

BRB No. 12-0416 BLA

HENRY P. CAUDILL)
)
 Claimant-Respondent)
)
 v.)
)
 ARCH ON THE NORTH FORK,) DATE ISSUED: 04/25/2013
 INCORPORATED)
)
 and)
)
 ARCH COAL, INCORPORATED)
 c/o UNDERWRITERS SAFETY & CLAIMS)
)
 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 Awarding Benefits of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell, LLP), Washington, D.C., for
employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits
(2009-BLA-05723) of Administrative Law Judge John P. Sellers, III, on a claim filed
pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (Supp. 2011) (the Act). This case involves a subsequent claim¹ filed on August 28, 2008.

The administrative law judge credited claimant with twenty-one years of coal mine employment,² at least fifteen years of which constituted underground coal mine employment. Decision and Order at 21. The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),³ and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the Section 411(c)(4) presumption.⁴ Claimant responds, urging affirmance of the award of benefits.

¹ Claimant filed two previous claims, both of which were finally denied. His most recent prior claim, filed on April 19, 1989, was denied by the district director on September 11, 1989, because claimant did not establish any element of entitlement. Director's Exhibit 2. Claimant filed his current claim on August 28, 2008. Director's Exhibit 4. The hearing on his current claim was held on May 12, 2011.

² The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 5, 9. 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).

³ 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 that a miner is totally disabled 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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

⁴ In its brief, under a heading asserting that the retroactive application of the amendment to the Act is invalid, employer "acknowledges that the Board and Courts of Appeals have upheld the retroactive application of Section 411(c)(4)," but notes its belief that "retroactive application . . . may be rejected by the Supreme Court." Employer's

The Director, Office of Workers' Compensation Programs, declined to submit a substantive response brief.⁵

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).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); see *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011). The administrative law judge found that employer did not establish rebuttal under either method.⁶ Decision and Order at 21-29.

In considering whether employer disproved the existence of legal pneumoconiosis,⁷ or proved that claimant's impairment did not arise out of coal mine

Brief at 5, 6. As employer makes no specific argument, we do not address the issue further.

⁵ Employer does not challenge the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Therefore, those findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of legal pneumoconiosis, with his discussion of whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 21-29. Employer does not challenge this aspect of the administrative law judge's decision.

⁷ 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).

employment, the administrative law judge focused on the opinion of Dr. Jarboe.⁸ Dr. Jarboe opined that claimant does not have legal pneumoconiosis, but suffers from severe chronic obstructive pulmonary disease (COPD) and emphysema that are unrelated to coal mine dust exposure, but instead are due to smoking and asthma. Director's Exhibit 21; Employer's Exhibits 2, 5, 6. The administrative law judge found that Dr. Jarboe did not provide "persuasive . . . reasons for ruling out the [c]laimant's 21 years of mostly underground coal mine employment as a significant contributing factor to" his disabling COPD. Decision and Order at 27. The administrative law judge therefore found that employer did not rebut the Section 411(c)(4) presumption. Decision and Order at 29.

Employer contends that the administrative law judge failed to provide valid reasons for finding that Dr. Jarboe's opinion did not establish rebuttal. Employer's Brief at 6-22. We disagree. As set forth below, the administrative law judge permissibly found that Dr. Jarboe's reasons for excluding coal mine dust exposure as a cause of claimant's COPD were not persuasive. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

The administrative law judge noted that Dr. Jarboe relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration, to exclude coal mine dust exposure as a cause of claimant's COPD. Decision and Order at 23; Director's Exhibit 21 at 8. The administrative law judge found, as was within his discretion, that Dr. Jarboe did not adequately explain why the irreversible portion of claimant's pulmonary impairment was unrelated to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling COPD. *See* 20 C.F.R. §718.201(a)(2); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 23-24. Further, Dr. Jarboe eliminated coal dust exposure as a source of claimant's COPD, in part, because he found a disproportionate decrease in claimant's FEV1, compared to his FVC value, a characteristic that Dr. Jarboe explained is indicative of cigarette smoke-induced lung disease, but not one caused by coal mine dust. Director's Exhibit 21 at 7-8. The administrative law judge permissibly discounted Dr. Jarboe's opinion, noting that scientific evidence endorsed by the Department of Labor recognizes that coal mine dust can cause clinically significant COPD, as shown by a reduction in "the ratio of FEV1/FVC." Decision and Order at 23, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20,

⁸ The administrative law judge also considered the opinions of Drs. Baker and Rasmussen, who diagnosed claimant with clinical pneumoconiosis, and legal pneumoconiosis, in the form of a disabling chronic obstructive pulmonary disease due to both smoking and coal mine dust exposure. Director's Exhibit 17; Claimant's Exhibits 1, 2.

2000); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012).

In addition, the administrative law judge noted that Dr. Jarboe relied, in part, on the absence of x-ray evidence of coal dust deposits in claimant's lungs to support his conclusion that only claimant's cigarette smoking, and not his coal mine dust exposure, caused his COPD. Decision and Order at 24; Employer's Exhibit 6 at 21. The administrative law judge permissibly declined to credit Dr. Jarboe's reasoning, finding it to be contrary to the Department of Labor's recognition that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; Decision and Order at 24, *citing* 65 Fed. Reg. at 79971. Additionally, the administrative law judge indicated that he was not persuaded by Dr. Jarboe's reliance on claimant's normal lung function at the time he left coal mining in 1989, as a reason for concluding that the COPD that claimant has since developed is unrelated to coal mine dust exposure. Decision and Order at 26-27; Employer's Exhibits 2 at 27; 5 at 5. That credibility determination is both unchallenged by employer, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), and it is reasonable in light of the regulation recognizing that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488, 25 BLR 2-135, 2-151 (6th Cir. 2012).

We conclude that, contrary to employer's contention, the administrative law judge provided valid reasons for discounting Dr. Jarboe's opinion that claimant's disabling COPD is unrelated to his years of coal mine dust exposure.⁹ Substantial evidence supports the administrative law judge's findings that employer did not disprove the existence of pneumoconiosis, or establish that claimant's impairment did not arise out of, or in connection with, coal mine employment. Therefore, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

⁹ Thus, we need not address employer's other arguments regarding the weight that the administrative law judge accorded Dr. Jarboe's opinion, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983), or its argument that the administrative law judge did not accurately determine the length of claimant's smoking history.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge