

BRB No. 13-0360 BLA

ARTHUR M. LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROBINSON PHILLIPS COAL COMPANY	)	
	)	DATE ISSUED: 04/22/2014
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 of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-5071) of Administrative Law Judge Richard A. Morgan awarding benefits 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). This case involves a claim filed on September 28, 2010.

Considering amended Section 411(c)(4), 30 U.S.C. §921(c)(4),<sup>1</sup> the administrative

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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 that a miner is totally disabled due to pneumoconiosis in cases

law judge found that claimant established that he had over fifteen years of coal mine employment in surface mining,<sup>2</sup> but did not establish that any of his coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge, therefore, found that claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

The administrative law judge also considered whether claimant could establish entitlement to benefits, without the assistance of the Section 411(c)(4) presumption. The administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).<sup>3</sup> The administrative law judge also found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.<sup>4</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,

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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 coal mine employment was in West Virginia. Hearing Transcript at 13. 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).

<sup>3</sup> "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).

<sup>4</sup> Because employer does not challenge the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 (1965).

In order to establish entitlement to benefits in a miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

### **Legal Pneumoconiosis**

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In evaluating whether claimant established the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Ammisetty, Splan, Gallai, Rosenberg, and Basheda. Drs. Ammisetty, Splan, and Gallai diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis, each of which they attributed to both coal mine dust exposure and cigarette smoking. Director’s Exhibit 12; Claimant’s Exhibits 5, 8. Conversely, Drs. Rosenberg and Basheda opined that claimant does not suffer from legal pneumoconiosis. Although Drs. Rosenberg and Basheda diagnosed COPD, they opined that the disease was due to cigarette smoking. Employer’s Exhibits 5, 9-11. Drs. Rosenberg and Basheda also found an asthmatic component to claimant’s COPD. Employer’s Exhibits 10 at 17, 11 at 38.

After noting certain deficiencies with the opinions of Drs. Ammisetty, Splan, and Gallai,<sup>5</sup> the administrative law judge considered the opinions provided by Drs. Rosenberg and Basheda. The administrative law judge accorded less weight to Dr. Rosenberg’s opinion because he found that the doctor based his opinion on assumptions contrary to the regulations. Decision and Order at 24. The administrative law judge further

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<sup>5</sup> The administrative law judge noted that Drs. Ammisetty and Splan “more or less summarily concluded [that] the COPD and chronic bronchitis resulted from coal mine exposure.” Decision and Order at 22. The administrative law judge next noted that, while Drs. Ammisetty and Gallai listed a history of allergies and asthma, neither physician addressed whether these conditions contributed to claimant’s obstructive pulmonary impairment. *Id.* at 22-23. Because claimant denied a history of allergies to Dr. Splan, the administrative law judge noted that Dr. Splan was unaware of this potential causative factor. *Id.* at 23. The administrative law judge also noted that the “somewhat conclusory opinions” offered by Drs. Ammisetty, Splan, and Gallai were based solely upon their own limited testing and examinations. *Id.* at 23.

discounted Dr. Rosenberg's opinion because the physician failed to adequately explain how he eliminated claimant's over fifteen years of coal mine dust exposure as a contributor to claimant's COPD. *Id.* The administrative law judge accorded less weight to Dr. Basheda's opinion because it was based, in part, upon his view that he would expect to see evidence of fibrosis if claimant's coal mine dust exposure caused an impairment. *Id.* at 25. The administrative law judge also found that Dr. Basheda's opinion, regarding the cause of claimant's pulmonary impairment, was entitled to less weight because it was inconsistent with the recognition that pneumoconiosis is a latent and progressive disease. *Id.* The administrative law judge concluded that:

Although the opinions of Drs. Basheda and Rosenberg are certainly much more comprehensive and considered than those of Drs. Ammisetty, Splan, and Gallai, both have the defects noted. The thoroughness of their opinions and Dr. Rosenberg's better credentials are not sufficient to overcome those defects. While the opinions of Drs. Ammisetty, Splan, and Gallai are fairly simplistic and somewhat conclusory in certain aspects, they are sufficient to establish that [claimant's] sixteen-some years of coal dust exposure significantly contributed to or aggravated his COPD and chronic bronchitis.

Decision and Order at 26. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis. *Id.*

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Rosenberg and Basheda. We disagree. Dr. Rosenberg eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1, compared to his FVC, a characteristic that he opined was uncharacteristic of a coal mine dust-induced lung disease.<sup>6</sup> The administrative law judge permissibly accorded less weight to Dr. Rosenberg's opinion because he found that this view was contrary to the regulations. Decision and Order 24; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) ("coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio."); *see J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also Harman Mining Co. v.*

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<sup>6</sup> Dr. Rosenberg opined that claimant's coal mine dust exposure was not the cause of his pulmonary impairment because claimant's pulmonary function studies indicated a reduced FEV1/FVC ratio, and not a preserved FEV1/FVC ratio. Employer's Exhibits 5, 10 at 12. Although Dr. Rosenberg noted that he agreed with the Department of Labor that "COPD may be detected by a decrease in the FEV1 and FEV1/FVC ratio, this does not generally apply to patients with legal [coal workers' pneumoconiosis]." *Id.*

*Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). The administrative law judge also acted within his discretion in finding that Dr. Basheda's opinion was entitled to less weight, based upon the doctor's view that he would expect to see evidence of fibrosis if claimant's coal mine dust exposure caused an obstructive impairment. Employer's Exhibit 9 at 26. The administrative law judge correctly noted that, although a fibrotic reaction of lung tissue caused by coal dust exposure is generally associated with the existence of clinical pneumoconiosis, evidence of fibrosis is not required for a finding of legal pneumoconiosis under 20 C.F.R. §718.201(a)(2).<sup>7</sup> See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000).

However, we agree with employer that the administrative law judge did not adequately address whether the opinions of Drs. Ammisetty, Splan, and Gallai are sufficiently reasoned. The administrative law judge never addressed the bases for their respective opinions that claimant's COPD and chronic bronchitis are attributable in part to his coal dust exposure. Consequently, the administrative law judge's analysis of the medical opinion evidence does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration.

In light of our decision to vacate the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate his finding that the evidence established that the miner's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

### **The Section 411(c)(4) Presumption**

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge found that the evidence established the existence of a totally disabling respiratory impairment. Decision and Order at 32. However, the administrative law judge found that claimant "failed to establish that [the] conditions of [his] employment in

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<sup>7</sup> Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Rosenberg and Basheda, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

a surface coal mine were substantially similar to conditions in an underground mine.” *Id.* The administrative law judge, therefore, found that claimant did not invoke the Section 411(c)(4) presumption. *Id.*

Subsequent to the issuance of the administrative law judge’s Decision and Order, the Department of Labor promulgated regulations implementing amended Section 411(c)(4). Those regulations clarified that “[t]he conditions in a mine other than an underground mine will be considered ‘substantially similar’ to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.”<sup>8</sup> 78 Fed. Reg. at 59,114 (to be codified at 20 C.F.R. §718.305(b)(2)); *see also Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512-13 (7th Cir. 1988). In light of the newly promulgated regulations clarifying the proper standard, we vacate the administrative law judge’s finding that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. On remand, the administrative law judge is instructed to address whether claimant’s testimony as to his surface working conditions<sup>9</sup> is sufficient under the newly promulgated regulations to satisfy the “substantially similar” requirement of Section 411(c)(4). 20 C.F.R. §718.305(b)(2).

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<sup>8</sup> The comments accompanying the Department of Labor’s regulations further clarify claimant’s burden in establishing substantial similarity:

[T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner’s duties regularly exposed him to coal mine dust, and thus that the miner’s work conditions approximated those at an underground mine. The term “regularly” has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant’s burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner’s non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder’s satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

<sup>9</sup> Claimant testified that his surface coal mine work was “very dusty.” Hearing Transcript at 17. Claimant described his coal dust exposure as “probably worse” than that of an underground coal miner, noting that you could only see his “eyeballs and teeth” at the end of the day. *Id.* at 17. Claimant testified that he was exposed to coal dust “all of the time.” *Id.* at 19.

Should the administrative law judge, on remand, credit claimant with fifteen years of qualifying coal mine employment, claimant would be entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. If the administrative law judge finds that claimant is entitled to invocation of the Section 411(c)(4) presumption, the Department's regulations provide that the burden of proof shifts to employer to establish rebuttal by establishing both that claimant does not have legal and clinical pneumoconiosis, or by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2).

However, if the administrative law judge, on remand, determines that claimant has not established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, he must determine whether claimant can otherwise establish entitlement to benefits under 20 C.F.R. Part 718. The administrative law judge must reconsider whether the evidence establishes legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and whether the evidence establishes that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge