

BRB No. 11-0311 BLA

LARRY WILLOUGHBY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 01/30/2012
Employer-Petitioner	)	
	)	
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 Joseph E. Kane,  
Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for  
employer.

Michelle S. Gerdano (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: SMITH, McGANERY, and HALL, Administrative Appeals  
Judges.

**PER CURIAM:**

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5239) of Administrative Law Judge Joseph E. Kane 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 miner's claim filed on December 12, 2006. The administrative law judge accepted the parties' stipulation to eighteen years of underground coal mine employment,<sup>1</sup> and further found that claimant has at least a forty pack-year smoking history, ending in 2000. With respect to the merits of the claim, the administrative law judge initially determined that the medical evidence did not establish the existence of complicated pneumoconiosis and thus, did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

Next, the administrative law judge 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 miner's 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(a), 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 the miner'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, because claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to rebut the Section 411(c)(4) presumption. Specifically, the administrative law judge found that, although employer disproved the existence of clinical pneumoconiosis,<sup>2</sup> employer failed to disprove the

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<sup>1</sup> The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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*).

<sup>2</sup> Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

existence of legal pneumoconiosis,<sup>3</sup> and further failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

Employer asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not establish rebuttal of the Section 411(c)(4) presumption.<sup>4</sup> Employer also argues that this case should be held in abeyance pending the resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's request to hold this case in abeyance. Employer has filed a reply brief, reiterating its contentions on appeal.<sup>5</sup>

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).

Employer asserts that the administrative law judge erred in finding that employer did not establish rebuttal of the Section 411(c)(4) presumption. Specifically, employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis. The administrative law judge considered

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<sup>3</sup> 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

<sup>4</sup> Employer does not challenge the administrative law judge's findings of eighteen years of underground coal mine employment, and that the evidence established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>5</sup> Employer's request that this case be held in abeyance pending the resolution of the constitutional challenges to Public Law No. 111-148 in federal court is denied. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), recon. denied, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.), appeal docketed, No. 11-1620 (4th Cir. June 13, 2011); Employer's Brief at 10-14.

the medical opinions of Drs. Rasmussen, Houser, Simpao, Repsher, and Fino. Drs. Rasmussen, Houser, and Simpao diagnosed legal pneumoconiosis, opining that claimant suffers from chronic obstructive pulmonary disease (COPD) and emphysema due to both cigarette smoking and coal mine dust exposure.<sup>6</sup> 20 C.F.R. §718.201(a)(2); Claimant's Exhibits 9, 10; Director's Exhibits 14, 17. Drs. Repsher and Fino opined that claimant's coal mine dust exposure did not contribute to his COPD or emphysema.<sup>7</sup> Employer's Exhibits 1, 2, 5.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge accorded little probative weight to the opinions of Drs. Repsher and Fino, and credited the opinions of Drs. Rasmussen, Houser, and Simpao. Decision and Order at 19-23. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Fino. We disagree. The administrative law judge permissibly discredited Dr. Repsher's opinion as unreasoned, in part, because Dr. Repsher did not adequately explain why he attributed claimant's COPD entirely to smoking. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 21. Substantial evidence supports the administrative law judge's credibility determination to accord little probative weight to Dr. Repsher's opinion.<sup>8</sup> *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-

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<sup>6</sup> Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD) and emphysema due to both coal mine dust exposure and smoking. Claimant's Exhibit 9. Dr. Houser diagnosed COPD, moderately severe, due to both coal mine dust exposure and smoking. Claimant's Exhibit 10. Dr. Simpao diagnosed moderate restrictive and obstructive airways disease due to both coal mine dust exposure and smoking. Director's Exhibits 14, 17.

<sup>7</sup> Dr. Repsher opined that claimant's pulmonary function testing, while "medically invalid," nonetheless "suggests some degree of COPD, which is clearly the result of his long, extremely heavy, and continued cigarette smoking." Employer's Exhibit 1 at 3. Dr. Repsher concluded that claimant has no evidence of any pulmonary or respiratory condition either caused, or aggravated by, coal mine dust. Employer's Exhibit 1 at 3. Dr. Fino diagnosed a disabling obstructive respiratory impairment, primarily emphysema, causally related to cigarette smoking. Employer's Exhibits 2, 5.

<sup>8</sup> Employer also asserts that, in finding that claimant quit smoking in 2000, the administrative law judge substituted his opinion for that of Dr. Repsher, who opined in 2007 that claimant's "markedly elevated" carboxyhemoglobin level, along with his elevated serum nicotine and cotinine levels, "indicate[d] a current 2+ pack per day

113 (1989); Decision and Order at 21; Employer's Exhibit 1. That determination is therefore affirmed.

The administrative law judge also acted within his discretion in finding that Dr. Fino's opinion, that claimant's emphysema was due entirely to smoking, was entitled to little weight because Dr. Fino "conflate[d] the issues of clinical and legal pneumoconiosis." Decision and Order at 22; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Dr. Fino opined that, because "the amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema," it is "very helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal mine dust inhalation." Employer's Exhibit 2 at 6-7. As the administrative law judge properly noted, Dr. Fino's reasoning is contrary to the Department of Labor's recognition that coal dust-related emphysema may develop independently of clinical pneumoconiosis. Decision and Order at 22, quoting 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2008). An administrative law judge may discredit a medical opinion he finds to be divergent from the prevailing view of the medical community and scientific literature relied upon by the Department of Labor in promulgating the revised regulations. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). Because the administrative law judge rationally explained why he found Dr. Fino's opinion to be insufficiently reasoned as to the etiology of the miner's emphysema, we affirm the administrative law judge's decision to discount Dr. Fino's opinion that claimant does not have legal pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12

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cigarette smoking habit." Employer's Brief at 15; Employer's Exhibit 1 at 3. However, the administrative law judge permissibly discredited Dr. Repsher's opinion on grounds unrelated to the length of claimant's smoking history; namely, that Dr. Repsher failed to adequately explain why claimant's eighteen years of coal mine employment did not also contribute, along with cigarette smoking, to claimant's COPD. Moreover, employer asserts, but fails to explain, how the administrative law judge's finding that claimant quit smoking in 2000, if erroneous, tainted his evaluation of Dr. Repsher's opinion. Employer's Brief at 19. Thus, any error in the administrative law judge's finding that claimant quit smoking in 2000, contrary to Dr. Repsher's opinion that claimant continued to smoke in 2007, is harmless. *Shinseki v. Sanders*, 556 U.S. 396, 413, 129 S.Ct. 1696, 1708 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

BLR 1-161 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125 (2009).

The determination of whether a medical opinion is sufficiently documented and reasoned is a credibility matter within the purview of the administrative law judge. *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 835, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Repsher and Fino, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 19 BLR (6th Cir. 2011); *see also Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Therefore, we need not address employer's additional contention that the administrative law judge erred in finding the opinions of Drs. Rasmussen, Houser, and Simpao to be reasoned and documented. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *Kozele*, 6 BLR at 1-382 n.4.

Employer next argues that the administrative law judge erred in finding that employer did not establish rebuttal by showing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4); Employer's Brief at 24-25. Employer's argument lacks merit. Contrary to employer's contention, the same reasons for which the administrative law judge discredited the opinions of Drs. Repsher and Fino, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 24; Employer's Brief at 24-25. Because the opinions of Drs. Repsher and Fino are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. 30 U.S.C. §921(c)(4). Because we affirm the administrative law judge's findings that employer did not establish rebuttal of the Section 411(c)(4) presumption, we affirm the award of benefits.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge