

BRB No. 14-0225 BLA

KENNETH L. WARFIELD )  
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 Claimant-Respondent )  
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 v. )  
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 E & L CONSTRUCTION )  
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 and )  
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 KENTUCKY EMPLOYERS MUTUAL ) DATE ISSUED: 10/31/2014  
 INSURANCE )  
 )  
 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 Award of Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Paul E. Jones, E. Shane Branham (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Award of Benefits in an Initial Claim (09-BLA-05289) of Administrative Law Judge Larry S. Merck rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Claimant filed this claim for benefits on April 10, 2008. Director's Exhibit 2. Applying amended Section 411(c)(4) of the Act, 30 U.S.C.

§921(c)(4) (2012),<sup>1</sup> the administrative law judge credited claimant with at least twenty-nine years of qualifying coal mine employment,<sup>2</sup> and found that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge found that claimant invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, and he further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination that claimant established at least twenty-nine years of qualifying coal mine employment, and, therefore, it argues that he erred in finding that claimant invoked the amended Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in his analysis of the evidence in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.<sup>3</sup>

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

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<sup>1</sup> 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, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

<sup>2</sup> The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 2 at 2, 3 at 1; Decision and Order at 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

<sup>3</sup> The administrative law judge's finding that total respiratory disability was established is affirmed, as unchallenged on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 7, 15, 17, 18; Employer's Brief at 9.

## I. THE AMENDED SECTION 411(c)(4) PRESUMPTION

### A. Qualifying Coal Mine Employment

The administrative law judge found that claimant established at least twenty-nine years of surface coal mine employment in conditions substantially similar to those known to prevail in underground mines. Decision and Order at 5-6. Employer contends that, in view of claimant's testimony that he "worked from inside a truck during the time he worked as a foreman and [emergency medical technician] (EMT)," the administrative law judge improperly credited claimant's "nonsensical testimony" that he was "exposed to more coal dust as a foreman and EMT because he had to get out of his truck to perform various tasks." Employer's Brief at 8.<sup>4</sup> Employer argues that, in crediting "this testimony," the administrative law judge failed to render specific findings "regarding the length of time that the [c]laimant spent working from his truck as opposed to working outside," which are necessary to establish that claimant was 'regularly' exposed to coal mine dust. *Id.* Employer's arguments are without merit.

To invoke the amended Section 411(c)(4) presumption, a miner must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2012). In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is required only to proffer sufficient evidence of coal dust exposure in his or her work environment. *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *see also Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 876 (3d Cir. 1986) ("The term 'substantially similar conditions' refers to conditions in which a worker inhales a similar quantity of dust from the coal mine environment as do miners."). Once a miner has provided evidence or testimony regarding the nature of his or her dust exposure in surface coal mine employment, it is then the function of the administrative law judge, "with his expertise and knowledge of the industry, to compare [the miner's] working conditions to those prevalent in underground mines." *Summers*, 272 F.3d at 480, 22 BLR at 2-276; *see Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011).

In this case, the administrative law judge reviewed claimant's testimony that his coal mine jobs included shoveling coal, equipment operator of bulldozers, big end loaders, and back-dumps, as well as working as a foreman and an EMT. Decision and Order at 5-6; *see* Hearing Tr. at 15-16, 28-29. Next, the administrative law judge considered claimant's testimony that, after a typical shift as an equipment operator, "his

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<sup>4</sup> Employer's brief is unpaginated.

clothes would be black as well as his face and hands, as a result of his exposure to coal dust.”<sup>5</sup> Decision and Order at 5-6. The administrative law judge noted claimant’s testimony that, compared to his equipment operator jobs, in his jobs as a foreman and EMT, “he was exposed to more coal dust because he had to get out of his truck to

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<sup>5</sup> With regard to operating bulldozers, claimant explained:

[I]n the wintertime you have to turn the fan blades around backwards to get the heat off the engine. That’s the only heat you had. And you not only got the heat, you got all the dust. It looked like a windstorm. And you done that ten hours a day or ten hours a night, whichever shift you worked. And then later on they put heat shields on and that covered the front of the radiator, the front of the dozer, and it comes across the hood and got back in your face. And that was wind - and you got more dust than ever.

Hearing Tr. at 15.

Q. So...when you were operating the dozer, you were actually having the dust that you were going through come back on you?

A. Every bit of it.

Q. You go in and you’re going to remover (sic) the overburden; is that right?

A. Yeah, we do that, go in and take heavy machine[s], dozers and end loaders, and the back dumps and take the rock off the top (sic) the coal, push it off with the dozers, and lift it with the bucket and the end loader will put it in the truck and haul it off, and a lot of times the road would get so dusty, you couldn’t even see the truck in front of you.

Q. And how would you look when you finished a shift?

A. I looked probably - not all the time - most of the time, around machinery, twice as bad as any deep miners, that they looked (sic).

Q. Okay, so you would have black dust on your face?

A. All over. Yeah, all you could see was my eyes.

Hearing Tr. at 15-16.

perform his various duties.” *Id.* at 6; *see* Hearing Tr. at 29.<sup>6</sup> The administrative law judge found that claimant’s “uncontradicted description of the work he performed” and his “description of his dust exposure history established that [he] was exposed to a substantial amount of coal dust during his employment in surface mining,” in conditions substantially similar to those of an underground mine. Decision and Order at 6; *see* Hearing Tr. at 27.

Assessing the credibility of a witness is committed to the administrative law judge’s discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Therefore, as employer identifies no contrary evidence, we specifically reject employer’s argument that the administrative law judge improperly credited claimant’s testimony.<sup>7</sup> *See Mabe*, 9 BLR at 1-68. Nor do we discern error in the administrative law judge’s determination that claimant’s testimony regarding the dust conditions at the surface mine was consistent with that of an underground miner, as the administrative law judge may rely upon his expertise and

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<sup>6</sup> Claimant testified, comparing the dust exposure in the (emergency medical technician) [EMT] and foreman jobs to that of the equipment operator job, as follows:

Q. ... Now, when you were an EMT and foreman, you were exposed to more dust?

A. Yes.

Q. So if it was anything, it was worse than what you just described to me?

A. It was worse then.

Hearing Tr. at 27-29.

<sup>7</sup> Claimant admitted that, “except for” ten years as an EMT and foreman, he worked operating equipment, namely, bulldozers, end loaders and back dumps. Hearing Tr. at 27. Employer does not contest claimant’s testimony regarding the conditions of dust exposure in his equipment operator jobs. Rather, employer specifically challenges the administrative law judge’s determination to credit claimant’s testimony regarding his jobs as foreman and EMT, jobs which comprised only ten years of his entire coal mine employment of at least twenty-nine years. Employer’s Brief at 8; Decision and Order at 6. Thus, the administrative law judge’s finding of comparability applicable to claimant’s nineteen years of employment as an equipment operator is uncontested, and independently established at least fifteen years of comparable coal mine employment in support of invocation of the amended Section 411(c)(4) presumption. *See* Decision and Order at 5-6, 22; Employer’s Brief at 8.

knowledge of the coal mine industry in reaching his findings. *See Summers*, 272 F.3d at 480, 22 BLR at 2-276; *Phillips*, 794 F.2d at 876; Decision and Order at 6. We, therefore, affirm the administrative law judge's determination that claimant established at least fifteen years of surface coal mine employment in dust conditions that were substantially similar to those of an underground mine.<sup>8</sup> *See Clark*, 12 BLR at 1-155; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

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

The administrative law judge explained that employer could rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) with "evidence establishing [that the claimant] does not have pneumoconiosis, or that his total disability did not arise in whole or in part out of dust exposure from coal mine employment." Decision and Order at 15. Having found that the evidence did not establish the existence of clinical pneumoconiosis, the administrative law judge considered the opinions of Drs. Dahhan, Dineen, and Rosenberg to determine whether employer disproved the existence of legal pneumoconiosis.<sup>9</sup> Decision and Order at 18, 19. Dr. Dahhan diagnosed claimant with chronic obstructive pulmonary disease, which he attributed solely to cigarette smoking. Director's Exhibit 16; Employer's Exhibit 4. The administrative law judge found, however, that Dr. Dahhan's opinion was "speculati[ve]" since Dr. Dahhan did not "explain[] how he eliminated coal dust exposure as a possible cause."<sup>10</sup> Decision and

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<sup>8</sup> Because employer does not challenge the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment, we also affirm the administrative law judge's determination that claimant invoked the amended Section 411(c)(4) presumption. *Skrack*, 6 BLR at 1-711.

<sup>9</sup> "Legal pneumoconiosis" includes 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.

For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. §718.201(a)(2), (b).

<sup>10</sup> Dr. Dahhan opined, in part, that claimant's smoking habit "is sufficient to cause significant loss in the ventilator capacity and secondary alteration in the blood gas exchange mechanisms, in particularly (sic) when it is associated with the development of

Order at 8-11, 19. The administrative law judge, therefore, found that Dr. Dahhan's opinion was insufficient to disprove the existence of legal pneumoconiosis.

Employer asserts, however, that Dr. Dahhan "provided a thorough and sound medical basis for his opinion that claimant's pulmonary impairment was unrelated to coal dust exposure." Employer's Brief at 9. First, employer contends that Dr. Dahhan relied on x-rays revealing the presence of opacities "that were not characteristic of the radiological appearance of coal dust inducted lung disease," but were consistent with abnormalities seen in heavy smokers. *Id.* Second, employer points to Dr. Dahhan's reliance on claimant's blood gas exchange mechanism impairment as "consistent with centricinar (sic) emphysema attributable to smoking rather than focal emphysema consistent with the development of coal macules from coal dust exposure." *Id.* at 10. Employer's arguments are without merit.<sup>11</sup>

To disprove the existence of legal pneumoconiosis, it is employer's burden to affirmatively show that claimant's disabling respiratory or pulmonary impairment is unrelated to coal dust exposure. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011). Whether employer has met its burden is an issue for the administrative law judge to determine, based upon an assessment of the credibility of the

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advanced emphysema with loss in the diffusion capacity and abnormalities in the oxygenation." Employer's Exhibit 4 at 3.

<sup>11</sup> Because legal pneumoconiosis encompasses a broader set of conditions than clinical pneumoconiosis, a diagnosis of legal pneumoconiosis is not dependent upon x-ray findings, *see Cornett v. Benham Coal Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *see also Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 898, 22 BLR 2-409, 426-427 (7th Cir. 2002), but involves a determination of whether coal dust exposure was a causal factor in claimant's respiratory condition. Hence, Dr. Dahhan's reliance on irregular x-ray opacities as indicative of smoking, rather than coal dust exposure, does not affirmatively rule out the presumed existence of legal pneumoconiosis, i.e., "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Additionally, although Dr. Dahhan cited research showing that smoking causes centriacinar emphysema, the research he cited did not indicate that coal dust exposure did not have the same effect. Literature cited by the Department of Labor in its rulemaking found a significant decrement in coal miners' pulmonary function in addition to that found by smoking, 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000), and that centrilobular [centriacinar] emphysema correlated with coal dust exposure. *See* 65 Fed. Reg. 79,941-42 (Dec. 20, 2000); *Stein*, 294 F.3d at 898, 22 BLR at 426-427; *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); Employer's Brief at 9-10.

evidence submitted by employer. As a reviewing body, we must defer to the administrative law judge's findings, if they are rational, supported by substantial evidence, and in accordance with law. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002). In light of the regulations' inclusion of obstructive pulmonary impairments as possible pneumoconiosis, based on scientific evidence credited by the Department of Labor, *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), the administrative law judge reasonably rejected Dr. Dahhan's opinion because he failed "to explain how he eliminated coal dust exposure as a possible cause" of claimant's totally disabling respiratory impairment. *See Morrison*, 644 F.2d at 480, 25 BLR at 2-9; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); Decision and Order at 19; Director's Exhibit 16 at 5; Employer's Exhibit 4 at 2-3. Consequently, we reject employer's assertion that the administrative law judge mischaracterized Dr. Dahhan's opinion. The administrative law judge also assigned "little weight" to Dr. Dineen's opinion diagnosing chronic obstructive airways disease due "solely" to cigarette smoking. Similarly, the administrative law judge assigned "little probative weight" to Dr. Rosenberg's opinion that claimant has chronic obstructive pulmonary disease in the form of emphysema, due "entirely" to cigarette smoking, and that he does not have legal pneumoconiosis. As employer does not challenge the administrative law judge's credibility determinations, or his conclusion that Drs. Dineen and Rosenberg failed to provide well-reasoned and well-documented opinions establishing that claimant does not suffer from legal pneumoconiosis, they are affirmed. Decision and Order at 7-8, 11-15, 19-22; *see Skrack*, 6 BLR at 1-710; Employer's Brief at 9-10. Moreover, we affirm the administrative law judge's finding that the opinions of Drs. Dahhan and Rosenberg were insufficient to rebut the amended Section 411(c)(4) presumption by establishing the absence of legal pneumoconiosis.<sup>12</sup>

Finally, employer argues that the administrative law judge "failed to offer any findings" to support his conclusion that employer did not establish rebuttal by showing that claimant's totally disabling pulmonary or respiratory impairment did not arise out of,

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<sup>12</sup> Because the burden of proof shifted to employer upon invocation of the amended Section 411(c)(4) presumption, we specifically reject employer's argument that claimant was required to "establish[] legal pneumoconiosis by a consideration of all the evidence." *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); Employer's Brief at 11-12.

or in connection with, employment in a coal mine. Employer's Brief at 10-11. Contrary to employer's contention, the administrative law judge permissibly determined that the "same reasons" for which he discredited the opinions of employer's experts on the issue of legal pneumoconiosis also undercut their opinions that claimant's total disability is unrelated to his coal mine employment. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Adams*, 886 F.2d at 826, 13 BLR at 2-63-64; *Morrison*, 644 F.3d at 478, 25 BLR at 2-9; *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 21-22. Thus, based upon our affirmance of the administrative law judge's findings on the issue of the existence of legal pneumoconiosis, we also affirm the administrative law judge's determination that the opinions of Drs. Dahhan, Dineen and Rosenberg are insufficient to establish that claimant's total disability did not arise out of, or in connection with, his coal mine employment. *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004). We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. *See* 30 U.S.C. §921(c)(4) (2012). Because we affirm the administrative law judge's finding that employer did not establish rebuttal of the amended Section 411(c)(4) presumption, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Award of Benefits in an Initial Claim is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge