BRB No. 12-0172 BLA

NED YORK	)	
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Claimant-Respondent	)	
	)	
v.	)	
	)	
F.M. COAL CORPORATION	)	DATE ISSUED: 12/13/2012
	)	
and	)	
	)	
NATIONAL FIRE INSURANCE COMPANY, c/o CHARTERIS	)	
	)	
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 – Award of Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Frank K. Newman (Cole, Cole, Anderson & Newman P.S.C.), Barbourville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (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/carrier (employer) appeals the Decision and Order – Award of Benefits in an Initial Claim (2010-BLA-5645) of Administrative Law Judge Larry S. Merck rendered on a claim filed on May 5, 2009, 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 accepted the parties' stipulation to thirty-five years of coal mine employment, and found that over fifteen of those years were in conditions substantially similar to those in underground mining. The administrative law judge also found that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found, based on the length of claimant's qualifying coal mine employment and the fact that he was totally disabled, that claimant was entitled to invocation of the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] Further, the administrative law judge found that, although employer established that claimant did not have clinical pneumoconiosis, it failed to establish that claimant did not have legal pneumoconiosis or that his disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. Therefore, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality and applicability of the Patient Protection and Affordable Care Act (the PPACA). Employer also challenges the administrative law judge's weighing of the medical opinion evidence on rebuttal pursuant to Section 411(c).[2] Claimant responds, urging affirmance of the administrative law

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[1] Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis, if a miner establishes at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). If the presumption is successfully invoked, the burden of proof shifts to employer to rebut the presumption by affirmatively proving that the miner did not have pneumoconiosis, or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to reject employer's challenges to the constitutionality and applicability of the PPACA.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of employer's arguments, the administrative law judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge's Decision and Order is rational, supported by substantial evidence, and in accordance with law. Initially, we reject employer's challenges to the constitutionality and applicability of the Patient Protection and Affordable Care Act, and the severability of its non-health care provisions. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2010); *Rose v. Trojan Mining & Processing*, BLR , BRB No. 12-0001 BLA (Oct. 24, 2012).

Next, contrary to employer's argument, we hold that the administrative law judge properly rejected Dr. Broudy's opinion that claimant did not have legal pneumoconiosis[4] as unreasoned.[5] In doing so, the administrative law judge properly found that Dr. Broudy's opinion, attributing claimant's respiratory impairment to smoking, and not coal

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[3] Because claimant's last coal mine employment was in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Decision and Order at 4; Director's Exhibits 3, 5.

[4] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory of pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[5] The administrative law judge found that employer proved that claimant did not have clinical pneumoconiosis. Decision and Order at 19. Therefore, employer's remaining burden, in order to rebut the Section 411 (c)(4) presumption in this case, is to affirmatively establish that claimant did not suffer from legal pneumoconiosis, or that his respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment. *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9.

mine employment,[6] was unreasoned because the basis of Dr. Broudy's opinion was that claimant had an obstructive impairment, rather than a restrictive impairment. The administrative law judge properly found that such an opinion is inconsistent with the scientific and medical literature adopted by the DOL indicating that legal pneumoconiosis can involve either an obstructive impairment, a restrictive impairment, or both. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,920-77 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. 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); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-292 n.7 (7th Cir. 2001).

Further, the administrative law judge permissibly found that Dr. Broudy failed to adequately explain his determination that claimant's coal mine dust exposure did not cause any of claimant's pulmonary emphysema, when the DOL has found that coal dust exposure can cause chronic obstructive pulmonary disease, such as emphysema, in a way similar to that in which cigarette smoking causes emphysema. Decision and Order at 24. The determination of whether a medical opinion is adequately reasoned is a credibility matter reserved to the discretion of the administrative law judge as fact-finder. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(en banc). The DOL has approved scientific evidence demonstrating that both coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms, and that coal dust and smoking have additive effects. *See* 65 Fed. Reg. at 79,940-43; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7; *Obush*, 24 BLR at 1-125-26. Therefore, a doctor's opinion that fails to comport with the DOL position that coal dust exposure can cause a clinically significant obstructive impairment, and produces an additive effect, may, as here, be assigned less probative weight. *See* Decision and Order at 22, 24; 65 Fed. Reg. at 79,942; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

In addition, contrary to employer's argument, the administrative law judge permissibly found that Dr. Broudy's view that there is "usually" a parallel reduction in the FEV_1 and FVC when an impairment is caused by coal mine dust is inconsistent with studies approved by the DOL demonstrating that coal dust causes a reduced FEV_1%, and that total disability can be established by a reduced FEV_1%. Decision and Order at 24;

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[6] Dr. Broudy performed a pulmonary evaluation and diagnosed very severe chronic obstructive airways disease due to chronic bronchitis and pulmonary emphysema from cigarette smoking. Dr. Broudy did not diagnose either clinical or legal pneumoconiosis. Decision and Order at 13-14; Employer's Exhibit 1; Director's Exhibit 15.

Director's Exhibit 15 at 4-5; Employer's Exhibit 1 at 10-11, 18.[7] The regulations provide that a reduced FEV_1 value may establish a disabling coal dust-related respiratory impairment. *See* 65 Fed. Reg. at 79,940; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7.

Based on the foregoing reasons, therefore, the administrative law judge rationally concluded that Dr. Broudy's view was contrary to the DOL's determinations regarding the link between coal dust exposure and obstructive lung disease. Decision and Order at 24. Consequently, the administrative law judge properly found that Dr. Broudy's opinion on the issue of legal pneumoconiosis was not well-reasoned, and deserved "little probative weight." *See* 65 Fed. Reg. at 79,940; s*ee Greene v. King James Coal Mining*, Inc., 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7.

Lastly, the administrative law judge permissibly discounted Dr. Broudy's opinion, that claimant's disabling respiratory impairment did not arise out of, or in connection with coal mine employment, because he did not diagnose the existence of legal pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 27; s*ee Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). In conclusion, as the administrative law judge properly discredited the only medical opinion supportive of employer's burden on rebuttal, we affirm his finding that the evidence was insufficient to rebut the Section 411(c)(4) presumption.[8]

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[7] Dr. Broudy stated: "[I]n particular with [chronic obstructive pulmonary disease] or emphysema from smoking, there's a disproportionate reduction in the FEV_1." Employer's Exhibit 1 at 11.

[8] Employer also challenges the administrative law judge's assignment of "most" probative weight to Dr. Baker's opinion as well-reasoned and well-documented. Decision and Order at 28. Dr. Baker opined that claimant's disabling respiratory impairment was due to both coal mine employment and smoking. Director's Exhibit 10. However, in light of the our affirmance of the administrative law judge's findings with respect to Dr. Broudy's opinion, we need not address employer's argument that the administrative law judge erred in crediting Dr. Baker's opinion as well-reasoned. As the administrative law judge has provided rational reasons for rejecting the sole medical opinion supportive of employer's burden on rebuttal, employer's arguments with respect to the opinion of Dr. Baker are unavailing. *See Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits in an Initial Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge