BRB No. 12-0648 BLA

SYLUS BURKHART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRIPLE C COAL, INCORPORATED	)	
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	DATE ISSUED: 08/29/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer/carrier.

Richard A. Seid (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.

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5458) of Administrative Law Judge Stephen M. Reilly awarding benefits 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 claim filed on December 19, 2008.

Because the administrative law judge credited claimant with over fifteen years of qualifying coal mine employment,[1] and found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.[3]

On appeal, employer contends, *inter alia*, that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that the administrative law judge did not err in relying on the preamble as a guide to assess the credibility of the medical evidence.[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

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[1] The record indicates that claimant's coal mine employment was in Kentucky. Hearing Transcript at 13. 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).

[2] 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).

[3] Because the administrative law judge found that the evidence also established that claimant was totally disabled due to pneumoconiosis, 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c), he found that claimant was also entitled to benefits under 20 C.F.R. Part 718.

[4] Because employer does not challenge the administrative law judge's findings of over fifteen years of qualifying coal mine employment, that the evidence established total disability, and that claimant invoked the Section 411(c)(4) presumption, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. §932(a); *O'Keeffe 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 at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by establishing 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); Decision and Order at 16-17. The administrative law judge found that employer failed to establish rebuttal by either method.

With respect to whether employer disproved the existence of pneumoconiosis, the administrative law judge found that the x-ray and medical opinion evidence affirmatively established the existence of clinical pneumoconiosis,[5] a finding that employer does not challenge on appeal. Decision and Order at 11-12; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011).

With respect to whether employer rebutted the Section 411(c)(4) presumption by establishing 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), the administrative law judge considered the opinions of Drs. Rosenberg and Castle. Dr. Rosenberg opined that it was "possible that [claimant] has a component of obstruction related to his past coal mine employment." Employer's Exhibit 3. Dr. Castle opined that the physiologic changes that he observed are "more likely due to tobacco smoking induced airway obstruction than coal workers' pneumoconiosis." Employer's Exhibit 5. Dr. Castle, therefore, opined that claimant "is likely disabled as a result of tobacco smoke induced airway obstruction." *Id.*

The administrative law judge found that Dr. Rosenberg's opinion was insufficient to establish that claimant's disabling pulmonary impairment did not arise out of his coal

[5] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

mine employment because the doctor acknowledged that claimant's coal mine dust exposure could have contributed to his obstructive impairment. Decision and Order at 17. The administrative law judge further found that Dr. Castle failed to adequately explain how he eliminated claimant's coal mine dust exposure as a contributor to his obstructive pulmonary impairment. *Id.* at 13, 17. The administrative law judge, therefore, determined that employer failed to prove that claimant's pulmonary impairment "did not arise out of, or in connection with," coal mine employment.

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Rosenberg and Castle did not establish rebuttal of the Section 411(c)(4) presumption. We disagree. The administrative law judge accurately noted that Dr. Rosenberg acknowledged that claimant's coal mine dust exposure could have contributed to claimant's obstructive pulmonary impairment.[6] Decision and Order at 17. The administrative law judge, therefore, properly found that Dr. Rosenberg's opinion was insufficient to establish that claimant's pulmonary impairment did not arise out of his coal mine employment.

The administrative law judge next considered Dr. Castle's opinion, that claimant's obstructive impairment is due to cigarette smoking and not coal mine dust exposure. Noting that the preamble to the revised regulations acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discounted Dr. Castle's opinion because he did not adequately explain why claimant's obstructive impairment could not be caused by a combination of smoking and coal mine dust exposure. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 17, *citing* 65 Fed. Reg. 79,941 (Dec. 20, 2000). Moreover, contrary to employer's argument, the administrative law judge did not err in relying on the preamble to the revised regulations in evaluating the credibility of the medical opinion evidence. Employer's Brief at 2-3. Rather, the administrative law judge permissibly consulted the preamble as an authoritative statement

[6] Employer argues that, because Dr. Rosenberg opined that claimant's obstructive impairment is insignificant, the doctor's opinion regarding the cause of the impairment is of no consequence. We disagree. In finding that the medical opinion evidence established total disability, the administrative law judge discredited Dr. Rosenberg's assessment of claimant's obstructive impairment as insignificant, finding that it was not well-reasoned. Decision and Order at 15. The administrative law judge credited Dr. Baker's assessment of a moderate obstructive defect as better supported by the objective evidence. *Id.* Because employer does not challenge those findings, they are affirmed. *Skrack*, 6 BLR at 1-711.

of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

In sum, substantial evidence supports the administrative law judge's finding that employer's evidence is not sufficient to disprove the existence of pneumoconiosis, or to establish that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. We, therefore, 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.

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