



BRB No. 19-0247 BLA

DAN D. DANIEL)

Claimant-Respondent)

v.)

SIMMONS FORK MINING,)
INCORPORATED)

and)

BRICKSTREET MUTUAL INSURANCE)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 04/15/2020

DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

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

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Living Miner's Benefits (2016-BLA-05724) of Administrative Law Judge Peter B. Silvain, Jr., on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on December 24, 2014.

The administrative law judge found claimant has thirty-eight years of surface coal mine employment¹ in conditions substantially similar to those in an underground mine and is totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.² 30 U.S.C. §921(c)(4) (2012). He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer summarily objects to the application of the Section 411(c)(4) presumption, contending that Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148, which revived this provision, "violates Article II of the United States Constitution." Employer's Brief at 2. Additionally, employer argues the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers'

¹ Claimant's most recent coal mine employment occurred in West Virginia. Hearing Transcript at 11. 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).

² Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. We affirm, as unchallenged, the administrative law judge's finding that claimant invoked the presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Compensation Programs (the Director), has filed a limited response, urging the Board to decline to entertain employer's unidentified constitutional objection.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Living Miner's Benefits 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, 362 (1965).

As a threshold matter, we agree with the Director that employer fails to provide any specific argument for its constitutional objection to the Section 411(c)(4) presumption. Employer's Brief at 2. Thus, we decline to address it. *See* 20 C.F.R. §802.211(b).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis³ or that "no part of [his] 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)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.

We affirm as unchallenged the administrative law judge's finding that employer failed to disprove clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711; Decision and Order at 22. Although employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis, we will address the issue of legal pneumoconiosis because it is relevant to the second method of rebuttal. 20 C.F.R. §718.305(d)(1)(i). To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

³ "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). The definition 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(b). "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).

The administrative law judge considered Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis, but has emphysema due solely to cigarette smoking.⁴ Employer's Exhibit 3. The administrative law judge found Dr. Rosenberg's opinion unpersuasive because the doctor did not adequately explain why claimant's coal mine dust exposure did not contribute to his emphysema. Decision and Order at 22.

Employer contends the administrative law judge improperly discredited Dr. Rosenberg's opinion based on a mistaken belief that it is "not possible to 'rule out' coal mine dust as a contributing factor to a pulmonary impairment." Employer's Brief at 4. Contrary to employer's contention, the administrative law judge did not discredit Dr. Rosenberg's opinion on that basis. The administrative law judge found Dr. Rosenberg's opinion was not credible because it was not adequately explained. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313-14 (4th Cir. 2012) (an administrative law judge may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure").

Specifically, the administrative law judge noted Dr. Rosenberg's opinion that claimant's diffuse form of emphysema is a type caused solely by cigarette smoking. The administrative law judge permissibly rejected Dr. Rosenberg's opinion because the doctor did not adequately explain why claimant's coal mine dust exposure was not an additive factor, along with smoking, in causing claimant's "diffuse emphysema." *See* 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); Decision and Order at 22. Employer does not challenge this basis for discrediting Dr. Rosenberg's opinion. *Skrack*, 6 BLR at 1-711.

Because the administrative law judge permissibly discredited Dr. Rosenberg's opinion, the only opinion supportive of a finding that claimant did not have legal pneumoconiosis, we affirm his determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

⁴ The administrative law judge also considered the opinions of Drs. Rasmussen and Cohen who diagnosed legal pneumoconiosis in the form of emphysema due to cigarette smoking and coal mine dust exposure. Decision and Order at 22; Director's Exhibit 11; Claimant's Exhibit 1.

Upon finding employer did not disprove pneumoconiosis, the administrative law judge addressed whether employer established that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly found that the same reasons for which he discredited Dr. Rosenberg's opinion that claimant does not have legal pneumoconiosis also undercut his opinion that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 23-24. We therefore affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge