BRB No. 10-0635 BLA

LESLIE E. BAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/06/2011
	)	
FLEETWOOD ENERGY, INCORPORATED	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Paul L. Edenfield (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, HALL, and BOGGS, Administrative Appeals Judges.

Employer appeals the Decision and Order Awarding Benefits (09-BLA-5041) of Administrative Law Judge Linda S. Chapman 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). The case involves a claim filed on August 23, 2007. Director's Exhibit 2. The administrative law judge credited claimant with 24.54 years of

coal mine employment,[1] as stipulated, Hearing Transcript at 13, with "all but one, or at most two," years involving underground work, and found that claimant established the existence of a totally disabling obstructive respiratory impairment, pursuant to 20 C.F.R. §718.204(b). The administrative law judge properly noted that, under a recently enacted amendment to the Act, amended Section 411(c)(4),[2] if a miner establishes at least fifteen years of qualifying coal mine employment, 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, 124 Stat. 119 (2010) (to be codified at 30 U.SC. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4). Applying amended Section 411(c)(4) to this miner's claim, the administrative law judge found that, as claimant established at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, claimant is entitled to invocation of the rebuttable presumption. The administrative law judge also found that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief, but notes that claimant is entitled to invocation of the Section 411(c)(4) presumption, because claimant filed it after January 1, 2005, was credited with more than fifteen years of coal mine employment, and has a totally disabling respiratory impairment.[3]

[1] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law 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*).

[2] Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living 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).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established 24.54 years of coal mine employment, with "all but one, or at most two," years involving underground work, that claimant suffers from a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b), and that, therefore, claimant established invocation of the Section 411(c)(4) presumption. *See*

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in her evaluation of the medical opinion evidence in finding that claimant's disabling COPD arose out of coal mine dust exposure. Employer argues that the administrative law judge erred in crediting the opinions of Drs. Baker and Mettu, that claimant's disabling respiratory impairment is due in part to legal pneumoconiosis,[4] and in discrediting the opinions of Drs. Dahhan and Broudy, that claimant does not suffer from pneumoconiosis or any coal mine dust related disease or impairment.[5] Employer's Brief at 2-5. Contrary to employer's assertion, the administrative law judge gave permissible reasons for discrediting the opinions of Drs. Dahhan and Broudy regarding the etiology of claimant's disabling COPD. We consider employer's assertions of error with regard to these physicians to be little more than a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Employer first contends that the administrative law judge erred in discrediting Dr. Dahhan's opinion. We disagree. In his report dated June 10, 2008, and deposition dated

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Coen v. Director, OWCP, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). A disease arising out of coal mine employment includes 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). A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[5] The administrative law judge also considered claimant's hospital and treatment records found at Director's Exhibit 14 and Claimant's Exhibits 3, 5, but found that they did not render an opinion as to the cause of claimant's chronic obstructive pulmonary disease. Decision and Order at 19-20. Employer raises no challenge to the administrative law judge's consideration of the hospital and treatment records.

December 5, 2008, Dr. Dahhan opined that claimant does not have clinical or legal pneumoconiosis, but suffers from a totally disabling obstructive respiratory impairment due to smoking. Director's Exhibit 16; Employer's Exhibit 1. Dr. Dahhan reasoned that coal mine dust exposure was not a cause of claimant's disabling COPD because claimant had not been exposed to coal mine dust since 1996, and thus any contribution by coal mine dust had ceased. Director's Exhibit 16 at 2; Employer's Exhibit 1 at 8. The administrative law judge rationally found that Dr. Dahhan's reasoning was inconsistent with the premises underlying the amended regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); Decision and Order at 22.

The administrative law judge further noted that Dr. Dahhan relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's disabling obstructive impairment. The administrative law judge found, as was within her discretion, that Dr. Dahhan did not adequately explain why the irreversible portion of claimant's pulmonary impairment was not due, in part, to coal mine dust exposure or why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004)(unpub.); Decision and Order at 22-23. As the administrative law judge provided two valid reasons for discrediting Dr. Dahhan's opinion, and as her conclusions are rational and supported by substantial evidence, we affirm this credibility determination. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Employer next contends that the administrative law judge erred in discrediting Dr. Broudy's opinion. Employer's Brief at 3-5. In his reports dated May 24, 2008, September 30, 2009, October 22, 2009, and deposition dated January 19, 2009, Dr. Broudy opined that claimant does not have pneumoconiosis or any coal dust related disease or impairment, and that his totally disabling COPD is due to smoking. Director's Exhibit 17; Employer's Exhibits 2, 3. Dr. Broudy further opined that coal mine dust exposure "usually" causes a restrictive or mixed impairment, and that it was "extremely unlikely, but possible," for coal mine dust exposure to cause a totally disabling purely obstructive impairment, absent x-ray evidence of pneumoconiosis. Decision and Order at 15; Employer's Exhibit 2 at 11. Contrary to employer's assertion, the administrative law judge permissibly discredited Dr. Broudy's opinion because his statements indicated that

he ruled out any role for coal dust in causing the miner's obstructive impairment on the basis that coal mine dust exposure rarely causes disabling obstructive lung disease. 20 C.F.R. §718.201(a)(2); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 Fed. Appx. 757 (6th Cir. Nov. 29, 2007)(unpub.); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); Decision and Order at 23. The Department of Labor has determined that nonsmoking miners develop moderate and severe obstruction at roughly the same rate as smoking miners, and that this causality occurs at clinically significant rates. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103, *citing* 65 Fed. Reg. 79,938 (Dec. 20, 2000).

The administrative law judge also rationally questioned Dr. Broudy's opinion that coal mine dust exposure did not play a role in claimant's disabling COPD, because, like Dr. Dahhan, Dr. Broudy based his conclusion, in part, on the fact that claimant's symptoms worsened in 2005 and 2008, long after his cessation of coal mine employment in 1997. 20 C.F.R. §718.201(c); *see Mullins*, 484 U.S. at 151, 11 BLR at 2-9; *Odom*, 342 F.3d at 491, 22 BLR at 2-621; Decision and Order at 23. As the administrative law judge provided two valid reasons for discrediting Dr. Broudy's opinion, we affirm the administrative law judge's credibility determination. *See Compton*, 211 F.3d at 207-08, 22 BLR at 2-168; *Mays*, 176 F.3d at 762 n.10, 21 BLR at 2-603 n.10; *Kozele*, 6 BLR at 1-382-83 n.4.

By contrast, the administrative law judge credited the opinions of Drs. Baker[6] and Mettu.[7] Decision and Order at 21. Employer contends that the administrative law judge selectively analyzed the evidence by failing to subject the opinions of Drs. Baker and Mettu to the same degree of scrutiny that she applied to the opinions of employer's experts. Employer's Brief at 4. It is the function of the administrative law judge to evaluate the physicians' opinions, and the Board will not substitute its inferences for those of the administrative law judge. *See Underwood v. Elkay Mining, Inc*., 105 F.3d

[6] The administrative law judge found that Dr. Baker, in his report dated December 19, 2008, and deposition dated November 2, 2009, opined that claimant has clinical pneumoconiosis, as well as legal pneumoconiosis, in the form of COPD due to both coal mine dust exposure and smoking, and opined that both conditions contributed to claimant's total respiratory disability. Claimant's Exhibit 1 at 4; Employer's Exhibit 7 at 14-15.

[7] The administrative law judge found that Dr. Mettu opined, in his report dated February 18, 2008, and deposition dated July 29, 2008, that claimant is totally disabled due to legal pneumoconiosis, in the form of chronic bronchitis due to both smoking and coal mine dust exposure. Director's Exhibits 15 at 4; 44 at 9-10.

946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543, 21 BRBS 10, 16(CRT)(4th Cir. 1988). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Dahhan and Broudy, the only physicians to opine that pneumoconiosis played no role in claimant's disabling COPD, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Consequently, we decline to address, as moot, employer's additional arguments regarding the administrative law judge's evaluation of the opinions of Drs. Baker and Mettu.

Because claimant established invocation of the Section 411(c)(4) presumption, that he is totally disabled due to pneumoconiosis, and the administrative law permissibly found that employer did not rebut the presumption, we affirm the administrative law judge's 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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge