



BRB No. 17-0186 BLA

GARY W. WELCH, SR.)	
)	
Claimant-Respondent)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 01/08/2018
)	
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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2012-BLA-5579) of Administrative Law Judge Drew A. Swank, rendered on a claim filed on

November 9, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. The Board previously affirmed the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).¹ *Welch v. Consolidation Coal Co.*, BRB No. 15-0197 BLA, slip op. at 4 (Feb. 11, 2016) (unpub.). The Board vacated the award of benefits, however, because the administrative law judge did not conduct a proper analysis as to whether employer established rebuttal of the presumption. *Id.* at 6-9. On remand, the administrative law judge again determined that the evidence was insufficient to rebut the Section 411(c) presumption and he awarded benefits.

On appeal, employer contends that the administrative law judge erred in weighing the opinions of Drs. Zaldivar and Castle relevant to rebuttal. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response brief. Employer has filed a reply brief reiterating its contentions.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing either that claimant does not have legal and clinical pneumoconiosis,³ or that

¹ Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

² Because claimant's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 26.

³ 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). Clinical pneumoconiosis consists of "those diseases recognized by the medical community as

“no part of [claimant’s] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201.” 20 C.F.R. §718.305(d)(1)(i), (ii); see *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal under either method.

I. Rebuttal of the Section 411(c)(4) Presumption - Legal Pneumoconiosis

The administrative law judge found that the opinions of Drs. Zaldivar and Castle were not credible to disprove legal pneumoconiosis.⁴ Contrary to employer’s contention, we see no error in the administrative law judge’s conclusion.

Dr. Zaldivar diagnosed claimant with bullous emphysema and opined that it is not legal pneumoconiosis because bullae occurs only in complicated pneumoconiosis and claimant has no radiographic findings of either simple or complicated pneumoconiosis.⁵ Employer’s Exhibit 1 at 3. The administrative law judge rationally found that Dr. Zaldivar’s opinion “necessarily relies on the belief that coal dust-induced emphysema cannot exist in the absence of clinical pneumoconiosis, which is inconsistent with 20 C.F.R. §718.202(a)(4).”⁶ Decision and Order on Remand at 10-11; *Milburn Colliery Co.*

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 tissue to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1).

⁴ The administrative law judge determined that employer disproved the existence of clinical pneumoconiosis based on the preponderance of the negative x-ray evidence and Dr. Castle’s opinion. Decision and Order on Remand at 13.

⁵ Dr. Zaldivar prepared a report on January 9, 2013, based on his examination of claimant on January 2, 2013, and his review of medical records. Employer’s Exhibit 1. Dr. Zaldivar found radiographic evidence of bullous emphysema and stated that: “[b]ullae are not a manifestation of simple pneumoconiosis. They are found in complicated pneumoconiosis . . . Bullae are manifestations of smoking and not coal workers’ pneumoconiosis.” *Id.* Dr. Zaldivar attributed claimant’s emphysema solely to smoking. *Id.*

⁶ The regulation at 20 C.F.R. §718.202(a)(4) specifically provides that pneumoconiosis may be established by a reasoned physician’s opinion, “notwithstanding a negative X-ray.” In order to rebut the presumed existence of legal pneumoconiosis

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). Furthermore, the administrative law judge observed correctly that the preamble does not distinguish between the types of emphysema that may be caused by coal dust exposure.⁷ See 65 Fed. Reg. 79,920, 79,939-41 (Dec. 20, 2000). We affirm the administrative law judge's rational finding that Dr. Zaldivar's opinion is insufficient to disprove legal pneumoconiosis as Dr. Zaldivar "references neither medical literature or any research studies" to support his assertion that "coal mine dust does not cause the type of emphysema afflicting [c]laimant." Decision and Order on Remand at 10; see *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

The administrative law judge likewise permissibly rejected Dr. Castle's opinion that claimant does not have legal pneumoconiosis. Dr. Castle excluded coal dust exposure as a causative factor for claimant's severe obstructive respiratory impairment, in part, because the FEV1/FVC ratio was markedly reduced and not preserved. Employer's Exhibit 6. The administrative law judge permissibly found Dr. Castle's reasoning to be unpersuasive because it conflicted with the medical science accepted by the Department of Labor, recognizing that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio.⁸ See 65 Fed. Reg. at 79,943; *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663,

employer must establish that claimant's respiratory disease or impairment was not significantly related to, nor substantially aggravated, by dust exposure in coal mine employment. 20 C.F.R. §718.201(b).

⁷ The administrative law judge noted that the preamble states "without qualification or limitations as to a particular form," that emphysema "may be legal pneumoconiosis if it arises from coal-mine employment." Decision and Order on Remand at 10 n. 15, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).

⁸ We reject employer's assertion that Dr. Castle's views "regarding the reduced FEV1/FVC ratio in a smoking-related [chronic obstructive pulmonary disease (COPD)] form, as opposed to a dust-related form, is in fact consistent with the preamble." Employer's Brief in Support of Petition for Review at 13. The preamble specifically states:

[I]n developing its recommended dust exposure standard, NIOSH carefully reviewed the available evidence on lung disease in coal miners. NIOSH also considered the strength of the evidence, including the sampling and statistical analysis techniques used, and concluded that the science provided

671-72, BLR (4th Cir. Nov. 29, 2017); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); Decision and Order on Remand at 12.

The administrative law judge also correctly observed that the preamble recognizes that the risks associated with smoking and coal mine dust exposure are additive. Decision and Order on Remand at 12, *citing* 65 Fed. Reg. at 79,940. In light of this premise, the administrative law judge permissibly found that Dr. Castle failed to adequately explain why claimant's emphysema "could not have been aggravated by coal dust exposure," even if claimant exhibited symptoms and findings consistent with smoking-related emphysema. Decision and Order on Remand 12; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155.

As the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Castle, we affirm his finding that employer failed to disprove legal pneumoconiosis.⁹ We therefore affirm the administrative law judge's

a substantial basis for adopting a permissible dust exposure limit. NIOSH summarized its findings . . . as follows: "In addition to the risk of simple CWP [coal workers' pneumoconiosis] and PMF [progressive massive fibrosis], *epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC.*"

65 Fed. Reg. at 79,943, *quoting* NIOSH Criteria Document 4.2.3.2 (citations omitted) (emphasis added); Director's Brief at 2.

⁹ Because the administrative law judge gave valid reasons for rejecting the opinions of Drs. Zaldivar and Castle, we need not address employer's remaining arguments that: The administrative law judge erred in rejecting Dr. Zaldivar's explanation that claimant's symptoms of wheezing are not consistent with pneumoconiosis; and erred in not crediting the alternate rationales given by Dr. Castle for why claimant does not have legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).¹⁰

II. Rebuttal of the Section 411(c)(4) Presumption - Disability Causation

The administrative law judge concluded that the opinions of Drs. Zaldivar and Castle were insufficient to satisfy employer's burden to disprove the presumed fact of disability causation. Contrary to employer's contention, the administrative law judge reasonably discredited the opinions of Drs. Zaldivar and Castle on the cause of claimant's respiratory disability because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer did not disprove the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-5, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order on Remand at 15. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 20.

¹⁰ As employer must disprove both legal and clinical pneumoconiosis, our affirmance of the administrative law judge's finding on legal pneumoconiosis precludes rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge