



BRB No. 14-0374 BLA

KENNETH J. WARD (Deceased))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ELK RUN COAL COMPANY,)	DATE ISSUED: 07/31/2015
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Michael E. Froble (Froble Law Firm), Beckley, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-6261) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim¹

¹ The miner filed three prior claims, each of which was denied. Director's Exhibits 1-3. The most recent prior claim, filed on April 12, 2007, was denied by the district director on November 7, 2007, because the evidence failed to establish that the miner was totally disabled. Director's Exhibit 3. The miner took no action with respect

filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited the miner with at least twenty-five years of coal mine employment. The administrative law judge determined that the newly submitted evidence established total disability and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on the filing date of the claim, and his determinations that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked 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), as implemented by 20 C.F.R. §718.305. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that: the administrative law judge applied incorrect legal standards in considering whether employer rebutted the amended Section 411(c)(4) presumption; mischaracterized the biopsy evidence; failed to resolve the conflict in the biopsy evidence as to the existence of pneumoconiosis; did not weigh all of the evidence together in finding that employer failed to disprove that the miner had pneumoconiosis; selectively analyzed the medical opinions of Drs. Zaldivar and Rosenberg; and, failed to explain his findings as required by the Administrative Procedure Act (the APA).² Claimant responds, in support of the administrative law judge's award of benefits, asserting that the administrative law judge applied the correct rebuttal standard. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.³

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, is rational,

to that denial until he filed the current subsequent claim for benefits on August 13, 2010. Director's Exhibit 5.

² The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant invoked the amended Section 411(c)(4) presumption, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Applicable Rebuttal Standard

Initially, we reject employer’s contention that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4). In support of its argument, employer relies upon the statutory language of 30 U.S.C. §921(c)(4), and the United States Supreme Court’s holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976), that the rebuttal limitations are inapplicable to coal mine operators. Employer’s Brief at 18-19. Employer’s contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff’d on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision. *See W.Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015) (recognizing that the rebuttal provisions apply to coal mine operators as well as the Secretary).

Upon invocation of the amended Section 411(c)(4) presumption, the burden of proof shifts to employer to affirmatively establish that the miner did not have legal⁵ and clinical⁶ pneumoconiosis, or establish that no part of the miner’s respiratory or pulmonary 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 Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015); *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

⁴ Because the miner’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 (1989) (en banc); Director’s Exhibit 6.

⁵ 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).

⁶ Clinical pneumoconiosis consists of “those diseases recognized by the medical community as 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).

Cir. 1980). The administrative law judge found that employer failed to establish rebuttal by either method.

II. The Existence of Pneumoconiosis

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered an x-ray dated October 7, 2010, which was read by Dr. Gaziano, a B reader, as positive for pneumoconiosis, but read by Dr. Meyer, dually qualified as a Board-certified radiologist and B reader, as negative. Decision and Order at 6, 22; Director's Exhibit 16; Employer's Exhibit 4. The administrative law judge determined the x-ray was negative, based on Dr. Meyer's radiological credentials. Decision and Order at 22.

The administrative law judge found that there were five CT scans dated February 12, 2007, May 9, 2008, November 27, 2009, June 8, 2010 and August 11, 2010, each of which was read as negative by Dr. Scott, a dually qualified radiologist. Decision and Order at 7-8, 22-23; Employer's Exhibits 5-9. The administrative law judge also observed that CT scans contained in claimant's treatment records make no mention of pneumoconiosis but "show a worsening of the lung pathology consistent with the progression of the known malignancy." Decision and Order at 22; Claimant's Exhibits 6-9.

With regard to the biopsy evidence, the administrative law judge found that the miner underwent a CT guided needle biopsy of a right lung mass on September 15, 2010. Decision and Order at 14; Claimant's Exhibit 4. The pathology report by Dr. Gusack stated that the biopsy specimen was negative for malignancy, and "appears to be a granuloma." Claimant's Exhibit 4. Two years later, on February 29, 2012, a second needle biopsy was conducted of the *lower lobe* of the right lung and a subcarinal lymph node. Claimant's Exhibit 5. The pathology report by Dr. Zeid stated that the specimen from the lower lobe of the right lung showed "[a]nthracosis associated with granulomatous inflammation." *Id.* Dr. Zeid also commented that "[t]he nodular pattern of fibrosis associated with anthracosis and birefringent material is consistent with a pneumoconiosis such as but not limited to silicosis." *Id.* The specimen from the subcarinal lymph node was negative for malignant cells but showed "[g]ranulomatous reaction associated with anthracosis and finely granular birefringent foreign material" and "fibrotic tissue with anthracosis." *Id.*

The record reflects that a third biopsy, conducted on September 26, 2012, was a needle aspiration of a mass in the right anterior upper lobe, which showed "[m]alignant neoplasm with mixed features." Claimant's Exhibit 11. A fourth biopsy of three lymph nodes was obtained on October 10, 2012. *Id.* The specimen from lymph node station #R4 showed granulomatous infection, while the specimens from lymph node stations #R7

and #R10 were negative for malignancy. *Id.* A final biopsy, conducted on December 19, 2012, of the right *upper* lung showed small cell carcinoma. *Id.* The administrative law judge concluded that the miner suffered from clinical pneumoconiosis, based on the results of the February 29, 2012 biopsy. Decision and Order at 24.

In weighing the medical opinion evidence, the administrative law judge noted that Dr. Gaziano diagnosed clinical pneumoconiosis, based on his positive reading of the October 10, 2010 x-ray and the September 15, 2010 biopsy report, while Dr. Zaldivar and Dr. Rosenberg each opined that the miner did not have clinical pneumoconiosis, based on their consideration of the x-ray, CT scan and biopsy evidence. Decision and Order at 24. The administrative law judge observed, however, that the February 29, 2012 biopsy report, which Dr. Gaziano had not seen in rendering his opinion, “eventually proved him correct in that the miner did indeed have pneumoconiosis.” *Id.* At 25. The administrative law judge rejected the opinions of Drs. Zaldivar and Rosenberg, that the miner did not have clinical pneumoconiosis, as inconsistent with the regulations.⁷ *Id.* He found that they relied on “general statistics to show that few coal miners contract [coal workers’ pneumoconiosis (CWP)], but did not establish that this miner was not or could not have been one of those few.” *Id.* The administrative law judge further concluded that neither Dr. Zaldivar nor Dr. Rosenberg sufficiently explain “why the miner’s lengthy coal mine dust exposure did not play a role in or aggravate his pulmonary condition.” *Id.* Thus, the administrative law judge concluded that employer failed to disprove the existence of both clinical and legal pneumoconiosis and, therefore, failed to establish the first method of rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i). *Id.*

Employer contends that the administrative law judge erred in relying on the 2012 biopsy report to find that employer failed to disprove the existence of clinical pneumoconiosis. We disagree. The administrative law judge observed correctly that the term “anthracosis” satisfies the regulatory definition of clinical pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(1). See *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR

⁷ The administrative law judge summarized Dr. Zaldivar’s testimony that “a number of the biopsies were ‘needle’ biopsies which is like trying to find a needle in a haystack in terms of identifying any cancer . . . the needle did not hit the cancer until 2012.” Decision and Order at 21; Employer’s Exhibit 12 at 54. He also considered Dr. Rosenberg’s explanation that the February 29, 2012 biopsy finding of anthracosis was not medical pneumoconiosis, along with Dr. Zaldivar’s opinion, that “a finding of anthracosis is not synonymous medically with [coal workers’ pneumoconiosis] as anthracosis only describes black pigment deposition, usually found in smokers.” Decision and Order at 21; Employer’s Exhibit 12.

2-136 (6th Cir. 1989); *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001) (en banc) (Dolder and Smith, JJ, dissenting in part and concurring in part). Although Dr. Zaldivar and Dr. Rosenberg maintain that the term anthracosis refers only to black pigmentation, the administrative law judge observed correctly that the definition of clinical pneumoconiosis “is not confined to the medical definition of ‘coal workers’ pneumoconiosis,” and specifically recognizes anthracosis as a form of clinical pneumoconiosis. Decision and Order at 25; see 20 C.F.R. §718.201(a)(1). The administrative law judge thus acted within his discretion as fact-finder in determining that the biopsy evidence in this case was sufficient to establish the existence of clinical pneumoconiosis.

Furthermore, employer’s assertions regarding the administrative law judge’s failure to specifically explain the weight he accorded the biopsy reports that did not identify anthracosis are without merit. The administrative law judge summarized the findings of all five needle biopsies, each of which was obtained from a different location (upper lung, lower lung and four lymph nodes), and rationally concluded that although four biopsies did not identify pneumoconiosis, this did not necessarily detract from the credibility of the biopsy that showed anthracosis. Decision and Order at 21, 24-25. We see no error in his credibility determinations with respect to the opinions of Drs. Zaldivar and Rosenberg because they were inconsistent with his own finding that the biopsy evidence established the existence of clinical pneumoconiosis by demonstrating the presence of anthracosis. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993). We therefore affirm the administrative law judge’s finding that employer failed to disprove the existence of clinical pneumoconiosis.

As to whether employer disproved the existence of legal pneumoconiosis, employer contends that the administrative law judge did not properly explain his findings in accordance with the APA. We disagree. We affirm the administrative law judge’s decision to give little weight to the opinions of Drs. Zaldivar and Rosenberg because they “relied on general statistics to show that few coal miners contract [coal workers’ pneumoconiosis], but did not establish that this miner was not or could have been one of those few.” Decision and Order at 25; see *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997). The administrative law judge also observed correctly that Drs. Zaldivar and Rosenberg attributed the miner’s chronic obstructive pulmonary disease (COPD) entirely to his smoking, based on the length of his smoking history and the fact that the miner began smoking at a young age. Decision and Order at 25. The administrative law judge, however, was not persuaded by their opinions and

stated:

Although starting smoking at a young age may increase one's susceptibility to COPD and FEV1 decrease, standing alone I do not find that this concept is established to be acceptable to disprove the existence of a coal mine dust component of one's lung disease. I do not find the opinions of Drs. Zaldivar and Rosenberg sufficient to prove the miner's lengthy coal mine dust exposure did not play a role in or aggravate his pulmonary condition.

Id. Because the administrative law judge has discretion to weigh the evidence, and we are able to discern the bases for his credibility determinations, we affirm his finding that employer did not rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-1621, 1-165 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

III. Disability Causation

Regarding whether employer disproved the presumed fact of disability causation, there is no merit to employer's assertion that the administrative law judge erred in requiring it to "rule out" pneumoconiosis as a cause of the miner's disability. Employer's Brief at 6-13. The regulations specifically require the party opposing entitlement to establish that "no part of the miner'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)(ii). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated, explicitly, that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to the miner's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The Fourth Circuit also recently held in *Bender*, that "any 'party opposing entitlement' to black lung benefits, including coal mine operators, may rebut the statutory presumption of disability under subsection (d)(1)(ii) of the regulation only by proving that 'no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis.'" 20 C.F.R. §718.305(d); *Bender*, 782 F.3d at 129.

In this case, the administrative law judge concluded that employer "failed to meet [its] burden of proving that [the miner's] total respiratory or pulmonary disability is not due or related to coal workers' pneumoconiosis." Decision and Order at 36. In so finding, the administrative law judge stated that:

Neither of the employer's experts, Drs. Zaldivar and Rosenberg, diagnosed pneumoconiosis. I find no reason to give their disability causation opinions [any] special consideration. Given Dr. Zaldivar incorrectly believed the anthracosis established via biopsy did not qualify as pneumoconiosis the

underlying premise for his diagnosis is undermined and thus I give his causation opinion little, if any, weight. Likewise, Dr. Rosenberg's assessment of the biopsy evidence is legally flawed as is his requirement for "micro-nodularity" in order to diagnose pneumoconiosis. Moreover, their reliance on general statistics did not exclude the possibility that this [miner] was one of the few exceptions. Although they testified about the potential impacts of one beginning smoking at a young age, I do not find this established as a scientific principle in this case.

Decision and Order at 36.

Employer maintains that the administrative law judge misstated Dr. Zaldivar's opinion. In discussing Dr. Zaldivar's deposition testimony, the administrative law judge first noted accurately that Dr. Zaldivar ruled out coal dust exposure as a cause of the miner's disability because of the progressive and rapid development of restriction in the miner's lungs and the radiographic evidence.⁸ Decision and Order at 12. The administrative law judge subsequently related, however, that "Dr. Zaldivar testified that he could not rule out coal mine dust exposure" as a cause for the miner's disability. *Id.* at 24. Contrary to employer's argument, we consider the administrative law judge's error to be harmless, as the administrative law judge explained that Dr. Zaldivar's opinion was not persuasive that the miner's disability was unrelated to clinical pneumoconiosis,

⁸ Dr. Zaldivar's specific deposition testimony is as follows:

Q. Based upon your review of the evidence as a whole, does [the miner] have a respiratory impairment?

A. Yes. He has severe respiratory impairment.

Q. Is it sufficient to preclude him from performing his last coal mine work?

A. Yes. It is.

Q. To what do you attribute the impairment you see in this case?

A. Smoking.

Q. Are you able to exclude coal dust exposure as a causative factor of [the miner's] impairment?

A. Yes. Physiologically, radiographically and finally histologically, coal dust induced lung disease is ruled out in this case.

Q. And what physiologically do you rely on in making that conclusion?

A. As I said before, there's a progressive restriction of the lungs that goes along with the progressive radiographic findings that eventually proved to be cancer.

Employer's Exhibit 12 at 37-38.

insofar as Dr. Zaldivar did not believe that the miner had clinical pneumoconiosis, contrary to the administrative law judge's finding with regard to the biopsy evidence. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). To the extent that neither Dr. Zaldivar, nor Dr. Rosenberg, diagnosed clinical or legal pneumoconiosis, contrary to the administrative law judge's findings, we affirm his determination that their opinions are insufficient to affirmatively establish that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201.⁹ See 20 C.F.R. §718.305(d)(1)(ii); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); see also *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013).

⁹ Employer asserts that for purposes of rebuttal, it is required to show only that pneumoconiosis was not a "substantially contributing" cause of the miner's death. Employer's Brief at 22-23, citing *Arch on the Green v. Groves*, 761 F.3d 594 (6th Cir. 2014). The administrative law judge, however, applied the correct rebuttal standard and properly considered whether employer's evidence was sufficient to prove that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. See *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge