

BRB No. 14-0077 BLA

DOUGLAS R. BARR)
)
 Claimant-Respondent)
)
 v.)
)
 KINDILL MINING COMPANY)
)
 and)
)
 ZURICH AMERICAN INSURANCE) DATE ISSUED: 08/21/2014
 GROUP)
)
 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 Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

Vernon L. Plummer, II, Shelbyville, Illinois, for claimant.

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

Rebecca J. Fiebig (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5025) of Administrative Law Judge Alice M. Craft rendered 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). The administrative law judge found, as supported by the record, that claimant established thirty-three years of coal mine employment at a surface mine, which was the equivalent of at least fifteen years of underground coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and 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).¹ The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination that the conditions in claimant's surface coal mine employment were substantially similar to those in an underground mine. Employer also maintains that the administrative law judge erred in her weighing of the evidence relevant to rebuttal under amended Section 411(c)(4), and erred in relying on the preamble to the regulations in assessing the reliability of the medical opinion evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that the conditions in claimant's surface mine employment were substantially similar to those in an underground mine, and arguing that the administrative law judge's reliance on the preamble in determining the credibility of the medical opinion evidence was proper. Employer has filed a combined reply brief in support of its position.²

¹ 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, 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). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

² We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 16-18.

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.³ 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 challenges the administrative law judge's determination that the conditions in claimant's surface coal mine employment were substantially similar to those in an underground coal mine. While employer concedes that claimant's testimony established that "he worked in dusty conditions at times," employer maintains that mere evidence of some dust exposure is insufficient to constitute comparability with conditions in an underground coal mine. Employer's Brief at 5.

The administrative law judge reviewed claimant's uncontradicted hearing testimony, that the work conditions during his first ten to twelve years when he "worked on the drills" and "worked on a coal truck" were "very dusty," and that "there was no dust control." Hearing Transcript (H.T.) at 33; Decision and Order at 4. Claimant testified that his work on the drills involved the use of a machine to drill coal "all day [for] eight hours" from the inside of a cab that had "cracks, ...holes, [and] doors that wouldn't shut," which prevented any protection from dust entering the cab. H.T. at 34. Claimant testified further that his job as a coal truck driver involved loading coal in the pit and driving the coal from various pits to the preparation plant six to fifteen miles away and that "there was no way to get out of the dust," as claimant either loaded the coal or drove through it. H.T. at 34; Decision and Order at 4. The administrative law judge also acknowledged claimant's testimony that his last coal mine employment was as a dragline ground man for ten years, with responsibilities consisting of "pushing the overburden with a tractor, moving cable on and off the tractor, and repairing and oiling the dragline." H.T. at 29; Decision and Order at 4. Claimant explained that his tractor had a cab that did not keep all the dust out; that "if the wind [was] blowing right, it would blow [the dust] right in your direction;" and that he could not wear face protection or a mask because he wore glasses. H.T. at 14, 29. Claimant consistently emphasized that there were no jobs where he was not exposed to any kind of dust. H.T. at 35; Decision and Order at 4. The administrative law judge acted within her discretion in finding that claimant's uncontradicted testimony was credible, and as such, demonstrated that claimant worked in conditions substantially similar to those in underground mines. Decision and Order at 4; Hearing Transcript at 14-15, 28-34, 38; *see Freeman United*

³ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Indiana. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

Coal Mining Co. v. Summers, 272 F.3d 473, 479, 22 BLR 2-265, 2-274 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988); *see also Blakly v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995). As substantial evidence supports the administrative law judge's findings, we affirm her determination that claimant established an equivalency to at least fifteen years of underground coal mine employment. Consequently, we affirm the administrative law judge's finding that claimant established invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

Employer next maintains that the administrative law judge properly found that employer successfully rebutted the presumption of clinical pneumoconiosis at amended Section 411(c)(4), but erred in finding that the opinions of Drs. Castle and Repsher were insufficient to establish rebuttal of the presumed facts of legal pneumoconiosis and disability causation thereunder. Employer asserts that the administrative law judge selectively analyzed the conflicting medical opinions of record, applied an incorrect rebuttal standard, and failed to provide valid reasons for discounting the opinions of Drs. Castle and Repsher. Employer also avers that the administrative law judge improperly relied on the preamble to the revised regulations in gauging the credibility of the conflicting medical opinions, arguing that the preamble is not a regulation and is neither binding nor dispositive. Employer's Brief at 2-7.

At the outset, we note that, contrary to employer's argument, the administrative law judge may properly consider whether a medical opinion is based on premises that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science underlying the current regulations, as determined by the Department of Labor (DOL) and set forth in the preamble to the revised regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (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); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Thus, we reject employer's assertion to the contrary.

In reviewing the evidence relevant to rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge provided a comprehensive discussion of the opinions of Drs. Castle and Repsher, and fully delineated the physicians' findings and the bases supporting their conclusion that claimant does not suffer from legal pneumoconiosis and that his totally disabling respiratory impairment is unrelated to coal dust exposure. Decision and Order at 12-15; Employer's Exhibits 6, 7. In evaluating Dr. Castle's opinion, the administrative law judge determined that the physician reviewed various medical records, reports, and test results obtained prior to the date of his August 2, 2010 report, and found that claimant does not have pneumoconiosis. Decision and Order at 12-13; Employer's Exhibit 7. Dr. Castle explained that claimant had multiple

risks for developing pulmonary disease, and concluded that claimant's episode of severe pneumonia in 2003 with respiratory failure resulted in adult respiratory distress syndrome (ARDS), requiring a tracheostomy and hospitalization for eight weeks. *Id.* Dr. Castle opined that claimant's x-ray changes of elevated hemidiaphragm/linear markings/pulmonary fibrosis and the purely restrictive defect on pulmonary function studies were consistent with ARDS, and he attributed claimant's totally disabling respiratory impairment to this condition, unrelated to coal dust exposure. *Id.* Dr. Castle stated that claimant worked long enough in the mining industry for a susceptible person to develop pneumoconiosis, but that it was less likely that claimant would have had adequate dust exposure in surface mines. *Id.* Because the administrative law judge found that the conditions in claimant's surface mine employment were substantially similar to those in underground mines, however, the administrative law judge rationally determined that Dr. Castle relied on a faulty premise. Decision and Order at 21; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Moreover, while Dr. Castle indicated that claimant's purely restrictive defect was inconsistent with pneumoconiosis, which typically causes a mixed restrictive and obstructive defect, the administrative law judge observed that Dr. Castle was not aware of Dr. Clapp's diagnosis of chronic bronchitis and Dr. Repsher's later diagnosis of bullous emphysema in 2011, involving claimant's entire right lung. *Id.* Since she also found that Dr. Castle's opinion was internally inconsistent on the issue of total disability,⁴ the administrative law judge acted within her discretion in finding that the opinion was not well-reasoned, and was insufficient to rebut the presumed fact of legal pneumoconiosis. Decision and Order at 17, 21; *see Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

The administrative law judge next found that multiple factors detracted from the reliability of Dr. Repsher's opinion. Decision and Order at 22. While Dr. Repsher diagnosed bullous emphysema due to smoking, the administrative law judge determined that he failed to provide any credible explanation for his exclusion of coal dust exposure as a contributing or aggravating factor to claimant's obstructive disease, given that claimant stopped smoking in 1979, but continued working in the mines until 2002. *Id.*; Employer's Exhibits 6, 10; *see Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61

⁴ Dr. Castle reviewed non-qualifying pulmonary function studies and blood gas studies obtained in 2008 and 2009, and opined that the valid physiologic studies "demonstrated a very minimal reduction in both the forced vital capacity and FEV₁" consistent with severe adult respiratory distress syndrome (ARDS), and that the blood gas studies "did not demonstrate a disabling abnormality of blood gas transfer mechanisms from any cause." Dr. Castle concluded, however, that claimant "is very likely disabled" as a result of the 2003 onset of ARDS, and that "coal mine dust exposure and coal workers' pneumoconiosis can be excluded or ruled out as a contributing factor in his disabling lung disease." Employer's Exhibit 7.

(4th Cir. 1995). Additionally, the administrative law judge found that Dr. Repsher's opinion was inconsistent with the premises underlying the regulations, that smoking and coal dust exposure have additive effects, and affect the lungs by similar mechanisms. Decision and Order at 22; 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000). Further, the administrative law judge determined that Dr. Repsher's reliance on the premise that "miners who worked entirely or mostly after 1970 are less likely to develop [coal workers' pneumoconiosis] than miners who worked prior to 1970" rendered his opinion "speculative" and, therefore, unpersuasive with respect to claimant's specific pulmonary condition. Employer's Exhibit 6; Decision and Order at 22; see *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Lastly, because Dr. Repsher maintained that "coal dust exposure is unlikely to cause significant respiratory disease," the administrative law judge reasonably found that his opinion was antithetical to the regulations and, hence, entitled to little weight. Decision and Order at 22-23; see *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2007). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the opinions of Drs. Castle and Repsher were insufficient to establish rebuttal of the presumed fact of legal pneumoconiosis.

On the issue of disability causation, the administrative law judge similarly found that, while Drs. Castle and Repsher conceded that claimant had multiple risk factors for pulmonary disease and impairment, including infection, smoking, coal dust, and ARDS, neither doctor failed to provide "credible reasons for excluding coal dust as a contributing factor" in claimant's disability. Decision and Order at 22; Employer's Exhibits 6, 7, 10. Noting that the record documented that claimant had breathing problems before his 2003 episode of ARDS, the administrative law judge rationally found "no specific and persuasive reasons for concluding that Drs. Castle's and Repsher's judgment that exposure to coal dust did not cause or contribute to the Claimant's disability did not rest upon their disagreement with my finding that the Claimant has legal pneumoconiosis." Decision and Order at 22-23; see *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); see also *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). As substantial evidence supports the administrative law judge's findings, and the remaining medical opinions of record do not support employer's burden, we affirm the administrative law judge's conclusion that the opinions of Drs. Castle and Repsher were insufficient to establish rebuttal of the presumed fact of disability causation, and that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. See *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2010); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Consequently, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge