



BRB No. 18-0376 BLA

GARY N. MAY )

Claimant-Respondent )

v. )

CLINE BROTHERS MINING COMPANY, )  
INCORPORATED )

and )

WEST VIRGINIA COAL WORKERS' )  
PNEUMOCONIOSIS FUND )

Employer/Carrier- )  
Petitioners )

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

Party-in-Interest )

DATE ISSUED: 06/27/2019

DECISION and ORDER

Appeal of the Decision and Order on Remand of Drew A. Swank,  
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton,  
Virginia, for claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly, PLLC),  
Morgantown, West Virginia, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2016-BLA-05101) of Administrative Law Judge Drew A. Swank, awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on December 26, 2013,<sup>1</sup> and is before the Board for a second time.

In the initial decision, the administrative law judge credited claimant with 15.88 years of underground coal mine employment,<sup>2</sup> and found that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).<sup>3</sup> He further found employer did not rebut the presumption, and awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the findings that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. *May v. Cline Bros. Mining Co.*, BRB No. 17-0086 BLA, slip op. at 3 n.4 (Aug. 20, 2017) (unpub.). However, because the administrative law failed to consider whether employer rebutted the presumed fact of legal pneumoconiosis, and applied an improper standard in finding disability causation unrebutted, the Board

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<sup>1</sup> Claimant filed two prior claims. Director's Exhibits 1, 2. His most recent prior claim, filed on February 15, 2011, was denied by the district director on September 21, 2011 for failure to establish total disability. Director's Exhibit 2.

<sup>2</sup> Claimant's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, 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, 1-202 (1989) (en banc).

<sup>3</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

vacated his determination that employer did not rebut the presumption and remanded the case for further consideration. *May*, BRB No. 17-0086 BLA, slip op. at 5-7.

On remand, the administrative law judge again found that employer did not rebut the Section 411(c)(4) presumption, and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer has filed a reply brief, reiterating its previous 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis,<sup>4</sup> or that "no part of [his] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis, employer must demonstrate that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). In evaluating whether employer met its burden, the administrative law judge considered the opinions of Drs. Zaldivar and Castle<sup>5</sup>

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<sup>4</sup> "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). The definition includes "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). "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).

<sup>5</sup> The administrative law judge also considered the medical opinions of Drs. Al-Jaroushi and Habre that claimant has legal pneumoconiosis. Decision and Order on Remand at 8-10. Dr. Al-Jaroushi opined that claimant has legal pneumoconiosis in the

that claimant's restrictive pulmonary impairment is due to diaphragmatic paralysis and obesity, unrelated to coal mine dust exposure. Director's Exhibit 38; Employer's Exhibits 1, 4, 6. The administrative law judge discredited their opinions as conclusory and not well-reasoned. Decision and Order on Remand at 13.

We reject employer's argument that the administrative law judge erred. Employer's Brief at 11-18. Although the administrative law judge accepted the physicians' opinions that diaphragmatic paralysis and obesity "can cause restricted lung defects and impact pulmonary function," he permissibly found that neither Dr. Zaldivar nor Dr. Castle adequately explained why claimant's 15.88 years of coal mine employment did not also substantially contribute to, or aggravate, claimant's restrictive impairment.<sup>6</sup> *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013) (affirming an administrative law judge's discrediting of opinions which she determined provided inadequate and unconvincing reasons for eliminating coal mine dust exposure as a cause of a miner's interstitial fibrosis); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007) (holding that an administrative law judge permissibly rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments); Decision and Order on Remand at 10-13.

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Castle,<sup>7</sup> we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis, precluding a rebuttal finding that claimant does not have pneumoconiosis.<sup>8</sup> *See* 20 C.F.R. §718.305(d)(1)(i).

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form of chronic bronchitis and emphysema due to coal mine dust exposure. Director's Exhibit 14. Dr. Habre diagnosed legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure. Claimant's Exhibit 3.

<sup>6</sup> The administrative law judge found that the failure of Drs. Zaldivar and Castle to account for claimant's coal mine dust exposure was especially significant in light of the fact that claimant is a non-smoker without any other known occupational or environmental exposures. Decision and Order on Remand at 10-11.

<sup>7</sup> Because the administrative law judge provided a valid reason for discrediting the opinions of Drs. Zaldivar and Castle, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to their opinions.

<sup>8</sup> In light of our affirmance of the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis, we need not address

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing that “no part of [claimant’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). He rationally discounted the opinions of Drs. Zaldivar and Castle that claimant’s disability is not due to pneumoconiosis because neither doctor diagnosed legal pneumoconiosis, contrary to the administrative law judge’s finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Therefore, we affirm the administrative law judge’s determination that employer failed to prove that no part of claimant’s respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

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its challenges to his determination that it also failed to establish that claimant does not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge