

BRB No. 12-0649 BLA

WILLIAM HALL )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 SKY COAL COMPANY, INCORPORATED )  
 )  
 and )  
 ) DATE ISSUED: 06/26/2013  
 EMPLOYERS' INSURANCE OF WAUSAU )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 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 of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

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/carrier (employer) appeals the Decision and Order on Remand (08-BLA-05261) of Administrative Law Judge Kenneth A. Krantz awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case, involving a subsequent claim filed on April 20, 2007,<sup>1</sup> is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with seventeen years of coal mine employment,<sup>2</sup> and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. In considering the merits of the claim, the administrative law judge found that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).<sup>3</sup> The administrative law judge also found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Hall v. Sky Coal Co.*, BRB No. 10-0343 BLA, slip op. at 2 n.1 (Feb. 18, 2011) (unpub.). Thus claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The Board further affirmed the

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<sup>1</sup> Claimant's prior claim, filed on August 11, 2003, was denied by the district director on April 29, 2004, because claimant did not establish the existence of a totally disabling respiratory impairment. Director's Exhibit 1. Claimant also filed claims on January 25, 2001 and April 27, 2005, but as these claims were subsequently withdrawn, they are considered not to have been filed. 20 C.F.R. §725.306(d).

<sup>2</sup> The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 1, 45. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>3</sup> "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 to that deposition caused by dust exposure in coal mine employment." 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." 20 C.F.R. §718.201(a)(2).

administrative law judge's finding that claimant established the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1). *Id.* However, the Board vacated the administrative law judge's findings that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* The Board, therefore, vacated the administrative law judge's award of benefits, and remanded the case for further consideration. *Id.* The Board also instructed the administrative law judge, on remand, to consider whether claimant could establish invocation of the amended Section 411(c)(4) presumption<sup>4</sup> and to allow the parties the opportunity to submit additional evidence responsive to the new law.<sup>5</sup> 30 U.S.C. §921(c)(4).

Applying Section 411(c)(4) on remand, and reviewing the evidence *de novo*, the administrative law judge found that claimant established 16.737 years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the presumption of total disability due to pneumoconiosis. Specifically, employer argues that the administrative law judge erred in relying on portions of the preamble to the 2001 amendments to the regulations, and in finding the opinions of employer's medical experts to be inadequately explained. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments regarding the administrative law judge's references to the preamble.<sup>6</sup>

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<sup>4</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

<sup>5</sup> No new evidence was submitted on remand. Decision and Order on Remand at 13.

<sup>6</sup> The Board previously affirmed the administrative law judge's finding that

## Rebuttal of the Section 411(c)(4) Presumption

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's 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, 25 BLR 2-1, 2-8 (6th Cir. 2011). The administrative law judge found that employer did not establish rebuttal by either method.<sup>7</sup> Decision and Order on Remand at 21.

In determining whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Baker, Dahhan, and Castle. Dr. Baker opined that claimant has legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), hypoxemia, and chronic bronchitis due, in part, to coal mine dust exposure, and that claimant's disabling respiratory impairment is due to a combination of coal mine dust exposure and smoking. Director's Exhibit 12. In contrast, Drs. Dahhan and Castle opined that claimant does not have legal pneumoconiosis, but suffers from a disabling obstructive respiratory impairment that is due entirely to cigarette smoking. Director's Exhibit 14; Employer's Exhibits 2, 4-6. The administrative law judge found that the opinions of employer's physicians, Drs. Dahhan and Castle, were not sufficiently reasoned to establish rebuttal. Decision and Order on Remand at 18-21.

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claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Hall v. Sky Coal Co.*, BRB No. 10-0343 BLA, slip op. at 2 n.1 (Feb. 18, 2011) (unpub.). On appeal, employer does not challenge the administrative law judge's finding that claimant has 16.737 years of qualifying coal mine employment, sufficient to satisfy the requirement of Section 411(c)(4). Therefore, that finding, and the administrative law judge's consequent finding that claimant invoked the Section 411(c)(4) presumption, are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>7</sup> In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order on Remand at 13-21. Employer does not challenge this aspect of the administrative law judge's decision.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Dahhan and Castle did not establish rebuttal. Employer's Brief at 6-7. Moreover, employer argues that the administrative law judge erred in crediting the opinion of Dr. Baker. Employer's Brief at 7.

Contrary to employer's assertion, the administrative law judge provided valid reasons for discounting the opinions of Drs. Dahhan and Castle. The administrative law judge first considered Dr. Dahhan's opinion, that claimant's obstructive impairment is due to smoking, and cannot be explained by the possible impact of coal mine dust on his respiratory system. The administrative law judge noted that Dr. Dahhan relied, in part, on a study by Attfield & Hodous to calculate that claimant's loss of lung function related to coal mine dust would be "less than 200 cc . . . while he demonstrates a loss of over 1700 cc . . . ." Decision and Order on Remand at 19; Employer's Exhibit 5 at 10. The administrative law judge permissibly discounted the opinion of Dr. Dahhan, in part, because he failed to adequately explain how he excluded coal mine dust inhalation as having any impact, even less than 200 cc, on claimant's obstructive impairment. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Remand at 19.

The administrative law judge next considered the opinion of Dr. Castle, that claimant's obstructive impairment is due to cigarette smoking and not coal mine dust exposure. Noting that the preamble to the revised regulations acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discounted Dr. Castle's opinion, in part, because he did not adequately explain why claimant's obstructive impairment could not be caused by a combination of smoking and coal mine dust exposure. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order on Remand at 20-21, *citing* 65 Fed. Reg. 79,941 (Dec. 20, 2000). Moreover, contrary to employer's argument, the administrative law judge did not err in relying on the preamble to the revised regulations in evaluating the credibility of the medical opinion evidence. Employer's Brief at 7-8. Rather, the administrative law judge permissibly consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *see also Westmoreland Coal Co. v. Cochran*, F.3d , 2013 WL 2418396 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir.

2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

In sum, substantial evidence supports the administrative law judge's finding that employer's evidence is not sufficient to disprove the existence of pneumoconiosis, or to establish that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment.<sup>8</sup> Decision and Order on Remand at 21. We, therefore, affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

Accordingly, the administrative law judge's Decision and Order on Remand 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

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<sup>8</sup> Thus, we need not address employer's allegations of error regarding the administrative law judge's consideration of Dr. Baker's medical opinion. Employer's Brief at 6.