BRB No. 12-0465 BLA

EDWARD H. GIBSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 06/12/2013
	)	
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.

Joseph Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Jeffrey S. Goldberg (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5515) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim filed on

March 17, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] The administrative law judge found that claimant established over fifteen years of underground coal mine employment[2] and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge, therefore, found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309 as claimant established one of the elements of entitlement previously adjudicated against him.[4] Additionally, the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis because he established over fifteen years of underground coal mine employment and a totally disabling respiratory impairment.[5] 30 U.S.C. §921(c)(4). Further, the administrative law judge found that the presumption was not rebutted because employer failed to disprove

[1] Claimant's previous claim, filed on May 13, 2003, was denied because claimant failed to establish any element of entitlement. The Board affirmed that denial on November 30, 2006. Director's Exhibit 1; *see Gibson v. Eastern Associated Coal Corp*., BRB No. 06-0498 BLA (Nov. 30, 2006)(unpub.); *see also* Decision and Order at 20.

[2] The Board previously affirmed the administrative law judge's finding that at least twenty-seven years and nine months of coal mine employment were established. *Gibson*, BRB 06-0498 BLA, slip op. at 2 n.3. The administrative law judge reiterated his length of coal mine employment finding in the instant claim. Decision and Order at 3.

[3] The administrative law judge also found that claimant established the existence of legal, but not clinical, pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that he was entitled to the presumption that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 26-27.

[4] If a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

[5] On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

the existence of legal pneumoconiosis or that claimant's disabling respiratory impairment arose out of coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings of total respiratory disability and, therefore, invocation of the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's findings that claimant has legal pneumoconiosis,[6] that his disability is due to coal mine employment and, therefore, that the Section 411(c)(4) presumption was not rebutted.[7] Employer also contends that the administrative law judge improperly utilized the preamble to the revised regulations in evaluating the medical opinion evidence. Additionally, employer alleges that the administrative law judge's Decision and Order does not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument regarding the use of the preamble in evaluating the credibility of the medical opinions of record.

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.[8] 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).

[6] Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] We construe employer's objections to the administrative law judge's evaluation of the medical opinions on the issues of total respiratory disability, legal pneumoconiosis and disability causation as arguments concerning Section 411(c)(4) invocation and rebuttal, and address them accordingly.

[8] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 6 at 1-2, 8 at 4-5; *see also* Decision and Order at 20, 29, 32.

Section 411(c)(4)
Invocation

In finding that claimant established total respiratory disability pursuant to Section 718.204(b), the administrative law judge found that all of the pulmonary function studies of record were qualifying, while all of the blood gas studies of record were non-qualifying.[9] 20 C.F.R. §718.204(b)(2)(i), (ii). Regarding the medical opinion evidence, the administrative law judge found that "[a]ll of the physicians concluded that claimant's pulmonary impairment rendered him totally disabled." Decision and Order at 30; 20 C.F.R. §718.204(b)(2)(iv). Weighing all of the evidence of record together, the administrative law judge found that claimant established the presence of total respiratory disability pursuant to Section 718.204(b).

Contrary to employer's contentions, we discern no error in the administrative law judge's finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). First, employer does not challenge the administrative law judge's finding that the four newly submitted pulmonary function studies are uniformly qualifying, as were the studies from the previous claim. *See* Decision and Order at 11, 28; 20 C.F.R. §718.204(b)(2)(i). Nor does employer contest the administrative law judge's finding that claimant last worked as a mobile equipment operator, which "essentially required a sedentary position in which [c]laimant operated levers, but did not require maintenance, lifting or carrying." Decision and Order at 5; *see* Employer's Brief at 18. The administrative law judge also accurately found that the four newly submitted medical opinions stated that claimant is totally disabled from performing his usual coal mine work.[10] Decision and Order at 5,

[9] The administrative law judge found that total respiratory disability could not be established pursuant to 20 C.F.R. §718.204(b)(2)(iii) because "there is no evidence that…claimant suffers from cor pulmonale with right-sided congestive heart failure." Decision and Order at 28.

[10] Dr. Zaldivar stated that claimant's last years of work involved operating "bulldozers, cranes and truck (sic) as a mobile equipment operator…the job consisted of operating equipment," and identified claimant's job as a "heavy equipment operator," and as a mobile equipment operator "for the last two years." He concluded that from a pulmonary standpoint, claimant is severely impaired and incapable of performing his usual coal mine work. Director's Exhibits 1, 24 at 1, 5, 6; Decision and Order at 6, 12, 16.

Dr. Gallai noted that claimant "last ran a bulldozer loading coal." Specifically, Dr. Gallai recorded that claimant's "last coal mine position" involved running "a D9 and D10 bulldozer loading coal." He found that claimant had "very severe obstructive lung disease," and experienced "three step dyspnea on exertion" when getting "in the cab of a

12, 13-14, 16; Director's Exhibits 15, 24; Claimant's Exhibits 2, 5; Employer's Exhibits 4, 11. Thus, employer's assertions that the administrative law judge "ignore[d] the functional demands (or lack of functional demands)" of claimant's usual coal mine employment and that the medical opinions did not assess claimant's "ability to perform sedentary work from a pulmonary standpoint" are unfounded. *See* Employer's Brief at 18. Because the medical opinions provided reasonable explanations for the doctors' determinations that claimant could not perform his usual coal mine employment, which the administrative law judge characterized as sedentary, we reject employer's argument that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability. *See Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). Additionally, contrary to employer's assertion, the existence of other possible causes of claimant's disabling respiratory impairment is not at issue in determining the existence of total respiratory disability pursuant to Section 718.204(b). *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b), (c).

Because employer raises no further arguments with respect to the administrative law judge's weighing of the new and old evidence relevant to total respiratory disability,

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[twelve foot high] D10 Caterpillar bulldozer[.]" Dr. Gallai concluded, therefore, that claimant "is completely disabled from his prior position." Decision and Order at 12-13; Claimant's Exhibit 1 at 1, 3.

Dr. Ranavaya assessed "severe pulmonary impairment … severe ventilatory defect, which would prevent him from performing his usual or last coal mine employment." Dr. Ranavaya's medical report included a work form identifying claimant's job as "heavy equipment operator." The form also records the job title "miner," and "sitting for: Miner 8hrs.;" no additional crawling, lifting or carrying exertional requirements are specified in the areas provided. *See* Decision and Order at 12; Director's Exhibit 15 at 4, 18-19.

Dr. Klayton found claimant "totally disabled based on very severe obstructive lung disease" and noted "severe dyspnea on minimal exertion." He summarized claimant's 1968-1998 coal mine work as "long wall operator, continuous miner operator, loader operator, roof bolter, and main line motorman." Decision and Order at 13; Claimant's Exhibit 5 at 1-3, 4.

Dr. Rosenberg found claimant "disabled from a pulmonary perspective." His medical evidence review included a description of claimant's coal mine work, as well as the reports of Drs. Ranavaya, Zaldivar, Gallai, and Klayton, and he specifically noted the work histories they recorded. He detailed that claimant "last worked as a miner…on the miner he would sit for eight hours." Decision and Order at 14; Employer's Exhibits 4 at 1-2, 5-6, 9, 11 at 17.

we affirm the administrative law judge's finding that the evidence, as a whole, establishes total respiratory disability pursuant to Section 718.204(b). Decision and Order at 30; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc). Further, because we affirm the finding of total respiratory disability, we also affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). Additionally, because claimant has established the requisite years of qualifying coal mine employment and has established the presence of total respiratory disability pursuant to Section 718.204(b), we affirm the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4, 30, 32-33.

Section 411(c)(4)
Rebuttal

In considering the issue of Section 411(c)(4) rebuttal, the administrative law judge properly noted that in order to establish rebuttal of the presumption, employer must disprove the existence of both clinical and legal pneumoconiosis, or prove that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *see also Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); Decision and Order at 27, 31. Here, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption because it failed to disprove the existence of legal pneumoconiosis, or to disprove a causal relationship between claimant's disabling respiratory impairment and coal mine employment. Decision and Order at 32-33.

Employer argues, however, that the administrative law judge improperly relied on the preamble to the revised regulations in evaluating the medical opinions of Drs. Rosenberg and Zaldivar, and alleges that, unlike the regulations, the preamble was not subject to notice and comment, and is not binding on the Department of Labor (DOL). To the contrary, the preamble sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

Hence, we agree with the Director that, contrary to employer's assertion, the administrative law judge had the discretion to consider the preamble to the revised regulations in assessing the credibility of the medical experts in this case. In so doing, the administrative law judge did not treat the preamble as medical evidence, substitute his own opinion for that of the medical experts, or deprive employer of a fair hearing or impartial findings in violation of the APA. Rather, he permissibly consulted the preamble as an authoritative statement of medical principles accepted by the DOL. *See Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Obush*, 24 BLR at 1-125-26. Accordingly, we reject employer's argument that the administrative law judge erred in utilizing the preamble in his evaluation of the medical opinion evidence.

Next, in addressing rebuttal, the administrative law judge found that Drs. Zaldivar and Rosenberg failed to disprove the existence of legal pneumoconiosis and relied on principles contrary to the regulations and the preamble to form their opinions. The administrative law judge found that, unlike Drs. Ranavaya, Gallai and Klayton, whose diagnoses of legal pneumoconiosis were found to be consistent with the medical principles set forth in the preamble, the conclusions of Drs. Zaldivar and Rosenberg, that claimant does not have legal pneumoconiosis, were based on views that conflicted with the medical principles in the preamble. Decision and Order at 26; Employer's Exhibit 11 at 15; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000).

Drs. Rosenberg and Zaldivar diagnosed asthma and emphysema due to smoking, they attributed claimant's disability to those conditions and excluded coal mine dust exposure as a possible cause or exacerbating factor. Decision and Order at 25-26; *see also* Employer's Exhibit 10 at 32. Specifically, Dr. Rosenberg stated that patterns of airflow obstruction help determine the etiology of a miner's airway obstruction, and that "while the FEV_1 decreases in relationship to coal mine dust exposure, the measurement of the FEV_1/FVC ratio generally is preserved. In contrast, with smoking-related forms of [chronic obstructive pulmonary disease], the FEV_1/FVC ratio is generally reduced." Dr. Rosenberg opined further that a decreased FEV_1 and FEV_1/FVC ratio does not "generally apply" to legal pneumoconiosis, while "the opposite is true with respect to smoking-related [chronic obstructive pulmonary disease] where the ratio is decreased." Employer's Exhibits 5 at 6-7, 8-9, 11 at 11, 15-16, 21-24. The administrative law judge found, however, the basis of the doctor's opinion is inconsistent with the scientific studies that recognize "that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV_1/FVC ratio." *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); Decision and Order at 25. Hence, the administrative law judge acted within his discretion in finding that Dr. Rosenberg's opinion was "inconsistent" with the preamble. He, therefore, rationally assigned it "little weight" on the issue of legal pneumoconiosis. Decision and Order at 14-15, 24-25, 32-

33; *see Sewell Coal Co. v. Triplett*, 253 F. App'x 274, 277 (4th Cir. 2007); *Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Freeman United Coal Mining v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *see also Obush*, 24 BLR at 1-125.

Further, contrary to employer's argument, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Zaldivar,[11] who found that claimant has asthma and that coal mine dust did not contribute to claimant's asthma. The administrative law judge found, however, that the opinions of Drs. Rosenberg and Zaldivar, that the disease of asthma was unrelated to coal mine employment, were inconsistent with the view accepted by the DOL in the preamble that the "term chronic obstructive pulmonary disease includes . . . chronic bronchitis, emphysema and asthma," and that the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease. *See* 65 Fed. Reg. 79920, 79939, 79944 (Dec. 20, 2000); *Obush*, 24 BLR at 1-125-26; *see also Milburn Colliery Co. 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).

The evaluation of medical evidence is properly for the finder-of-fact. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). The administrative law judge is charged with weighing the evidence and drawing his own conclusions. *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

In this case, the administrative law judge acted within his discretion in determining that the opinions of Drs. Rosenberg and Zaldivar diverge from the prevailing views of the medical community and scientific literature relied upon by the DOL in the preamble to the revised regulations, and consequently, have little probative weight. *See Obush*, 24 BLR at 1-125-26; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7; *Lane*, 105 F.3d at 174, 21 BLR at 2-48. Thus, we reject employer's assertion that the administrative law judge mischaracterized or improperly evaluated the opinions of Drs. Rosenberg and Zaldivar, or substituted his own opinion for their opinions. Rather, we affirm his determination that the opinions of Drs. Rosenberg and Zaldivar fail to rebut the

[11] Dr. Rosenberg opined that coal mine dust exposure does not cause or contribute to asthma, and likened its effect "on a short-term basis" to "when somebody who is an asthmatic has a response to being around heavy perfume." Employer's Exhibit 11 at 12-13.

Dr. Zaldivar opined that asthma is not related in any way to coal workers' pneumoconiosis, as coal mine work does not cause asthma or worsen or contribute to it in any way. Director's Exhibit 24 at 4-5; Employer's Exhibit 10 at 20-21, 23.

presumption of legal pneumoconiosis pursuant to Section 411(c)(4). Decision and Order at 24-25, 32-33. Moreover, because the opinions of Drs. Rosenberg and Zaldivar, regarding the absence of legal pneumoconiosis, were properly rejected, the administrative law judge also rationally discounted their opinions that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment.[12] Decision and Order at 32 n.53; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). We, therefore, affirm the administrative law judge's determination that employer has failed to prove that claimant's disabling respiratory impairment is unrelated to his coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9.

As the administrative law judge permissibly discredited all of the medical opinions supportive of employer's burden on rebuttal, and substantial evidence supports his credibility determinations, we affirm his finding that the Section 411(c)(4) presumption was not rebutted.[13] *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9. Consequently, we affirm the administrative law judge's finding that claimant is entitled to benefits pursuant to Section 411(c)(4).

[12] Employer's additional assertion that the administrative law judge improperly "rel[ied] on the ten-year presumption in [20 C.F.R. §] 718.203 to find disease causation," Employer's Brief at 16, is without merit. Employer is correct that the administrative law judge's finding of legal pneumoconiosis pursuant to Section 718.202(a) necessarily subsumes a finding of disease etiology. However, under the procedural posture of this case, it is employer's burden to affirmatively rebut the presumption of coal dust exposure/coal mine employment causation afforded by Section 411(c)(4). 30 U.S.C. §921(c)(4).

[13] Because we affirm the administrative law judge's rejection of employer's medical opinion evidence, we need not consider employer's arguments concerning the opinions of Drs. Ranavaya, Klayton and Gallai, who found the existence of legal pneumoconiosis and that claimant's disabling respiratory impairment arose out of coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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