

BRB No. 13-0036 BLA

HERMAN H. WILLIAMS)
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 Claimant-Respondent)
)
 v.)
)
 CONSOLIDATION COAL COMPANY)
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 and)
)
 CONSOL ENERGY, INCORPORATED) DATE ISSUED: 10/30/2013
)
 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 on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Micah S. Blankenship (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jonathan Rolfe (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (08-BLA-5764) of Administrative Law Judge Adele H. Odegard awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ This subsequent claim, filed on September 4, 2007, is before the Board for the second time.² Director's Exhibit 3.

In the initial decision, the administrative law judge credited claimant with more than thirty years of coal mine employment, of which more than fifteen years were spent underground.³ Decision and Order on Remand at 2. The administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)

¹ A recent amendment to the Act reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

² Claimant's first claim for benefits, filed on April 16, 1993, was denied by the district director on August 9, 1996, for failure to establish total disability and was administratively closed, as abandoned, on October 29, 1996. Director's Exhibit 1 at 1, 3. The present claim was filed on September 4, 2007. Director's Exhibit 3. The district director issued a proposed decision and order awarding benefits on April 21, 2008. Director's Exhibit 18. Employer requested a formal hearing before the Office of the Administrative Law Judges on April 25, 2008, and a hearing was held on December 15, 2009. Director's Exhibit 19.

³ The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 1. 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).

(2013), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 (2013). Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge found that invocation of the rebuttable presumption of total disability due to pneumoconiosis was established, and that employer failed to establish rebuttal. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's application of amended Section 411(c)(4) to this case, rejecting, *inter alia*, employer's contention that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. The Board further affirmed the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, that the evidence established total disability and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b) (2013), 725.309(d) (2013), and that claimant invoked the Section 411(c)(4) presumption. *Williams v. Consolidation Coal Co.*, BRB No. 11-0261 BLA, slip op. at 3-4 (Dec. 29, 2011) (unpub.). Addressing the administrative law judge's rebuttal determinations, the Board affirmed the administrative law judge's findings that as the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment, employer did not disprove the existence of pneumoconiosis. The Board vacated, however, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis by establishing that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. *Williams*, slip op. at 6. Specifically, the Board found merit in employer's contentions that the administrative law judge erred in her consideration of claimant's smoking history and, therefore, erred in discrediting the opinions of Drs. Spagnolo and Ghio on the ground that they relied on an inaccurate smoking history. The Board instructed the administrative law judge, on remand, to reassess the evidence of record relevant to the issues of the length and extent of claimant's smoking history and rebuttal of the amended Section 411(c)(4) presumption, and to fully explain the basis for her findings of fact and conclusions of law, as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *Williams*, slip op. at 4-5.

In a Decision and Order on Remand dated October 10, 2012, the administrative law judge initially found that claimant had a smoking history of approximately twenty-six pack-years, that he initially stopped smoking in approximately 1981, and may have been smoking again in 2001 and 2007. The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that, in finding that employer failed to rebut the amended Section 411(c)(4) presumption, the administrative law judge inaccurately

assessed claimant's smoking history, which tainted her credibility determinations with regard to the cause of claimant's disabling respiratory impairment.⁴ Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that the administrative law judge erred in applying Section 411(c)(4) to this case.

Claimant's Smoking History

Employer concedes that claimant has "a twenty six pack-year history of smoking which may have initially concluded in 1981 or 1982." Employer's Brief at 12. Employer asserts, however, that "the [administrative law judge's] conclusion that the evidence did not demonstrate a resumption of smoking during at least some portions of the [c]laimant's later years" is not rational and is unsupported by substantial evidence. Employer's Brief at 12. Rather, employer argues, the evidence supports a conclusion that claimant resumed smoking after 1996 and was likely smoking from 2001 to 2007. Employer's Brief at 19. Employer contends that, therefore, the administrative law judge improperly discounted the medical opinions of Drs. Spagnolo and Ghio, relevant to rebuttal, as inconsistent with the administrative law judge's findings as to the extent of claimant's smoking history. Employer's Brief at 12. Employer's contentions lack merit.

On remand the administrative law judge reconsidered all of the evidence of record pertaining to claimant's smoking history, including the smoking histories recorded in the medical opinions, medical treatment records, and hospitalization records.⁵ The

⁴ Additionally, employer reiterates its argument that the rebuttal provisions of amended Section 411(c)(4) do not apply in cases where an employer is liable for benefits, asserting that the plain language of 30 U.S.C. §921(c)(4) provides limitations on rebuttal evidence which apply only to claims brought against "the Secretary." Employer's Brief at 7-8. In the prior appeal, the Board rejected employer's argument pursuant to *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013). *Williams v. Consolidation Coal Co.*, BRB No. 11-0261 BLA, slip op. at 3 (Dec. 29, 2011) (unpub.). Moreover, as discussed *supra* n.1, the Department of Labor subsequently promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. 59,115 (Sept. 25, 2013).

⁵ The administrative law judge also considered claimant's 2009 hearing testimony, but permissibly concluded that claimant was "not . . . particularly credible regarding his smoking history," as he testified, in contrast to the histories contained in the voluminous medical records, that he had smoked a few cigarettes but never had a habit of smoking, and that he smoked some cigarettes but never inhaled. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Grizzle v. Pickands*

administrative law judge noted that the 1996 report of Dr. Rasmussen, the only medical opinion associated with claimant's prior claim, reflected that claimant began to smoke regularly in 1955 and smoked an average of one pack of cigarettes per day until he quit in 1981. Decision and Order on Remand at 7; Director's Exhibit 1. The administrative law judge further found that the medical treatment records, primarily from New River Breathing Center, covering approximately twenty visits from 1985 to 1994, uniformly and affirmatively indicated that claimant was a non-smoker who quit smoking in 1981 or 1982. Decision and Order on Remand at 4-6, 9; Employer's Exhibit 3. The administrative law judge correctly noted that these records are not contradicted. Decision and Order on Remand at 9. The administrative law judge also considered the treatment records from Dr. Hasan, claimant's treating physician, reflecting more than seventy-five visits from 1996 to 2008. Decision and Order on Remand at 5, 7. The administrative law judge accurately noted that, with the exception of the record of claimant's initial visit in May 1996, which indicated that claimant was a non-smoker, none of Dr. Hasan's treatment records indicated claimant's smoking status. Decision and Order on Remand at 7.

In contrast, the administrative law judge found that the record contains three documents, pertaining to two hospitalizations in 2001 and 2007, that note that claimant was smoking at that time.⁶ Decision and Order on Remand at 8. The administrative law judge further noted, however, that none of these documents contains any information about the length or extent of claimant's smoking history, and other documents that also pertain to the 2001 and 2007 hospitalizations do not address whether claimant was smoking. *Id.*

Considering the three hospitalization records from 2001 and 2007 that note that claimant was a smoker, together with the uncontradicted New River Breathing Center records that affirmatively state that claimant was a non-smoker from 1985 to 1994, and Dr. Hasan's records, memorializing more than seventy-five visits from 1996 to 2008, and containing no indications that claimant was a smoker, the administrative law judge concluded that, "at best" the evidence of record "reflect[s] that the Claimant was smoking in 2001 and again in 2007," but does "not establish . . . that [c]laimant continued smoking

Mather & Co., 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); Decision and Order on Remand at 6; Hearing Tr. at 21-23.

⁶ Dr. Hasan's December 13, 2001 hospital admission record reflects that "[claimant] is a smoker," and Dr. Dy's December 16, 2001 hospital consultation notes state that "[h]e smokes." Employer's Exhibit 2. Dr. Hasan's March 22, 2007 hospital admission record also notes that claimant "is a smoker." *Id.*

without interruption from the early 1980's into the [twenty-first] century.” Decision and Order on Remand at 8. Thus, as the administrative law judge acknowledged that claimant may have smoked in 2001 and 2007, there is no merit to employer’s contention that the administrative law judge erred in “conclud[ing] that the evidence did not demonstrate a resumption of smoking during at least some portions of the [c]laimant’s later years.” Employer’s Brief at 12.

It is the duty of the administrative law judge to weigh the medical evidence and to draw his own inferences, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge properly considered all of the documentary and testimonial evidence of record, as instructed,⁷ and adequately explained her conclusions that claimant had a twenty-six pack-year history of smoking, beginning in 1955 and ending approximately in 1981, and that he may have smoked again in 2001 and 2007, but did not smoke continuously from 1955 to 2007. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803-04, 21 BLR 2-302, 2-310-12 (4th Cir. 1998). As substantial evidence supports the administrative law judge’s permissible inferences relevant to claimant’s smoking history, they are affirmed. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); Decision and Order on Remand at 9-10.

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant’s totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with,

⁷ Employer contends that the administrative law judge erred by failing to address claimant’s 2009 testimony that he “had not smoked in four years at least,” which employer asserts constitutes an admission by claimant that he was smoking as late as 2005. Employer’s Brief at 19-20. Contrary to employer’s contention, the administrative law judge permissibly concluded that claimant’s 2009 testimony regarding his smoking history was not credible. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-126; Decision and Order on Remand at 6.

coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); Decision and Order on Remand at 10. In order to meet its rebuttal burden, employer must effectively rule out any contribution to claimant’s pulmonary impairment by coal mine dust exposure. 78 Fed. Reg. 59,105 (Sept. 25, 2013); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); Decision and Order on Remand at 10.

Employer contends that the administrative law judge erred in finding that employer failed to establish that claimant’s pulmonary or respiratory impairment “did not arise out of, or in connection with,” coal mine employment.⁸

In evaluating whether employer proved that claimant’s pulmonary or respiratory impairment “did not arise out of, or in connection with,” coal mine employment, the administrative law judge considered the medical opinions of Drs. Spagnolo and Ghio, that claimant’s disabling obstructive respiratory impairment is due entirely to claimant’s history of cigarette smoking.⁹ Employer’s Exhibits 4, 5, 7. The administrative law judge discounted Dr. Spagnolo’s opinion on the cause of claimant’s disabling impairment because the physician relied on an inaccurate smoking history. The administrative law judge discounted the opinion of Dr. Ghio as to the cause of claimant’s disabling obstructive impairment, finding it inadequately explained.¹⁰ Decision and Order on Remand at 12-14. The administrative law judge concluded that, as “no opinion articulates a rationale whereby the contributory nature of the [c]laimant’s stipulated coal mine dust exposure can be ruled out as a cause of his disability,” employer failed to prove

⁸ As the Board previously affirmed the administrative law judge’s finding that the evidence establishes the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013), employer is precluded from rebutting the presumption by disproving the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(1); Decision and Order on Remand at 10.

⁹ The administrative law judge also considered the opinion of Dr. Porterfield, that claimant’s disabling respiratory impairment is due, in part, to coal mine dust exposure. Director’s Exhibit 11. The administrative law judge discounted Dr. Porterfield’s opinion because it was premised on the incorrect assumption that claimant was never a smoker. Decision and Order on Remand at 11.

¹⁰ Contrary to employer’s assertion, the administrative law judge did not discount Dr. Ghio’s opinion as based on an inaccurate smoking history. Decision and Order on Remand at 12-13; Employer’s Brief at 12. Rather, the administrative law judge noted that Dr. Ghio considered a twenty to twenty-five pack-year history, similar to her own findings. Decision and Order on Remand at 12.

that claimant's disabling pulmonary impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order on Remand at 13.

Employer contends that the administrative law judge mischaracterized Dr. Spagnolo's opinion as being based on an uninterrupted smoking history from 1955 to 2007. Employer's Brief at 23, 26-27. We disagree. Dr. Spagnolo noted that the records he reviewed, including the 1996 report of Dr. Rasmussen and the 1985 New River Family Health Center Record, indicated that claimant began smoking regularly in 1955 and smoked one pack per day for at least twenty-six years. The administrative law judge noted that Dr. Spagnolo further stated that "[o]f importance, subsequent hospital records from 2001 and 2007 indicated that [claimant] was still smoking," and that "[t]his long period of cigarette smoking would have placed [claimant] at risk of developing [chronic obstructive pulmonary disease], bullous emphysema, chronic bronchitis, lung cancer and heart disease." Decision and Order on Remand at 12; Employer's Exhibit 7. Based on Dr. Spagnolo's statements, the administrative law judge reasonably inferred that Dr. Spagnolo's opinion, that claimant's disabling impairment was entirely due to his smoking history, was based, in part, "on Dr. Spagnolo's conclusion that the [c]laimant continued to smoke at least up to 2007." See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order on Remand at 12; Employer's Exhibits 4, 7. Employer's argument, that the administrative law judge improperly weighed the opinion of Dr. Spagnolo essentially amounts to a request to reweigh the evidence, which is beyond the Board's scope of review. See *Anderson*, 12 BLR at 1-113. We therefore affirm, as supported by substantial evidence and within her discretion, the administrative law judge's determination to discount Dr. Spagnolo's opinion because of his reliance on an inaccurate smoking history. See *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988).

We also reject employer's contention that the administrative law judge erred in discounting the opinion of Dr. Ghio, that claimant's chronic obstructive pulmonary disease is due entirely to smoking and not to coal mine dust exposure. In finding Dr. Ghio's opinion to be unreasoned, the administrative law judge correctly noted that while Dr. Ghio relied, in part, on evidence of hyperinflation seen on x-ray to support his conclusion, only one of the five x-rays he reviewed, according to Dr. Ghio's summaries, showed hyperinflation. Decision and Order on Remand at 13; Employer's Exhibit 5 at 3. The administrative law judge also correctly noted that Dr. Ghio relied on a medical study that indicated that, under current dust control measures, the estimated loss of FEV1 attributable to coal mine dust exposure over a career would be insignificant. The administrative law judge further noted, however, that claimant worked for at least a decade before dust control measures were implemented. Decision and Order on Remand at 13; Employer's Exhibit 5 at 4. In light of these factors, the administrative law judge

permissibly concluded that Dr. Ghio failed to adequately explain his conclusion that claimant's thirty years of coal mine dust exposure played no role in claimant's disabling pulmonary impairment. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order on Remand at 13.

As the administrative law judge's bases for discrediting the opinions of Drs. Spagnolo and Ghio are rational and supported by substantial evidence, they are affirmed. *See Compton*, 211 F.3d at 207-08, 22 BLR at 2-168. We, therefore, affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment.

Therefore, we affirm the administrative law judge's determination that employer failed to meet its burden to establish rebuttal, and we affirm the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. 718.305(d); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge