BRB No. 12-0624 BLA

TONEY L. MAHON	)	
	)	
Claimant-Respondent	)	
v.	)	
	)	
PEN COAL CORPORATION	)	DATE ISSUED: 08/27/2013
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	
	)	
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 on Modification - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith, Parkersburg, West Virginia, for claimant.

Kevin T. Gillen (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

Anne Marie Scarpino (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification - Awarding Benefits (2011-BLA-5477) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a subsequent claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] The administrative law judge found that claimant established over fifteen years of underground coal mine employment,[2] and agreed with Administrative Law Judge Adele Higgins Odegard's earlier finding that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), as supported by the evidence submitted on modification. Consequently, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge further found that, although employer established that claimant does not have clinical pneumoconiosis, employer failed to establish rebuttal of the amended Section

[1] Claimant filed his first application for benefits on August 11, 2000. Director's Exhibit 1. The district director denied benefits on February 7, 2001, as claimant did not establish any of the elements of entitlement. *Id*. Claimant filed a second application for benefits on July 12, 2004. *Id*. In that claim, although claimant established the existence of pneumoconiosis, he did not prove that he was totally disabled due to pneumoconiosis; accordingly, the district director denied benefits on April 1, 2005. *Id*. Claimant took no further action until filing the present subsequent claim on July 3, 2006. Director's Exhibit 4. On November 18, 2008, Administrative Law Judge Adele Odegard denied benefits on this subsequent claim, based on her finding that, although claimant established that he suffers from a totally disabling pulmonary impairment, thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), he failed to demonstrate that he suffers from pneumoconiosis or that his disability is due to pneumoconiosis. The Board affirmed that denial on December 16, 2009. *See Mahon v. Pen Coal Corp.*, BRB No. 09-0229 BLA (Dec. 16, 2009)(unpub.). Claimant filed a timely request for modification of the denial on February 17, 2010.

[2] The administrative law judge accepted the parties' stipulation to 16.3 years of coal mine employment, all of which was performed underground. Decision and Order at 2, 6.

[3] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

411(c)(4) presumption with affirmative proof that claimant does not have legal pneumoconiosis,[4] or that his disabling respiratory impairment is not due to pneumoconiosis. Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310, and awarded benefits.

On appeal, employer contends that the provisions of amended Section 411(c)(4) do not apply to this claim, brought against a responsible operator. Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, arguing that he applied the wrong standard on rebuttal and improperly utilized the preamble to the revised regulations in evaluating the medical opinions of record, contrary to law and 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, maintains that amended Section 411(c)(4) is applicable in claims filed against coal mine operators, and that the administrative law judge applied a correct legal standard on rebuttal.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, F.3d , 2013 WL 3929081 (4th Cir. 2013)(Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision. We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to this claim. As employer has not challenged the administrative law judge's findings that the evidence

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[4] Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "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).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Response at 2; Director's Exhibit 5 at 1; *see also* Decision and Order at 11 n.16.

establishes more than fifteen years of underground coal mine employment and total respiratory disability pursuant to Section 718.204(b)(2), we affirm his finding that claimant established invocation of the rebuttable presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning to the merits, employer challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4). Employer contends that the administrative law judge applied the wrong standard on rebuttal, and asserts that the opinions of Drs. Fino, Zaldivar and Repsher are sufficient to establish rebuttal under the proper standard. Employer further maintains that the administrative law judge's reliance on the preamble to the revised regulations in discounting the medical opinions of Drs. Fino, Zaldivar, and Repsher is contrary to law. Employer's Brief at 7-16.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. At the outset, we reject employer's argument that the administrative law judge erred in utilizing the preamble to the revised regulations in evaluating the medical opinions of record. To the contrary, the preamble sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact relevant to the elements of entitlement that claimant must establish in order to secure an award of benefits. Therefore, an administrative law judge may evaluate expert opinions in conjunction with DOL's discussion of sound medical science in the preamble, and consult the preamble as an authoritative statement of medical principles accepted by DOL. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *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). Hence, we agree with the Director that the administrative law judge had the discretion to consider the preamble to the revised regulations in assessing the credibility of the medical experts in this case. Moreover, contrary to employer's assertions, the administrative law judge did not treat the preamble as medical evidence, substitute his own opinion for that of the medical experts, or improperly utilize the scientific underpinnings of the preamble in place of specific findings in this case, in violation of the APA. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013); *Looney*, 678 F.3d at 305, 25 BLR at 2-115; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Obush*, 24 BLR at 1-125-26.

We also reject employer's argument that the administrative law judge misinterpreted the scientific findings in the preamble in discounting the medical opinions

of Drs. Fino,[6] Zaldivar[7] and Repsher.[8] In finding that these opinions were poorly reasoned and insufficient to establish rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge determined that Dr. Fino based his opinion, in part, on the premise that the effects of smoking and coal dust exposure can be distinguished, and that scientific studies to the contrary are flawed.[9] *See* Employer's Exhibit 3 at 12-14; Decision and Order at 10. The administrative law judge rationally found that the scientific studies supporting DOL's view, that these agents can cause obstructive impairments through similar mechanisms and that their effects can be additive, contradict Dr. Fino's assertion that he is able to distinguish between the effects of smoking and coal dust exposure. Decision and Order at 4-5, 9-10; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26. Additionally, Dr. Fino opined that medical literature recognizes a correlation between the severity of emphysema and the amount of coal dust exposure/retention in the lungs.[10] Employer's Exhibit 3 at 15. The administrative law judge reasonably inferred

[6] Dr. Fino attributed claimant's disabling obstructive impairment to severe emphysema caused by cigarette smoking, and opined that claimant does not suffer from clinical or legal pneumoconiosis. Employer's Exhibits 3, 7.

[7] Dr. Zaldivar diagnosed asthma, finding that claimant does not have clinical or legal pneumoconiosis, and that his disabling impairment is unrelated to coal dust exposure. Director's Exhibit 40.

[8] Dr. Repsher opined that claimant suffers from a number of serious or potentially serious diseases and conditions "of the general population," none of which "can be fairly attributed" to coal dust exposure. He opined that claimant does not have clinical or legal pneumoconiosis, and stated that coal dust exposure has not caused or contributed to claimant's severe chronic obstructive pulmonary disease (COPD) due to smoking; his disabling impairment is "overwhelmingly most likely due to his cigarette smoking." Director's Exhibit 40.

[9] Dr. Fino stated: "The medical literature does allow the determination of whether or not coal mine dust is a significant contributing factor in the patient's COPD. It does allow the distinction between smoking-related COPD and coal mine dust-related COPD." He also stated: "[T]here is medical literature to support the way [] a physician can go about trying to determine whether it's smoking, coal dust or both. And it all gets down to what the literature says, is that the amount of emphysema that you have due to coal mine dust is related to the amount of coal mine dust inhaled into the lungs…" Employer's Exhibits 3 at 11, 13, 7 at 11, 16.

[10] Dr. Fino relied on Dr. Leigh's "very excellent" medical article, which "allows you to correlate the chest x-ray changes with the amount of emphysema due to coal dust and the pulmonary function abnormalities," and "provides a way to quantitate the amount

that Dr. Fino's rationale for ruling out coal dust exposure as a factor in claimant's disabling emphysema was predicated on his view that the presence of legal pneumoconiosis is tied to the degree of clinical pneumoconiosis that is present. Decision and Order at 10. Thus, the administrative law judge permissibly found that Dr. Fino's opinion was insufficiently reasoned and entitled to little weight, as contrary to the preamble and the plain meaning of the regulations. *Id.* at 9-11; *see* 65 Fed Reg. 79,939 (Dec. 20, 2000)(noting that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]"); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

Next, the administrative law judge agreed with Judge Odegard's prior determination that the opinions of Drs. Zaldivar and Repsher were not well-reasoned. Dr. Zaldivar indicated that claimant did not have legal pneumoconiosis because his pattern of impairment showed "inflammatory problems with the lungs, not destructive problems," and opined that such a pattern typically resulted from an asthmatic condition.[11] Decision and Order at 12; Director's Exhibit 40. Similarly, the administrative law judge considered Dr. Repsher's finding that claimant's disabling obstructive impairment had a "significant asthmatic component."[12] Decision and Order at 12; Director's Exhibit 40.

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of emphysema due to coal mine dust." Thus, because "coal dust retained in the lungs was a significant predictor of emphysema severity," Dr. Fino explained that: "[i]n this case, where the x-ray, in my opinion is negative, there are ways to determine whether that's enough coal dust to contribute to this man's disability." Employer's Exhibit 7 at 12, 13-16.

[11] Dr. Zaldivar stated that coal workers' pneumoconiosis is a destructive process rather than an inflammatory process, and explained that claimant's "type of abnormality is typically the result of an asthmatic problem…so we are dealing with an asthmatic condition, inflammatory condition, reversible condition." He opined that claimant's condition is not due to dust retention, as there are no x-ray findings of pneumoconiosis; the ventilatory studies produced variable results; and the blood gases remained normal. Dr. Zaldivar stated that asthma is unrelated to coal dust exposure, but is "a disease of the population at large, particularly of smokers." Dr. Zaldivar concluded that claimant does not have clinical or legal pneumoconiosis, and that his disabling impairment is unrelated to coal dust exposure. Director's Exhibit 40.

[12] Dr. Repsher stated that claimant "has no evidence of medical coal workers' pneumoconiosis and certainly asthma and/or psychosomatic upper airways disease are not consequences of work in the coal mine with exposure to coal mine dust. … I can say pretty confidently, that he does not have a problem related to the inhalation of coal mine dust, but I can't say for sure at this point exactly what his problem is." Dr. Repsher also

Noting that asthma may be encompassed within the definition of legal pneumoconiosis, as recognized in the preamble, the administrative law judge rationally found that the opinions of Drs. Zaldivar and Repsher were poorly reasoned, as the physicians failed to adequately explain why the miner's asthma, or the asthmatic component of his impairment, could not be related to his coal dust exposure. Decision and Order at 11-12; *see* 65 Fed. Reg. 79,920, 79,939, 79,944 (Dec. 20, 2000); *Obush*, 24 BLR at 1-125-26; *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Further, in light of Dr. Fino's finding that "the overwhelming majority of [claimant's] lung disease is irreversible," and that he remained "significantly impaired" post-bronchodilation, the administrative law judge reasonably questioned the failure of Drs. Zaldivar and Repsher[13] to address the possibility that claimant "could also suffer from an irreversible obstructive impairment that does arise from his coal dust exposure." *Id*. at 12. This was rational, as an opinion that fails to adequately explain why partial improvement, post-bronchodilation, indicates that a miner's impairment is solely caused by cigarette smoking, or is necessarily unrelated to coal dust exposure, may be assigned less probative weight. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Moreover, the administrative law judge noted that Dr. Repsher relied on a negative x-ray to conclude that claimant's impairment was not due to coal dust exposure, a rationale that was rejected as contrary to the preamble

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stated that "on the average the effect of coal mine dust on lung function is negligible, when compared with the effect of cigarette smoking." Director's Exhibit 40.

[13] In finding that Dr. Repsher's opinion did not support rebuttal at amended Section 411(c)(4), the administrative law judge also considered the physician's statement that, in the absence of complicated pneumoconiosis, legal pneumoconiosis does not progress as quickly as claimant's impairment progressed, as shown here by the reduction in claimant's breathing capacity. Dr. Repsher indicated that, statistically, most miners "will have a return to their normal pre-exposure pulmonary function within 6 to 12 months following cessation of exposure….[t]herefore, in this individual coal miner, to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma, but not the result of the inhalation of coal mine dust." Director's Exhibit 40. Dr. Repsher's remarks reflect a personal view of pneumoconiosis at odds with the position of the Department of Labor, expressed in 20 C.F.R. §718.201(c), that pneumoconiosis may be both latent and progressive in nature. 20 C.F.R. §718.201(c); *see Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *see also* 65 Fed. Reg. at 79,937-79,945, 79,968-79,977; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Decision and Order on Reconsideration en banc). Thus, the administrative law judge appropriately considered Dr. Repsher's reasoning to be flawed. Decision and Order at 12.

and regulations. Decision and Order at 10, 12; Director's Exhibit 40; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000). Based on the foregoing, the administrative law judge found that the opinions of Drs. Zaldivar and Repsher were entitled to little weight.

The evaluation of medical evidence is properly for the finder-of-fact. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). As substantial evidence supports the administrative law judge's finding that the medical opinions supportive of employer's burden on rebuttal are entitled to little weight, we affirm his finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4). 30 U.S.C. §921(c)(4). Consequently, we affirm the administrative law judge's conclusion that modification is appropriate pursuant to Section 725.310, and that claimant is entitled to benefits.

Accordingly, the administrative law judge's Decision and Order on Modification - 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