BRB No. 13-0004 BLA

ROY FLEMING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PHIL STROUTH COAL COMPANY	)	
	)	
and	)	
	)	
MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 10/23/2013
	)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia/Tennessee, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2011-BLA-5418) of Administrative Law Judge Pamela J. Lakes rendered on a

subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with 18.5 years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), based on her determination that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge also found that claimant established 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),[2] and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting claimant with 18.5 years of coal mine employment and in finding that employer failed to rebut the amended Section 411(c)(4) presumption with proof that claimant's disabling respiratory impairment did not arise out of, or in connection with, employment in a coal mine. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation (the Director), has filed a letter indicating that he is not participating in this appeal.[3]

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[1] Claimant filed his first claim for benefits on September 16, 1991, which was deemed abandoned and denied by the district director on December 9, 1991. Director's Exhibit 1. Claimant filed a second claim on October 4, 1994, which was denied by the district director on January 10, 1995, based on claimant's failure to establish the existence of pneumoconiosis arising out of coal mine employment, total disability, and total disability due to pneumoconiosis. Director's Exhibit 2. Claimant filed the present claim on February 24, 2010, which is pending herein. Director's Exhibit 4.

[2] 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, 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. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total respiratory disability at 20 C.F.R. §718.204(b), and

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.[4] 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).

Employer first challenges the administrative law judge's determination that claimant established 18.5 years of coal mine employment. Employer argues that, while the administrative law judge cited the pertinent evidence, specifically, claimant's Social Security Administration (SSA) earnings records, claimant's deposition testimony, Employment History form, and Description of Coal Mine Work form, she did not identify the evidence she credited or discredited. Employer maintains that the administrative law judge failed to employ a reasonable method of computation, and asserts that any of the reasonable methods she could have employed would have resulted in a finding of fewer than fifteen years of coal mine employment.[5] Employer also argues that the administrative law judge's inconsistent findings regarding the Social Security record undermine her length of coal mine employment determination. Specifically, employer avers that, even though the administrative law judge described the SSA records as "not particularly reliable," Decision and Order at 6 n.11, she found that claimant "has established in excess of 15 years of qualifying coal mine employment, based upon the Social Security records and other evidence," Decision and Order at 5. Further, employer avers that the administrative law judge improperly relied on claimant's vague testimony, that he "got paid under the table a lot of times," to find additional years of coal mine employment established, when claimant failed to identify the employers he worked for while earning unreported income, and the dates of such employment. Lastly, employer

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therefore established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6-8. Employer additionally concedes that claimant has simple, clinical pneumoconiosis. Employer's Brief at 14.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[5] For example, employer states that, had the administrative law judge utilized the average weekly wage methodology, claimant's length of coal mine employment would amount to "just under 13.5 years." Employer's Brief at 11. Alternatively, employer argues, had she compared claimant's earnings with the average earnings of coal miners, the administrative law judge's calculation would have totaled "less than 9 full years." *Id.*

contends that the administrative law judge erred in failing to determine whether claimant's work in strip mining for three years was performed in substantially similar conditions to those found in underground mining. Employer's arguments lack merit.

A review of the Decision and Order reveals that the administrative law judge set forth her findings of fact and conclusions of law, based on her assessment of the probative value of the relevant evidence of record. *See* Decision and Order at 5-6; Director's Exhibits 5-7, 31. The administrative law judge examined claimant's Employment History form and his Description of Coal Mine Work form, finding that these documents were "not detailed," but reflected that claimant's coal mine employment ceased in September of 1994. Decision and Order at 5; Director's Exhibits 2, 5, 6. Based on the SSA earnings records, the administrative law judge determined that claimant was properly credited with one quarter of coal mine employment in 1973, four quarters in 1974, one quarter in 1975, and two quarters in 1977, for a total of two years. She further determined that after 1977 the SSA records did not break down claimant's yearly earnings into quarters, but reflected "continuous coal mining for various employers from 1978 to 1994," with the exception of 1979, when claimant worked for the Town of Clintwood as well as for two coal companies.[6] Decision and Order at 5; Director's Exhibit 7. Next, the administrative law judge considered claimant's deposition testimony, and was persuaded by claimant's uncontradicted assertion that the SSA earnings records did not reflect all of his earnings "because '[a] lot of times [he] got paid under the table' and the earnings were not reported." *See Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984); Decision and Order at 5, *citing* Director's Exhibit 31 at 7. Thus, the administrative law judge permissibly declined to accept the Director's calculation of 15.65 years of coal mine employment, which was based upon the SSA reported earnings,[7] as she found that claimant's credible testimony established that the SSA records reflected incomplete earnings, rendering their use "not particularly reliable" as documentation of claimant's actual yearly earnings. Decision and Order at 6, n.11. Likewise, the administrative law judge rejected employer's recommended computation method, as it credited claimant only "for fractions of years even in those years for which his testimony ma[de] clear that he was employed for a full year." *Id.* Thus, the

[6] The administrative law judge noted that in 1979 claimant received $416 from the Town of Clintwood, $1,309.25 from Phil Strouth Coal Company, and $5,421.46 from High Top Mining. Decision and Order at 5, n.9; Director's Exhibit 7.

[7] The administrative law judge further noted that, despite attaching the applicable table, the district director did not show how he calculated 15.65 years of coal mine employment. Using the district director's earnings method, the administrative law judge indicated that she would calculate 16.18 years of coal mine employment. Decision and Order at 6, n.11; Director's Exhibits 23, 35.

administrative law judge acted within her discretion in crediting claimant with coal mine employment for every time period reflected on his SSA earnings records, less six months, for a total of 18.5 years between 1973 and 1994.[8] *See Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1232 (1984). Lastly, the administrative law judge determined that claimant worked in strip mining for approximately three years,[9] and that the remainder of his coal mine employment was underground. Thus, it was not incumbent upon the administrative law judge to determine whether the dust conditions in claimant's strip mine employment were substantially similar to those in an underground coal mine, because she found that claimant established at least fifteen years of underground coal mine employment, as required by amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4). As the administrative law judge employed a reasonable method of computation, *see Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984), and substantial evidence supports her findings, we affirm her determination of 18.5 years of coal mine employment, of which at least fifteen years were spent underground, and affirm her finding that claimant established invocation of the amended Section 411(c)(4) presumption.

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with proof that claimant's disabling impairment did not arise out of, or in connection with, employment in a coal mine.[10] Employer contends that the administrative law judge erred in assigning

[8] Contrary to employer's arguments, the administrative law judge did not rely on claimant's deposition testimony to *increase* the number of years of coal mine employment reflected on claimant's Social Security Administration (SSA) earnings records; rather, the administrative law judge declined to *decrease* the number of years of SSA-documented coal mine employment, based strictly on the amount of yearly earnings reported.

[9] Based on the SSA records considered in conjunction with claimant's testimony, the administrative law judge determined that claimant worked in strip mining for Coal Field and Norton Mining, for a total of six quarters between 1973 and 1975; and that claimant worked in both strip mining and underground mining for Triple S Mining from 1983 to 1985, and was also employed in underground mining by Wampler Brothers Coal Company in 1984 and 1985. The administrative law judge explained that claimant's employment in strip mining for Triple S could not be reliably estimated, but found that "it was probably between one and two years." Decision and Order at 5.

[10] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 10.

probative weight to Dr. Baker's opinion, and in finding that the opinions of Drs. Baker and Fino were of equal probative value. Employer asserts that Dr. Baker's reliance on an inflated coal mine employment history and a deflated smoking history diminishes the probative value of his opinion. Employer also maintains that Dr. Baker's opinion is unexplained and equivocal because Dr. Baker stated that claimant's chronic obstructive pulmonary disease, chronic bronchitis, and arterial hypoxemia "could be" caused by coal dust exposure and/or cigarette smoking. Employer's arguments essentially request a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

In evaluating the conflicting medical opinions of record, the administrative law judge accurately summarized the qualifications of the physicians, their explanations and bases for their conclusions, and acted within her discretion in finding that the opinions of both Dr. Fino, that claimant's disability is attributable solely to cigarette smoking, and Dr. Baker, that coal dust exposure is a substantial contributing cause of claimant's disabling respiratory impairment, were well-reasoned, well-documented, and entitled to full probative weight.[11] Decision and Order at 10-12; *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); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge acknowledged that reliance on a significantly inaccurate employment history may compromise the value of a medical opinion, but permissibly declined to accord less weight to Dr. Baker's opinion on that basis, finding that the discrepancy between Dr. Baker's reliance on a coal mine employment history of 22 years and the administrative law judge's determination of 18.5 years over a 22-year period was not significant. *See Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-309 (1985); Decision and Order at 12. Similarly, the administrative law judge acknowledged that Dr. Baker's reported smoking history of one pack per day for forty years was inconsistent with claimant's testimony and with her own determination that claimant smoked one and one-half packs per day for forty years. Decision and Order at 12. Nevertheless, the administrative law judge permissibly concluded that Dr. Baker's underestimation still constituted "a heavy smoking history, extending over the same period of time," and did not diminish the overall probative value of Dr. Baker's opinion. *See Gorzalka*, 16 BLR at 1-52; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Gouge*, 8 BLR at 1-308-309; Decision and Order at 12. Because the administrative law judge determined that the opinions of Drs. Fino and Baker were both entitled to full probative weight, she rationally concluded that the medical opinion evidence was in equipoise, and that employer failed to carry its

[11] Employer has not challenged the administrative law judge's discounting of the opinions of Drs. Gallai and Rosenberg, the remaining physicians of record. Decision and Order at 11; Claimant's Exhibit 6; Employer's Exhibits 1, 5.

burden on rebuttal. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); Decision and Order at 12. As substantial evidence supports the administrative law judge's credibility determinations, we affirm her findings that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption and that claimant is entitled to benefits. *See Mingo Logan Coal Co. v. Owens*, F.3d , 2013 WL 3929081 (4th Cir. 2013)(Niemeyer, J., concurring); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Accordingly, the Decision and Order Granting Benefits of the administrative law judge 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