**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0326 BLA

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| JERRY WAYNE FOWLER | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| TRONOX, INCORPORATED | ) | DATE ISSUED: 04/24/2017 |
| | ) | |
| Employer-Petitioner | ) | |
| | ) | |
| 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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Jeffrey S. Goldberg (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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 appeals the Decision and Order Awarding Benefits on Remand (2008-BLA-5350) of Administrative Law Judge Steven D. Bell, rendered on a subsequent claim filed on January 16, 2007, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.[1] In the prior appeal, the Board considered the March 25, 2014 Decision and Order awarding benefits of Administrative Law Judge Stephen M. Reilly. The Board initially rejected employer's argument that the 2013 regulations are impermissibly retroactive. The Board affirmed Judge Reilly's finding that claimant 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), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.309. *Fowler v. Kerr McGee Corp.*, BRB No. 14-0218 BLA, slip op. at 6-7, n.8. (Apr. 7, 2014) (unpub.) (Boggs, J., concurring). However, because Judge Reilly did not adequately explain why he found the opinions of Drs. Repsher and Zaldivar to be incomplete, inaccurate, and based on generalities on the issue of legal pneumoconiosis, the Board held that Judge Reilly erred in finding that employer did not establish rebuttal of the Section 411(c)(4) presumption.[2] Accordingly, the Board vacated Judge Reilly's award of benefits and remanded the case for further consideration.

Due to Judge Reilly's retirement, the case was reassigned to Judge Bell (the administrative law judge). On remand, the administrative law judge again found that employer failed to establish rebuttal of the Section 411(c)(4) presumption and awarded benefits, commencing January 2007.

On appeal, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Employer further argues that the administrative law judge created an irrebuttable presumption in finding that employer failed to disprove disability causation. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has responded, arguing that the administrative law judge applied the proper rebuttal standard and reasonably determined that employer

[1] We incorporate the procedural history of the case as set forth in the Board's prior decision. *Fowler v. Kerr McGee Corp.*, BRB No. 14-0218 BLA, slip op. at 2 n.1 (Apr. 7, 2014) (unpub.) (Boggs, J., concurring).

[2] The Board also held that Judge Reilly failed to adequately explain the weight accorded the analog x-rays, digital x-rays and CT scan evidence. *Fowler v. Kerr McGee Corp.*, BRB No. 14-0218 BLA, slip op. at 8-14 (Apr. 7, 2014) (unpub.) (Boggs, J., concurring). Thus, the Board vacated Judge Reilly's finding that employer failed to rebut the presumed fact of clinical pneumoconiosis.

did not rebut the Section 411(c)(4) presumption. Employer has filed a reply brief in support of its position.

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.[3] 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).

In order to rebut the Section 411(c)(4) presumption, employer must affirmatively establish that claimant has neither legal nor clinical pneumoconiosis, or that "no part of the miner'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)(i), (ii); *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 726, 25 BLR 2-405, 2-413 (7th Cir. 2013); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698 (4th Cir. 2015) ; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B), but failed to disprove the presumed facts of legal pneumoconiosis and disability causation. Decision and Order on Remand at 14.

**I. Legal Pneumoconiosis**

The administrative law judge noted initially that only one of the five physicians who submitted medical reports in conjunction with the prior claim diagnosed legal pneumoconiosis.[4] Decision and Order on Remand at 14. The administrative law judge indicated that while he found the evidence from the prior claim to be "preponderantly negative for legal pneumoconiosis," he found the medical reports were insufficient to satisfy employer's burden due to their advanced age and inadequate explanations. *Id*.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (en banc); Director's Exhibit 4.

[4] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' 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) (emphasis added).

Weighing the newly submitted medical opinion evidence, the administrative law judge observed that Drs. Houser, Cohen and Istanbouly diagnosed legal pneumoconiosis and therefore their opinions did not aid employer in rebutting the Section 411(c)(4) presumption. Decision and Order at 15. With regard to employer's physicians, the administrative law judge found that Drs. Repsher and Zaldivar attributed claimant's chronic obstructive pulmonary disease (COPD)/emphysema to cigarette smoking[5] and obesity, with no contribution from coal dust exposure. The administrative law judge, however, determined that neither Dr. Repsher nor Dr. Zaldivar offered a persuasive rationale for why claimant does not have legal pneumoconiosis. Thus, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A).

Employer contends that the administrative law judge erred in concluding that Dr. Repsher expressed views that were inconsistent with the preamble to the 2001 regulatory revisions. We disagree. Dr. Repsher opined that claimant does not have legal pneumoconiosis, explaining that "to a statistical certainty" there is only "an occasional miner who would develop clinically significant obstructive disease from inhaling coal mine dust." Employer's Exhibit 5 at 16. However, the administrative law judge correctly observed that the Department of Labor (DOL) has "disavowed the use of the statistical averaging employed by Dr. Repsher" and recognized in the preamble that "nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners." Decision and Order on Remand at 17-18, *quoting* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000);[6] *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521

[5] The administrative law judge determined that claimant had a forty pack-year smoking history. Decision and Order on Remand at 15.

[6] The administrative law judge cited the following passage in the preamble:

> [T]he incidence of smoking coal miners with intermediate dust exposure developing moderate obstruction (FEV1 of less than 80%) is roughly equal to the incidence of moderate obstruction in smokers with no mining exposure (15.5% v. 17.1%). Similarly, the incidence of non-smoking miners with intermediate exposure developing severe airways obstruction (FEV1 of Less than 65%) is equal to the incidence of severe obstruction in non-mining smokers (5.0% for both groups). Nonsmokers with high exposure are at greater risk for developing moderate or severe obstruction than unexposed smokers. *Smokers who mine have additive risk for developing significant obstruction. . . . The message from the Marine study is unequivocal: Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking.*

F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011). The administrative law judge permissibly found Dr. Repsher's opinion unpersuasive because he did not focus on the specifics of claimant's condition, and failed to adequately explain why the effects of coal dust exposure and smoking were not additive in causing claimant's COPD. *See* 65 Fed. Reg. at 79.920, 79,941; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04; Decision and Order on Remand at 17.

We further reject employer's argument that the administrative law judge erred in his treatment of Dr. Zaldivar's opinion. The administrative law judge observed correctly that Dr. Zaldivar excluded a diagnosis of legal pneumoconiosis in this case based on his belief that smoking causes a much more rapid decline in FEV1 in comparison to coal dust exposure. Decision and Order on Remand at 18. The administrative law judge rationally found that Dr. Zaldivar's view "contravenes the DOL position that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners." Decision and Order on Remand at 19, *citing Beeler*, 521 F.3d at 726, 24 BLR at 2-103-04. Additionally, we see no error in the administrative law judge's rejection of Dr. Zaldivar's explanation that claimant's COPD/bullous emphysema is not legal pneumoconiosis because there is no radiographic evidence of complicated pneumoconiosis or progressive massive fibrosis.[7] Decision and Order on Remand at 20, *citing* 65 Fed. Reg. at 79,939. The administrative law judge also permissibly rejected employer's argument as the regulatory definition of legal pneumoconiosis does not require the presence of clinical pneumoconiosis, and the regulations provide that the *presence* of legal pneumoconiosis is not necessarily based on the degree of dust retention in the lungs. *See* 65 Fed. Reg. at 79,941; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *Obush*, 650 F.3d at 257, 24 BLR at 2-383.

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Decision and Order on Remand at 16-17; *citing* 65 Fed. Reg.79,920, 79,940 (Dec. 20, 2000).

[7] Dr. Zaldivar testified that it is "almost impossible" to diagnose centrilobular emphysema caused by coal dust "without evidence of any pneumoconiosis physically . . . [it] would have to include, if available, any kind of pathological evidence." Employer's Exhibit 19 at 33. Dr. Zaldivar further testified that claimant "is suspected to have centrilobular emphysema once he has -- bullous emphysema because he is a smoker. He'll have both. Centrilobular emphysema is one of the first findings in smokers[']emphysema." *Id.* at 37.

Employer additionally argues that the administrative law judge did not properly consider that Dr. Zaldivar's opinion was based on scientific research obtained after the promulgation of the 2001 regulations and the preamble. Dr. Zaldivar testified that the articles he mentioned demonstrated that claimant "fulfills the criteria for smokers[']emphysema." Employer's Exhibit 19 at 43-44. However, contrary to employer's argument, the fact that claimant's condition is consistent with smoking does not address why claimant's COPD/emphysema was not "significantly related to, or substantially aggravated by coal exposure in coal mine employment."[8] 20 C.F.R. §718.201(b).

As the administrative law judge provided valid reasons for discrediting the opinions of Drs. Repsher and Zaldivar,[9] and substantial evidence supports his credibility determinations, we affirm his finding that employer failed to rebut the presumed fact of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A).

**II. Disability Causation**

[8] In support of its position, employer notes Dr. Zaldivar's observations that claimant does not have clinical pneumoconiosis and that research cited in the preamble concludes that emphysema is related to the "coal content" found in the miner's lung. Employer's Brief at 12, *citing* 65 Fed. Reg. at 79,920, 79,941-43 (Dec. 20, 2000). The administrative law judge, however, permissibly rejected Dr. Zaldivar's opinion, as the regulatory definition of legal pneumoconiosis does not require the presence of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

[9] We also reject employer's contention that the administrative law judge erred in concluding that the medical treatment records did not support its burden on rebuttal. The administrative law judge found that although the treatment records document repeated diagnoses of chronic obstructive pulmonary disease (COPD), none of the treating physicians, except Dr. Istanbouly, discussed the etiology of claimant's COPD. Decision and Order on Remand at 15. Because employer must affirmatively disprove the presumed existence of legal pneumoconiosis, the administrative law judge rationally found that the treatment records neither support nor oppose the employer's burden on rebuttal. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *Burris*, 732 F.3d at 726-27, 25 BLR at 2-413.

The administrative law judge next addressed whether employer established rebuttal by disproving the presumed fact of disability causation. Contrary to employer's contention, the administrative law judge reasonably discredited the opinions of Drs. Repsher and Zaldivar on the issue because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Burris*, 732 F.3d at 735, 25 BLR at 2-425; *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 25 BLR 2-725 (6th Cir. 2015); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 25 BLR 2-713 (4th Cir. 2015); Decision and Order on Remand at 23-25. Thus, we affirm the administrative law judge's determination that employer failed to establish rebuttal of the Section 411(c)(4) presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201."[10] 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 20.[11]

[10] We reject employer's contention that the rebuttal standard for disability causation is applicable only to the Secretary of Labor. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

[11] Because employer bears the burden of proof to affirmatively establish that claimant does not have pneumoconiosis or that his disability is unrelated to pneumoconiosis, it is not necessary that we address employer's arguments regarding the weight accorded Dr. Cohen's opinion, which does not aid employer in establishing rebuttal under 20 C.F.R. §718.305(d)(1)(i), (ii). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge