



BRB No. 15-0058 BLA

ROGER D. RICHMOND	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NO COAL, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS’	)	DATE ISSUED: 11/16/2015
PNEUMOCONIOSIS FUND	)	
	)	
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 Awarding Benefits – On Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits - On Remand (11-BLA-5388) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). In his first decision in this case, issued on July 13, 2012, the administrative law judge credited claimant with 32.4 years of coal mine employment, and adjudicated this claim, filed on January 19, 2010, pursuant to the regulatory provisions at 20 C.F.R. Part 718. Finding that claimant had at least seventeen years of underground coal mine employment, the administrative law judge determined that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>1</sup> The administrative law judge further found that employer did not rebut the presumption and, accordingly, awarded benefits.

Upon employer's appeal, the Board vacated the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, also vacated his finding that claimant established invocation of the presumption at amended Section 411(c)(4). The Board remanded this case to the administrative law judge, instructing him to determine the exertional requirements of claimant's usual coal mine employment as a section foreman and compare them with the medical opinions addressing claimant's abilities and limitations. The Board further instructed the administrative law judge to consider the impact on the credibility of a medical opinion where the physician's assessment of claimant's job duties differs from the administrative law judge's finding. *Richmond v. No Coal, Inc.*, BRB No. 12-0578 BLA, slip op. at 8 (July 30, 2013)(unpub.)(Boggs, J., concurring). Additionally, the Board rejected employer's assertion that application of the "rule-out" standard is improper in

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<sup>1</sup> 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 case, the amendments reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. Once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

determining whether rebuttal of the presumed fact of disability causation under amended Section 411(c)(4) is established. *Id.* at 9.

On remand, the administrative law judge found that the evidence established total disability pursuant to Section 718.204(b)(2), and that claimant was entitled to invocation of the presumption at amended Section 411(c)(4). The administrative law judge further found that employer failed to establish rebuttal of the presumption, and awarded benefits.<sup>2</sup>

In the present appeal, employer contends that the administrative law judge applied an improper rebuttal standard, and that he erred in finding that the opinions of Drs. Zaldivar and Repsher were insufficient to rebut the presumed fact of disability causation under amended Section 411(c)(4) and its implementing regulation at 20 C.F.R. §718.305(d)(1)(ii). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a letter indicating that he is not participating in this appeal.<sup>3</sup>

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.<sup>4</sup> 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).

Initially, we address employer's contention that the administrative law judge improperly restricted employer to the rebuttal methods provided to the Secretary of Labor

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<sup>2</sup> With respect to these determinations on rebuttal, the administrative law judge adopted and incorporated the reasoning set forth in the rebuttal analysis portion of his previous decision. *See* Decision and Order on Remand at 4, referencing the July 13, 2012 Decision and Order Awarding Benefits at 14-19 (2012 ALJ Decision and Order).

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4), and that employer failed to establish rebuttal by disproving the existence of pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 3-4; *see also* 2012 ALJ Decision and Order at 12, 15-16; Employer's Brief at 19.

<sup>4</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in West Virginia. Director's Exhibits 3, 6; Hearing Transcript at 21; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

as set forth in 30 U.S.C. §921(c)(4), contrary to the statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3, BLR 2-36 (1976). Employer asserts that the administrative law judge erred in “effectively” applying the “rule out” standard on rebuttal when addressing disability causation, and argues that the implementing regulation at 20 C.F.R. §718.305 is invalid because it conflicts with the statute. Employer’s Brief at 7, 14, 15 n.4. To the extent that the Board has already addressed this argument, our previous holding constitutes the law of the case. See *Richmond*, BRB No. 12-0578 BLA, slip op. at 9, citing *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011). Employer’s arguments relevant to the validity of the “no part” rebuttal standard that appears in 20 C.F.R. §718.305(d)(1)(ii) are without merit, as the Board and the United States Courts of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, have upheld this standard. See *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 5, 10-11 (Apr. 21, 2015)(Boggs, J., concurring and dissenting)(rebuttal requires “credible proof that no part, not even an insignificant part,” of a miner’s pulmonary or respiratory disability was caused by pneumoconiosis); accord *Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345, 25 BLR 2-549, 2-556 (10th Cir. 2014); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071, 25 BLR 2-431, 2-446-47 (6th Cir. 2013). We therefore reject employer’s contention.

Employer next challenges the merits of the administrative law judge’s finding that the opinions of Drs. Zaldivar<sup>5</sup> and Repsher<sup>6</sup> failed to rebut the presumed fact of disability causation pursuant to amended Section 411(c)(4). Employer reiterates that the administrative law judge applied an incorrect rebuttal standard, and that the opinions of Drs. Zaldivar and Repsher are well-reasoned and sufficient to establish rebuttal under the proper standard. Employer’s Brief at 17-19.

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<sup>5</sup> Dr. Zaldivar, who diagnosed clinical and legal pneumoconiosis, opined that asthma, pulmonary fibrosis, and smoking were the main contributors to claimant’s pulmonary impairment, and that his coal dust exposure was a “very minimal” factor but could not be ruled out. Dr. Zaldivar concluded that many other factors contributed heavily to claimant’s pulmonary condition, including smoking, asthma, emphysema, and pulmonary fibrosis. Decision and Order on Remand at 4; 2012 ALJ Decision and Order at 5-7, 11, 14-18; Employer’s Exhibits 4 at 3-4, 7 at 7-9, 12-16, 26-27.

<sup>6</sup> Dr. Repsher diagnosed simple clinical pneumoconiosis and chronic obstructive pulmonary disease (COPD)/asthma unrelated to coal dust exposure, and assessed a moderate impairment attributable to mild to moderate asthma aggravated by smoking. Employer’s Exhibits 1, 6; 2012 ALJ Decision and Order at 11-12, 16-17, 18-19; Decision and Order on Remand at 4.

After finding that all of the physicians diagnosed clinical pneumoconiosis and, therefore, that employer could not establish rebuttal of the presumed fact of pneumoconiosis, the administrative law judge reviewed the conflicting medical opinions of Drs. Rasmussen,<sup>7</sup> Zaldivar and Repsher on the issues of legal pneumoconiosis and disability causation. *See* Decision and Order on Remand at 4; 2012 ALJ Decision and Order at 17-19. The administrative law judge determined that Drs. Rasmussen and Zaldivar diagnosed legal pneumoconiosis, while Dr. Repsher attributed claimant's chronic obstructive pulmonary disease (COPD) to cigarette smoking, aging, and minimally controlled asthma. Dr. Repsher explained that claimant's spirometry showed a proportionally decreased FEV<sub>1</sub>/FVC ratio characteristic of smoking-aggravated asthma, and significant reversibility on bronchodilation, which he identified as showing uncontrolled asthma and not coal workers' pneumoconiosis. Employer's Exhibits 1, 6.

The administrative law judge permissibly discounted Dr. Repsher's "extrapolation of statistical evidence and medical studies showing that cigarette smoking is the most common and powerful cause of COPD/emphysema, and that the contribution of coal mine dust to COPD is insignificant to cause a clinically significant loss of FEV<sub>1</sub> values," since Dr. Repsher did not "specifically apply these studies to Claimant nor does he explain whether this FEV<sub>1</sub> loss is applicable to Claimant." 2012 ALJ Decision and Order at 16; *see Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). Further, the administrative law judge acted within his discretion in finding that the opinion of Dr. Repsher was not well-reasoned because he failed to adequately explain why 32.4 years of coal dust exposure did not in any way exacerbate claimant's pulmonary condition. 2012 ALJ Decision and Order at 16; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the opinions of Drs. Rasmussen and Zaldivar were well-reasoned and entitled to greater probative weight, and that the contrary opinion of Dr. Repsher was insufficient to rebut the presumed fact of legal pneumoconiosis. Decision and Order on Remand at 4; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

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<sup>7</sup> Dr. Rasmussen diagnosed clinical and legal pneumoconiosis, as well as COPD/emphysema, and assessed a moderate loss of lung function as reflected by ventilatory impairment, reduced diffusing capacity, and moderate impairment in oxygen transfer during light exercise. He attributed claimant's COPD/emphysema to both smoking and coal dust exposure, as "there's really no good way to separate them" because "both cause airways obstruction, they both cause COPD, including emphysema." Decision and Order on Remand at 4; 2012 ALJ Decision and Order at 11, 14-15, 17; Director's Exhibit 15; Employer's Exhibit 3 at 11, 19-23.

Turning to the issue of disability causation, the administrative law judge considered Dr. Zaldivar's initial opinion that both smoking and coal mine dust contributed to claimant's disabling impairment, as well as his later testimony that coal mine dust exposure made a "very minimal contribution" to claimant's impairment. Decision and Order on Remand at 4; 2012 ALJ Decision and Order at 7-8, 14-15, 18; Employer's Exhibits 4 at 4, 7 at 7-9, 12-13, 28. The administrative law judge found that Dr. Zaldivar's opinion, that claimant's coal mine dust exposure is a contributor, albeit very minimal, to claimant's pulmonary impairment, fails to rule out coal dust exposure as a causative factor in claimant's disability. Decision and Order on Remand at 4; 2012 ALJ Decision and Order at 17-19. As the record reflects that Dr. Zaldivar diagnosed both clinical and legal pneumoconiosis, and did not affirmatively opine that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, we affirm the administrative law judge's finding that his opinion is insufficient to establish rebuttal of the presumed fact of disability causation at amended Section 411(c)(4). Decision and Order on Remand at 4; *see* 20 C.F.R. §718.305(d)(1)(ii); *Bender*, 782 F.3d at 143; *Minich*, BRB No. 13-0544 BLA, slip op. at 5, 10-11.

With respect to the opinion of Dr. Repsher, the administrative law judge permissibly found that the physician's failure to diagnose legal pneumoconiosis, contrary to the weight of the evidence of record, diminished the probative value of his opinion on the issue of disability causation. Decision and Order on Remand at 4; 2012 ALJ Decision and Order at 16-19; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, BLR (4th Cir. 2015); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As the remaining opinion of Dr. Rasmussen does not support employer's burden, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumed fact of disability causation at amended Section 411(c)(4), and affirm the award of benefits.

Accordingly, the Decision and Order Awarding Benefits – On Remand is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge