



BRB No. 14-0428 BLA

BARBARA A. ALLRED, o/b/o and Widow)
of JAMES K. ALLRED)

Claimant-Respondent)

v.)

DRUMMOND COMPANY,)
INCORPORATED)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 07/13/2015

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in the Miner's and Survivor's Claims of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Walls, Weaver & Davies, LLP), Birmingham, Alabama, for claimant.

Jeannie B. Walston (Starnes Davis Florie LLP), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in the Miner's and Survivor's Claims (2011-BLA-5447 and 2012-BLA-5000) of Administrative Law Judge Lystra A. Harris with respect to a miner's claim filed on April 9, 2010, and a survivor's claim filed on October 15, 2010, pursuant to the provisions of the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).¹ The administrative law judge credited the miner with at least 22.25 years of underground coal mine employment, based on the parties' stipulation, and found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). Thus, the administrative law judge found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis, as set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), in the miner's claim.² The administrative law judge further found that employer failed to establish rebuttal of the presumption. The administrative law judge also found that, because claimant is the eligible survivor of a miner who was entitled to federal black lung benefits at the time of his death, she was automatically entitled to continuing benefits.³ Accordingly, the administrative law judge awarded benefits in both the miner's and the survivor's claims.

On appeal, employer argues that the administrative law judge inadequately weighed the evidence and failed to apply the proper rebuttal standard.⁴ Claimant

¹ Claimant, the widow of the miner, who died on August 29, 2010, is pursuing both his claim and her survivor's claim. Director's Exhibit 40; Decision and Order at 2.

² Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

³ With respect to survivors' claims, the amendments revive the "derivative entitlement" provision of Section 422(l) of the Act, 30 U.S.C. §932(l), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 932(l), a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010).

⁴ Employer also reserves the right to challenge the constitutionality of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010), providing survivor's benefits based on the miner's award of benefits. 30 U.S.C. §932(l); Employer's Brief at 79; *see Mathews*, 24 BLR at 1-200.

responds, urging affirmance of the award of benefits in both the miner's and the survivor's claims. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.⁵ Employer replies to claimant's response brief, reiterating and enlarging 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 rational, supported by substantial evidence, and in accordance with applicable law.⁶ 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).

Rebuttal of the Presumption at 30 U.S.C. §921(c)(4)

1. Rebuttal Standard:

In order to establish rebuttal of the presumption, employer must affirmatively establish either that the miner did not have clinical or legal pneumoconiosis,⁷ or that his

⁵ We affirm, as unchallenged on appeal, the administrative law judge's findings of at least 22.25 years of underground coal mine employment, that total respiratory disability was established at 20 C.F.R. §718.204(b)(2), and that the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) was, therefore, invoked. Decision and Order at 6, 18-19; Employer's Brief at 57-58; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁶ The record reflects that the miner's coal mine employment was in Alabama. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

⁷ The regulation at 20 C.F.R. §718.201 provides:

“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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

respiratory disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), implemented by 20 C.F.R. §718.305; *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Employer asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of the miner's respiratory impairment. Employer maintains that it need prove only that pneumoconiosis was not a contributing cause of the miner's disabling respiratory impairment, and contends that it has satisfied that standard by proving that the miner's impairment was "due to causes unrelated to coal mining," namely cigarette smoking. *See* Employer's Brief at 76-77; Employer's Reply Brief at 5. Contrary to employer's assertion, the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that the party opposing entitlement must 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)(ii). The Department of Labor (DOL) has explained that the "no part" standard recognizes that the courts have interpreted amended Section 411(c)(4) "as requiring the party opposing entitlement to 'rule out' coal mine employment as a cause of the miner's disabling respiratory or pulmonary impairment." 78 Fed. Reg. 59,105 (Sept. 25, 2013); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-446-47 (6th Cir. 2013)(holding that there is no meaningful difference between the "play[ed] no part" standard and the "rule-out" standard); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The DOL explicitly chose not to use the "contributing cause" standard set forth in 20 C.F.R. §718.204(c), and stated that the application of a different standard on rebuttal "is warranted by the statutory section's underlying intent and purpose," which "effectively singled out" totally disabled miners who had fifteen years of qualifying coal mine employment "for special treatment." 78 Fed. Reg. 59,106-07 (Sept. 25, 2013). Therefore, in requiring employer to affirmatively "rule out any causal relationship between the miner's disability and his coal mine employment," the administrative law judge applied the correct rebuttal standard in this case. Decision and Order at 19.

20 C.F.R. §718.201(a)(1).

"Legal pneumoconiosis" includes 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).

2. Existence of Pneumoconiosis:

In considering whether employer rebutted the amended Section 411(c)(4) presumption, the administrative law judge found that employer failed to rebut the presumption under the first method provided by failing to disprove the existence of legal pneumoconiosis. Employer contends that the administrative law judge erred in rejecting the opinions of Drs. Goldstein and Russakoff, that the miner did not have legal pneumoconiosis, because they were inconsistent with the definition of legal pneumoconiosis provided in the regulations and the preamble. Employer specifically contends that the administrative law judge should have found the presumption rebutted because both physicians provided well-reasoned and documented opinions adequately demonstrating that the miner's chronic obstructive pulmonary disease (COPD)/emphysema was entirely caused by smoking, and not by coal mine employment.⁸ Employer's Brief at 75; Employer's Reply Brief at 4, 7-8. In support of this argument, employer contends that Dr. Goldstein explained that the miner's respiratory condition is not seen in people with "mere 1/0 coal workers' pneumoconiosis," and that the miner's extensive smoking history "far outweighs any contribution from his coal mine employment." Employer's Reply Brief at 7-8. Employer also notes that both Dr. Goldstein and Dr. Russakoff considered that there was no x-ray evidence of pneumoconiosis. Further, employer contends that the administrative law judge failed to fully consider "voluminous medical and treatment records" documenting "extensive and on-going smoking and consequential emphysema," or to consider that the medical records are "devoid of any mention of coal workers' pneumoconiosis, any form of pneumoconiosis, or any inference whatsoever that the miner's pulmonary or respiratory problems were caused by his coal mining employment." Employer's Brief at 75-76; Employer's Reply Brief at 9-10. Finally, employer argues that none of the miner's treating physicians attributed his pulmonary or respiratory problems to his coal mine work. Employer's Brief at 75-76. Employer's argument is without merit.

Dr. Goldstein diagnosed severe COPD related to smoking, and opined that the miner did not have clinical or legal pneumoconiosis and that his COPD was not related to coal mine employment. Decision and Order at 9-10, 18; Director's Exhibit 13; Claimant's Exhibit 6 at 33, 43-44, 48. Dr. Russakoff diagnosed significant COPD with emphysema, chronic bronchitis and bronchospasm component, and opined that the miner's COPD was caused entirely by smoking and that he did not have legal pneumoconiosis. Decision and Order at 10-11, 18; Employer's Exhibit 11.

⁸ The administrative law judge's finding of an eighty pack year smoking history is affirmed, as uncontested on appeal. Decision and Order at 27-29; *see Skrack*, 6 BLR at 1-711.

The administrative law judge concluded that neither Dr. Goldstein nor Dr. Russakoff credibly rebutted the presumption that the miner had legal pneumoconiosis. In particular, she considered Dr. Goldstein's opinion in light of his statements that, in no case, does coal mine dust exposure cause severe obstructive airways disease in the absence of a distinctly abnormal x-ray of at least 1/1, and that coal dust exposure does not exacerbate COPD unless there is evidence of coal dust in the lungs and x-ray evidence of pneumoconiosis.⁹ She rationally found that these views conflicted with the definition of legal pneumoconiosis in the regulations and the preamble. Specifically, the DOL recognizes that miners who smoke are at an additive risk for significant obstruction; that both chronic obstructive and restrictive pulmonary disease arise out of coal mine employment and that a diagnosis of legal pneumoconiosis does not require x-ray evidence of clinical pneumoconiosis, or evidence of progressive massive fibrosis. Decision and Order at 29; *see* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (“[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]”); *see Black Diamond Coal Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532, 7 BLR 2-209, *reh'g denied*, 768 F.2d 1353 (11th Cir. 1985); *see also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co., v. Director, OWCP [Shores]*, 358 F.3d 486, 495, 23 BLR 2-18, 2-35 (7th Cir. 2004); *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); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 2001); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-25 (4th Cir. 1993). Moreover, a doctor's reliance on a negative x-ray, or x-rays, as a basis to conclude that a miner's respiratory impairment is not due to coal dust exposure is contrary to the science found credible in the preamble and to the definition of legal pneumoconiosis in the regulations, which recognizes chronic lung diseases significantly related to or substantially aggravated by dust exposure as legal pneumoconiosis. *See* 65 Fed. Reg. 79,940 (Dec. 20, 2000). The administrative law judge rationally found that Dr. Russakoff's views on legal pneumoconiosis are inconsistent with the DOL findings regarding the additive effects of smoking and coal mine dust exposure.¹⁰ Decision and Order at 10-11, 25, 29; *see* 65 Fed. Reg. 79,943 (Dec. 20,

⁹ The administrative law judge considered Dr. Goldstein's additional assertion that “normally you don't get obstructive airways abnormalities from black lung. The only time you see that is when you're dealing with progressive massive fibrosis, which this [miner] didn't have.” She also noted Dr. Goldstein's opinion that “you wouldn't expect someone to have a severe obstructive defect with a 1/0,” and his conclusion that there is no evidence that coal mine employment contributed to the miner's disability because there is no x-ray evidence of clinical pneumoconiosis. Decision and Order at 25, 29-30.

¹⁰ The administrative law judge considered Dr. Russakoff's assertion that it is rare to find obstructive lung disease in a non-smoking coal miner, and expressed disagreement with the major medical study linking coal mine dust exposure to obstructive lung disease.

2000); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3rd Cir. 2011). She therefore properly found that Dr. Russakoff “did not provide a well-reasoned justification for ruling out coal mine dust exposure as a contributing cause of the [miner’s] COPD.” Decision and Order at 10-11, 29-30.

The assessment of whether a medical opinion is sufficiently reasoned, and associated credibility determinations are reserved to the discretion of the fact-finder. *See United States Steel Mining Co. v. Director, OWCP [Jones]*, 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Taylor v. Ala. By-Products Corp.*, 862 F.2d 1529, 1531 n.1, 12 BLR 2-110, 2-112 n.1 (11th Cir. 1989). Substantial evidence supports the administrative law judge’s identification of deficiencies warranting her assignment of “little weight” to the opinions of Drs. Goldstein and Russakoff. *See* Decision and Order at 29-30; 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,939-79,945 (Dec. 20, 2000); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997).

Employer also contends that the administrative law judge failed to adequately consider the other medical and treatment records on the issue of legal pneumoconiosis. Contrary to employer’s contention, however, the administrative law judge reviewed the miner’s treatment and hospitalization records at length and found that, while many physicians believed that continued smoking was worsening his prognosis and his obstructive lung disease, “none stated that coal mine dust exposure did not contribute to the miner’s impairment or cause the COPD in combination with the cigarette smoking.”¹¹ Decision and Order at 11-16, 18, 30.

The record reflects that Dr. Barney diagnosed pneumoconiosis due to coal dust exposure and COPD due to smoking and coal dust exposure, and attributed the impairment “50% due to pneumoconiosis and 50% due to COPD.”¹² Decision and Order

Moreover, she recognized that Dr. Russakoff’s conclusion that the miner did not have legal pneumoconiosis was based on his opinion that the miner’s COPD was caused entirely by smoking, and the lack of radiographic evidence of clinical pneumoconiosis. Decision and Order at 11, 25.

¹¹ Employer does not challenge the accuracy of the administrative law judge’s summaries of the medical opinions of Drs. Barney, Keating, Crain and Westerman, or his summaries of the treatment and hospitalization records. *See* Decision and Order at 8-9, 11-19.

¹² While employer argues that “none of the miner’s *treating* physicians” attributed the miner’s pulmonary/respiratory condition to his coal mine employment, *see*

at 8-9, 11-12, 24; Director's Exhibit 12, 14. Dr. Keating, a treating physician, diagnosed emphysema, COPD, asthma, chronic bronchitis and questionable pneumonitis, based on office visits and "many" hospitalizations from 2003 to 2010, and opined that the miner died of complications from his lung disease.¹³ *Id.* at 9, 11-13, 17-18; Director's Exhibit 42. Dr. Crain, a pulmonologist, treated the miner from 2004 to 2010 and diagnosed severe emphysema, COPD, chronic bronchitis, and tobacco abuse, but did not indicate any specific etiology for the miner's lung disease. Decision and Order at 26; Director's Exhibit 44; Employer's Exhibit 3. Similarly, Dr. Westerman, who treated the miner from 2000 to 2003, diagnosed COPD and counseled the miner to stop smoking, but "did not delineate an etiology for the COPD or opine that coal mine dust exposure did not cause or contribute to the miner's impairment." Decision and Order at 26; Employer's Exhibit 6. The administrative law judge concluded that, while these records suggest that the COPD was due to smoking, the "evidence was insufficient to rule out coal mine dust exposure as a co-contributor." *Id.* at 30. Employer's arguments to the contrary essentially request that the Board reweigh the evidence, an exercise beyond our scope of review. *See*

Employer's Brief at 76, employer does not contest the administrative law judge's evaluation of examining physician Dr. Barney's diagnoses of pneumoconiosis due to coal dust exposure, as well as COPD due to smoking and coal dust exposure. As Dr. Barney attributed claimant's COPD, in part, to claimant's coal dust exposure, this condition constitutes legal pneumoconiosis under the Act. 30 U.S.C. §902(b); 20 C.F.R. §§718.201(a)(2), 718.201(a)(2), (b); *see also Jordan v. Benefits Review Board*, 876 F.2d 1455, 12 BLR 3-375 (11th Cir. 1989); *McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 1514, 12 BLR 2-108, 2-109 (11th Cir. 1988); *Stomps v. Director, OWCP*, 816 F.2d 1533, 1535, 10 BLR 2-107, 1-108 (11th Cir. 1987). Consequently, the administrative law judge properly concluded that Dr. Barney's opinion does not support rebuttal. Decision and Order at 9, 16, 18, 24, 30.

¹³ Employer urges that the statements of Dr. Keating, the miner's treating physician, "that the miner's smoking was the contributing cause to his COPD and that he could not make a diagnosis for occupational pneumoconiosis," support a finding that smoking, and not coal mine employment, caused the miner's lung disease. Employer's Reply Brief at 9; *see* Decision and Order at 4, 9. The administrative law judge considered Dr. Keating's lengthy course of treatment of the miner, including Dr. Keating's remark that "'because black lung and [COPD] have many similar symptoms, such as shortness of breath, chronic cough and obstruction of the air passages,' it would be preferable for the miner to be diagnosed by a black lung specialist." Decision and Order at 9, 11-13, 17-18, 24, 25-26, 27-28, 30; Director's Exhibit 42; Employer's Exhibit 4. Thus, contrary to employer's suggestion, the record supports the administrative law judge's rational construction of Dr. Keating's statements, and her finding that "Dr. Keating's report defers to other experts to ascertain the cause of the miner's symptoms." Decision and Order at 30.

Taylor, 862 F.2d at 1532, 12 BLR at 2-113. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.¹⁴

3. Disability Causation:

The administrative law judge found that the evidence failed to establish rebuttal under the second method because claimant failed to establish that no part of the miner's disability was due to pneumoconiosis pursuant to Section 718.305. Decision and Order at 30-31. We have affirmed, in the context of the issue of legal pneumoconiosis, the administrative law judge's findings that Drs. Goldstein and Russakoff did not provide credible opinions on the cause of the miner's respiratory impairment.¹⁵ Thus, because employer's arguments under the second method of rebuttal¹⁶ relate to the cause of the miner's respiratory impairment, namely the existence of legal pneumoconiosis, they fail to affirmatively disprove the presumed fact that the miner's disability was caused by pneumoconiosis. See Employer's Brief at 76-76, 78; Employer's Reply Brief at 2; 30 U.S.C. §921(c)(4), implemented by 20 C.F.R. §718.305; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Consequently, we affirm the administrative law judge's finding that employer did not

¹⁴ Employer's burden of proof under the first rebuttal method requires employer to disprove the existence of both clinical and legal pneumoconiosis; therefore, employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not suffer from pneumoconiosis. See 20 C.F.R. §718.305(d)(1); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Thus, any error in connection with the administrative law judge's evaluation of the evidence on the issue of clinical pneumoconiosis is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 23, 25, 29-30; Employer's Brief at 61, 75; Employer's Reply Brief at 2-4, 9-10.

¹⁵ Employer argues that rebuttal is established because the miner's respiratory impairment is due to smoking unrelated to coal mine employment, and that "claimant failed to prove that [the miner] had an occupational disease *and* that it caused him to be totally disabled and/or caused his death versus the fact that he smoked 1-3 packs of cigarettes a day for 50+ years through of (sic) his death." Employer's Brief at 76-78; Employer's Reply Brief at 10.

¹⁶ Namely, that the administrative law judge inadequately considered the factor of the miner's smoking, and that no treatment records documented pneumoconiosis or inferred that the miner's lung condition was caused by his coal mining employment. See Employer's Brief at 76-78; Employer's Reply Brief at 2.

rebut the amended Section 411(c)(4) presumption, and further affirm the award of miner's and survivor's benefits.

Accordingly, the Decision and Order Awarding Benefits in the Miner's and Survivor's Claims is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge