BRB No. 12-0005 BLA

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| COLUMBUS BEVERLY HALE | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| THREE H COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| and | ) | |
| | ) | DATE ISSUED: 09/25/2012 |
| OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| 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 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.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5827) of Administrative Law Judge Pamela J. Lakes awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a subsequent claim filed on October 6, 2008.[1]

Considering this claim, the administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish 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).

Applying amended Section 411(c)(4), the administrative law judge found that claimant established thirty-four years of underground coal mine employment,[2] and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R.

[1] Claimant initially filed a claim for benefits on June 21, 1985. Director's Exhibit 1. In a Decision and Order dated February 2, 1988, Administrative Law Judge John J. Forbes, Jr., found that the evidence did not establish the existence of pneumoconiosis, or that claimant was totally disabled. *Id.* Accordingly, Judge Forbes denied benefits. *Id.* On review of claimant's appeal, the Board affirmed Judge Forbes's finding that the evidence did not establish total disability, and, therefore, affirmed his denial of benefits. *Hale v. Three H Coal Co.*, BRB No. 88-0564 BLA (May 15, 1990) (unpub.). The district director denied claimant's request for modification on February 21, 1991. Director's Exhibit 1.

[2] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 4. 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 (1989) (en banc).

§718.204(b)(2).[3] The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that claimant did not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, requesting that the Board reject employer's arguments that the administrative law judge misapplied the law in finding that employer did not rebut the Section 411(c)(4) presumption.[4]

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).

**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 of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge found that employer failed to establish either method of rebuttal. Decision and Order 8-14. Specifically, the administrative law judge found that employer failed to disprove the

[3] In light of her finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), 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).

[4] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Id.*

existence of clinical pneumoconiosis.[5] *Id*. at 8-11. The administrative law judge also found that employer failed to disprove a causal relationship between claimant's disability and his pneumoconiosis. *Id*. at 11-14.

Because employer does not challenge the administrative law judge's determination that it failed to disprove the existence of clinical pneumoconiosis, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge, therefore, found it unnecessary to determine whether employer could disprove the existence of legal pneumoconiosis. Decision and Order at 10.

Employer asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption, by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). In addressing this second method of rebuttal, the administrative law judge considered the opinions of Drs. Rosenberg and Fino.

Dr. Rosenberg opined that claimant does not suffer from either clinical or legal pneumoconiosis. Employer's Exhibit 1. Although Dr. Rosenberg opined that claimant is disabled from a pulmonary standpoint, he opined that claimant's obstruction is due to asthma, not his coal mine dust exposure. Employer's Exhibits 1, 6. Dr. Fino also opined that claimant does not suffer from either clinical or legal pneumoconiosis. Employer's Exhibit 3. Dr. Fino further opined that claimant's obstructive impairment is due to asthma, not coal mine dust exposure. Employer's Exhibits 3, 5.

The administrative law judge found that neither Dr. Rosenberg nor Dr. Fino adequately explained how they eliminated claimant's thirty-four years of coal mine employment as a contributor to claimant's disabling obstructive impairment. Decision and Order at 13. The administrative law judge, therefore, found that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

[5] Clinical pneumoconiosis is a disease "characterized by [the] 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).

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Rosenberg and Fino. We disagree. The administrative law judge noted that both doctors relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to exclude coal mine dust exposure as a cause of claimant's obstructive impairment. Decision and Order at 13. The administrative law judge found, as was within her discretion, that neither Dr. Rosenberg nor Dr. Fino adequately explained why the irreversible portion of claimant's pulmonary impairment was not due, in part, to coal mine dust exposure,[6] or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling obstructive impairment. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 13. As the administrative law judge's basis for discrediting the opinions of Drs. Rosenberg and Fino is rational and supported by substantial evidence, it is affirmed.

Contrary to employer's additional argument, in order to establish rebuttal of the Section 411(c)(4) presumption, the administrative law judge appropriately required employer, to demonstrate that claimant's pulmonary impairment was not caused or aggravated by coal mine dust. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, there is no merit to employer's contention that the administrative law judge improperly imposed a heightened burden on employer to prove rebuttal of the Section 411(c)(4) presumption.

We further reject employer's contention that the administrative law judge erred in failing to consider whether claimant's disabling back injury precludes an award of benefits. Citing *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), employer contends that claimant's totally disabling, preexisting back injury precludes an award of benefits. As noted above, we must apply the law of the Fourth Circuit, which did not adopt the standard of *Foster* and *Vigna*. *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255. 1-267 (2003). Moreover, in claims filed after January 19, 2001, a nonpulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." *See* 20 C.F.R. §718.204(a); *see Gulley v. Director, OWCP*, 397 F.3d 535, 538-39, 23 BLR 2-242, 2-248-49 (7th Cir.

[6] As accurately noted by the administrative law judge, all of claimant's new pulmonary function studies, including post-bronchodilator studies conducted on November 6, 2008, October 7, 2009, and November 9, 2009, meet the disability standards set forth at Appendix B of Part 718. Decision and Order at 7; Director's Exhibit 10; Claimant's Exhibit 3; Employer's Exhibit 1.

2005). Therefore, the administrative law judge properly did not consider claimant's back injury in determining whether he is totally disabled due to pneumoconiosis.

We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal. *See Rose* 614 F.2d at 939, 2 BLR at 2-43. Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge