BRB No. 11-0482 BLA

MACK J. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA CREWS COAL COMPANY	)	
	)	DATE ISSUED: 04/19/2012
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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-05115) of Administrative Law Judge Kenneth A. Krantz rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited

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[1] Claimant filed his first claim for benefits on January 24, 2001. Director's Exhibit 1. The district director denied that claim on April 25, 2002, finding that the evidence failed to show that claimant had pneumoconiosis, that any pneumoconiosis arose out of coal mine employment, or that he was totally disabled; claimant did not pursue the claim further. *Id.* Claimant filed the current claim on March 6, 2009. Director's Exhibit 3.

claimant with at least eighteen years of underground coal mine employment and found that the new evidence established that claimant has pneumoconiosis and a totally disabling respiratory impairment, pursuant to 20 C.F.R. §§718.201(a)(2), 718.202, 718.204(b), and thus established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

Considering the claim on its merits, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, and affect claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 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 qualifying coal mine employment and that he or she has a totally disabling respiratory impairment, there will be 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, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). Applying amended Section 411(c)(4), the administrative law judge found invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, and, therefore, the administrative law judge 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 it failed to rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[2]

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,

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[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had at least eighteen years of underground coal mine employment and that the new evidence established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's findings on the merits that claimant established the existence of a totally disabling respiratory impairment and thus established invocation of the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711.

and in accordance with applicable law.[3] 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).

Employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption that claimant's disability is due to pneumoconiosis. Employer first argues that it rebutted the presumption by establishing that claimant does not have pneumoconiosis. Employer's Brief at 4-12. Pursuant to 20 C.F.R. §718.202(a), the administrative law judge considered the opinions of Drs. Forehand, Castle and Rosenberg. Dr. Forehand diagnosed legal pneumoconiosis[4] in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure. Drs. Castle and Rosenberg opined that claimant does not have pneumoconiosis, but suffers from moderate to severe obstructive airways disease, and a mild restrictive pulmonary impairment, due to smoking and bronchogenic carcinoma, respectively. Employer's Exhibits 2, 5. The administrative law judge credited Dr. Forehand's opinion and discredited the opinions of Drs. Castle and Rosenberg and found that the weight of the medical opinion evidence established the existence of legal pneumoconiosis. 20 C.F.R. §§718.202(a)(2), 718.202(a)(4); Decision and Order at 25.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Castle and Rosenberg. We disagree. Dr. Castle observed that when pneumoconiosis causes an impairment, it generally results in a "mixed, irreversible obstructive and restrictive ventilatory defect." Employer's Exhibit 2 at 10. Citing two pulmonary function studies – one that showed a significant increase in claimant's FVC value after receiving bronchodilators, and another that showed a significant increase in his FEV1 value after receiving bronchodilators – Dr. Castle concluded that claimant "demonstrates a significant degree of bronchoreversibility [that] clearly indicates that the obstructive airway problem is due to his tobacco smoking habit." *Id.* Contrary to employer's argument, the administrative law judge permissibly gave Dr. Castle's opinion less weight because Dr. Castle did not address the irreversible portions of claimant's

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[3] Claimant's coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction 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*).

[4] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

pulmonary impairment, or adequately explain why partial reversibility precludes a diagnosis of legal pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483-84 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004) (unpub.); Decision and Order at 24-25.

Nor did the administrative law judge err in discrediting Dr. Rosenberg's opinion. In concluding that claimant does not have legal pneumoconiosis, Dr. Rosenberg explained that the pattern of obstruction on claimant's pulmonary function studies is not consistent with coal mine dust exposure. Dr. Rosenberg opined that "preservation of the FEV1/FVC ratio is the 'norm' in patients with coal mine induced obstructive lung disease." Employer's Exhibit 5 at 5-6. Because claimant's FEV1 and FEV1/FVC ratio is reduced, Dr. Rosenberg concluded that claimant does not have legal pneumoconiosis, and that his disability is instead due to smoking-related COPD and lung cancer. *Id*. at 7. The administrative law judge permissibly discounted Dr. Rosenberg's opinion as inconsistent with the Department of Labor's regulations which permit a disabling respiratory impairment to be demonstrated by a low FEV1/FVC ratio.[5] 20 C.F.R. §§718.201(b), 718.204(b), (c); Decision and Order at 23-24.

The determination of whether a medical opinion is sufficiently documented and reasoned is a credibility matter within the purview of the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Castle and Rosenberg, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983), we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[6]

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[5] The definition of legal pneumoconiosis includes respiratory impairments that are significantly related to, or substantially aggravated by, coal mine dust exposure. *See* 20 C.F.R. §718.201(b). Consequently, absent further explanation, an FEV1/FVC ratio that indicates a respiratory impairment associated with smoking, does not establish that the impairment is not also significantly related to, or substantially aggravated by, coal mine dust exposure.

[6] Rather than requiring employer to disprove the existence of pneumoconiosis, the administrative law judge misplaced the burden of proof and actually found that claimant established the existence of pneumoconiosis. *See* 30 U.S.C. §921(c)(4). Because we affirm the administrative law judge's findings pursuant to 20 C.F.R §718.202(a)(4), that error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer also argues that the administrative law judge erred in finding that employer did not establish rebuttal of the Section 411(c)(4) presumption by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with, employment in a coal mine." Employer's Brief at 13-15. This argument lacks merit. The administrative law judge correctly noted that Dr. Forehand opined that claimant's respiratory disability is due, in part, to legal pneumoconiosis. In contrast, Drs. Castle and Rosenberg opined that claimant's disabling impairment is due entirely to smoking and cancer. The administrative law judge permissibly discredited the opinions of Drs. Castle and Rosenberg because they did not diagnose pneumoconiosis, contrary to the administrative law judge's finding. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Because the opinions of Drs. Castle and Rosenberg are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to rebut the presumption by showing that claimant's respiratory impairment did not arise out of, or in connection with, employment in a coal mine.

Because claimant established invocation of the amended Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge