosis, it is not necessary that we address employer's arguments pertaining to the administrative law judge's findings regarding the existence of clinical pneumoconiosis. *Id.*

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