BRB No. 11-0783 BLA

MARSHALL PEACE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/30/2012
	)	
ANDALEX RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN RESOURCES, INCORPORATED	)	
	)	
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.

Timothy J. Walker and Adam T. Adkins (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (09-BLA-5573) of Administrative Law Judge John P. Sellers, III, rendered on a 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). This case involves a subsequent claim filed on July 30, 2008.[1] Director's Exhibit 4.

The administrative law judge credited claimant with nineteen years of coal mine employment,[2] pursuant to the parties' stipulation, and noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this 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 underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, 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)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish 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).

Applying amended Section 411(c)(4), the administrative law judge found that claimant worked in underground coal mine employment for approximately nine months, and worked in strip mines for the remaining eighteen years and three months of his mining career. The administrative law judge determined that claimant's surface coal mine employment took place in dusty conditions that were substantially similar to those in an underground mine. Additionally, the administrative law judge found that the new medical evidence 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

[1] Claimant filed two prior claims, both of which were finally denied. Director's Exhibits 1, 2. His most recent prior claim, filed on May 29, 2001, was denied on July 28, 2005, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 2.

[2] Claimant's coal mine employment was in Kentucky and Tennessee. Director's Exhibit 5; Hearing Transcript at 16-17. Accordingly, this case arises within the jurisdiction 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).

judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in the 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 contends that the administrative law judge erred in finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Employer further asserts that the administrative law judge erred in finding that claimant's employment in strip mines was substantially similar to underground coal mine employment. Additionally, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption.[3] Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge applied the proper standard in finding a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d), that he properly found claimant's surface mining work to be qualifying coal mine employment for purposes of the Section 411(c)(4) presumption, and that he applied the correct standard in addressing whether employer rebutted the presumption.[4]

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

Section 725.309(d)

To establish entitlement to benefits under the Act, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203,

[3] Employer's additional argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

[4] Employer does not challenge the administrative law judge's findings of nineteen years of coal mine employment, that the new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and that employer did not meet its rebuttal burden to disprove the existence of clinical pneumoconiosis. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's last claim was denied because he did not establish the existence of pneumoconiosis. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Employer contends that the administrative law judge erred in finding that claimant established a change in the applicable condition of entitlement, because he failed to compare the new medical evidence with the evidence submitted in the prior claims to determine whether the new evidence differs qualitatively. Employer's Brief at 13-14. The United States Court of Appeals for the Sixth Circuit has held that, under the version of 20 C.F.R. §725.309(d) applicable to claims filed after January 19, 2001, such as this one, no such comparison is required to establish a change in an applicable condition of entitlement:

> We construe the term "change" to mean disproof of the continuing validity of the original denial . . . rather than the actual difference between the bodies of evidence presented at different times. Under this definition, the [administrative law judge] need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present.

Cumberland River Coal Co. v. Banks, F.3d , 2012 WL 3194224 at *6 (6th Cir. 2012)(internal quotation marks and citations omitted). Employer's contention to the contrary is, therefore, rejected.

Employer argues further that the administrative law judge "incorrectly turned to the rebuttable presumption under [Section 411(c)(4)] to begin the analysis" of whether claimant demonstrated a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d). Employer's Brief at 13. Contrary to employer's argument, because claimant is presumed to be totally disabled due to pneumoconiosis under Section 411(c)(4), if he can invoke the presumption, he will have satisfied his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *See White*, 23 BLR at 1-3. Therefore, we reject employer's argument that the administrative law judge erred in considering whether claimant could establish a change

in the applicable condition of entitlement under 20 C.F.R. §725.309(d). Accordingly, we turn to the administrative law judge's analysis of invocation under Section 411(c)(4).

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

Employer challenges the administrative law judge's finding that claimant worked for at least fifteen years in surface mining in dust conditions substantially similar to those in an underground mine. To establish that his or her work conditions were substantially similar to those in an underground mine, a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011).

In this case, the administrative law judge analyzed claimant's testimony regarding his working conditions at strip mines operated by employer, and by his two previous employers, Apollo Fuels and Medlin Coal. Decision and Order at 14-15. The administrative law judge found that claimant's testimony established that he was continuously exposed to heavy volumes of coal dust when he worked operating bulldozers and loaders in the strip mines. *Id.* at 16. The administrative law judge also considered the testimony of Dr. Dahhan, submitted by employer, that surface coal mine employment as a bulldozer or loader operator involves less dust exposure than is encountered in either underground mining, or in the more dusty surface job of a driller. Decision and Order at 15; Employer's Exhibit 3 at 7-8. The administrative law judge, however, found no evidence in the record that Dr. Dahhan was qualified as an expert in the environmental conditions of coal mining, or that his opinion was based on a consideration of the particular conditions of claimant's coal mine employment. Decision and Order at 15.

Based on his consideration of the evidence, the administrative law judge found that claimant's testimony established that his strip mine work took place in dusty conditions comparable to those in an underground mine:

> It is clear from the [c]laimant's testimony that he was continually exposed to heavy volumes of dust, or what he described as "a fog of dust," which arose around the heavy equipment he operated, and that the cab of whatever equipment he was operating did not provide any significant protection from the dust. As he described it, the cab often had "inches" of dust inside, and the result was that he was gritty, dusty, and black at the end of the work day. This testimony is consistent with the typical testimony of underground

> coal miners, who likewise complain of breathing dusty air and emerging from the mines at the end of the day covered in a thick layer of dust that is difficult to remove from skin and clothes. Based on this evidence, I find that the [c]laimant has met his burden of establishing that the work he performed above ground as an equipment operator was substantially similar in terms of dust exposure to the work performed by underground coal miners.

Decision and Order at 16.

Employer notes Dr. Dahhan's testimony, described above, and argues that the administrative law judge "erred in finding that claimant had met his burden of proof on this issue . . . ." Employer's Brief at 15-16. Employer, however, sets forth no specific legal or factual error made by the administrative law judge in discounting Dr. Dahhan's testimony that surface mining as a bulldozer or loader operator involves less dust exposure than does underground coal mining. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The administrative law judge's credibility determination is therefore affirmed. Employer makes no other argument on the issue of claimant's coal mine employment. Because it is based upon substantial evidence, the administrative law judge's finding, that claimant worked in strip mines, in dust conditions substantially similar to those in an underground mine, is affirmed. *See Leachman*, 855 F.2d at 512.

In light of our affirmance of the administrative law judge's findings that claimant worked for at least fifteen years in qualifying coal mine employment, and that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Therefore, we also affirm the administrative law judge's determination that claimant demonstrated a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *See White*, 23 BLR at 1-3.

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

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that 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 either method of rebuttal.[5] Decision and Order at 16-25.

In determining whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Baker, Broudy, and Dahhan. Dr. Baker opined that claimant has legal pneumoconiosis,[6] in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, and that claimant's disabling respiratory impairment is due to both coal mine dust exposure and smoking. Director's Exhibit 15 at 6, 10. In contrast, Drs. Broudy and Dahhan opined that claimant does not have legal pneumoconiosis, but suffers from disabling COPD that is due solely to smoking. Director's Exhibit 18 at 4; Employer's Exhibit 2 at 2-3; Employer's Exhibit 3 at 15, 19, 21; Employer's Exhibit 4 at 6-7, 9-10. The administrative law judge found that the opinions of employer's physicians, Drs. Broudy and Dahhan, were not sufficiently persuasive to establish either method of rebuttal. Decision and Order at 17-22, 24.

Employer contends that the administrative law judge applied an incorrect rebuttal standard. Employer's Brief at 16, 20-21. Employer argues further that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Broudy and Dahhan did not establish rebuttal. Employer's Brief at 16-20. Moreover, employer argues that the administrative law judge did not adequately consider that Dr. Baker relied on an inaccurate smoking history. Employer's Brief at 19.

Initially, we reject employer's contention that the administrative law judge applied an incorrect rebuttal standard. Contrary to employer's argument, the administrative law judge correctly stated that employer bore the burden to establish that claimant does not have pneumoconiosis or that his impairment did not arise out of, or in connection with, coal mine employment. As the Director notes, the Sixth Circuit has held that "rebuttal [of the Section 411(c)(4) presumption] requires an affirmative showing . . . that the claimant does not suffer from pneumoconiosis, or that the disease is not related to coal mine work," and that an employer bears the burden to "affirmatively prove[] the absence

[5] 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 pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 16-25. Employer does not challenge this aspect of the administrative law judge's decision.

[6] "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).

of pneumoconiosis. . . ."[7] *Morrison*, 644 F.3d at 480 and n.5, 25 BLR at 2-9, 2-12 n.5. Therefore, we reject employer's contention that the administrative law judge erred when he found that employer's physicians did not provide persuasive opinions ruling out coal mine dust exposure as a significant factor in claimant's disabling COPD. *See Morrison*, 644 F.3d at 480 and n.5, 25 BLR at 2-9, 2-12 n.5; Decision and Order at 18-22.

Further, contrary to employer's assertion, the administrative law judge provided valid reasons for discounting the opinions of Drs. Broudy and Dahhan, attributing claimant's COPD to smoking. The administrative law judge found that both Drs. Broudy and Dahhan relied, in part, on their view that coal mine dust exposure causes a degree of obstructive impairment that is clinically insignificant in miners who smoke. The administrative law judge acted within his discretion in discounting this aspect of their reasoning, as inconsistent with the medical science accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. 20 C.F.R. §718.201(a)(2); *see Banks*, 2012 WL 3194224 at *7-8*; Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012)*; Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Decision and Order at 19, 20-21. Additionally, the administrative law judge permissibly discounted the reasoning of Drs. Broudy and Dahhan, that because claimant stopped working in the mines in 1992, it was unlikely that his COPD was related to coal mine dust exposure, because that reasoning was inconsistent with the Department of Labor's recognition that pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Banks*, 2012 WL 3194224 at *8. Finally, the administrative law judge permissibly found that Dr. Dahhan did not adequately explain why claimant's response to bronchodilators eliminated coal mine dust exposure as a cause of claimant's COPD. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

In sum, substantial evidence supports the administrative law judge's finding that, "standing alone," the opinions of Drs. Broudy and Dahhan did not meet employer's burden to disprove the existence of pneumoconiosis, or to establish that claimant's impairment did not arise out of, or in connection with, coal mine employment.[8] Decision

[7] The Director argues that therefore, "an employer seeking to rebut the presumption must sever any connection between the miner's disabling lung disease and his coal-mine employment." Director's Brief at 7.

[8] Thus, we need not address employer's allegation of error in the administrative law judge's determination of the weight to be accorded Dr. Baker's medical opinion.

and Order at 24. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and we affirm the award of benefits. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge