BRB Nos. 13-0077 BLA
and 13-0077 BLA-A

BETTY JEAN BURGESS (o/b/o ALBERT D. BURGESS) Claimant-Respondent Cross-Petitioner v. ELKAY MINING COMPANY Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/19/2013 DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant[1] cross-appeals, the Decision and Order (2011-BLA-5306) of Administrative Law Judge Michael P. Lesniak 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). This case involves a miner's subsequent claim filed on October 22, 2007.[2] The administrative law judge initially noted that employer conceded that the miner suffered from pneumoconiosis arising out of coal mine employment. The administrative law judge, therefore, found that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. 20 C.F.R. §725.309.

Considering the miner's 2007 claim on the merits, the administrative law judge noted that Congress enacted amendments to the 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 was totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

After finding that the miner worked for at least fifteen years in qualifying coal mine employment,[3] the administrative law judge found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Therefore, the administrative law judge found that claimant invoked the amended Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer further argues that the administrative

[1] Claimant is the surviving spouse of the miner, who died on September 29, 2009. Director's Exhibit 52.

[2] The miner filed two prior claims, each of which was finally denied. Director's Exhibits 1, 2. His most recent prior claim, filed on March 2, 1999, was denied on July 1, 1999, because the miner did not establish any element of entitlement. Director's Exhibit 2.

[3] The miner's coal mine employment was in West Virginia. Director's Exhibit 5. 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).

law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. In her response brief and brief in support of her cross-appeal, claimant urges affirmance of the award of benefits. Claimant further contends that, if the Board remands this case, it must instruct the administrative law judge to consider credibility issues that, claimant argues, should affect the weight to be accorded to employer's physicians' opinions. In a response to claimant's cross-appeal, employer contends that claimant has provided no valid basis for the Board to review the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has filed a limited response to employer's appeal, arguing that the administrative law judge properly applied Section 411(c)(4) to this case, and that he applied the correct rebuttal standard.[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).

Application of Amended Section 411(c)(4)

Employer initially contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 16-17. This argument is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, F.3d , No. 11-2418, 2013 WL 3929081 (4th Cir. July 31, 2013) (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

We also reject employer's assertion that the application of amended Section 411(c)(4) to this case was premature, because the Department of Labor has yet to promulgate implementing regulations. Employer's Brief at 20-22. The mandatory language of the amended portions of the Act supports the conclusion that the provisions

[4] Employer does not challenge 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). Furthermore, employer does not challenge the administrative law judge's findings that the miner worked for at least fifteen years in qualifying coal mine employment, that the miner was totally disabled under 20 C.F.R. §718.204(b)(2), and that claimant invoked the Section 411(c)(4) presumption. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

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

We next consider employer's challenge to the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption. Employer asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of the miner's disabling respiratory impairment. Employer's Brief at 18-20. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption that the miner's total disability was 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 establishing that the miner's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 15-16; *see* 30 U.S.C. §921(c)(4); *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. Furthermore, the United States Court of Appeals for the Fourth Circuit has held that an employer must "effectively . . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure in order to meet its rebuttal burden. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case. Decision and Order at 15-16.

Employer stipulated that the miner suffered from clinical pneumoconiosis[5] arising out of coal mine employment. Decision and Order at 15; Hearing Tr. at 9-10. Therefore, the administrative law judge correctly determined that employer was unable to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 15.

In considering whether employer rebutted the presumption by establishing that the miner's impairment did not arise out of, or in connection with, coal mine employment, the administrative law judge considered the biopsy report of Dr. Oesterling, as well as the

[5] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by 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).

medical reports of Drs. Rasmussen, Rosenberg, and Zaldivar. In an initial biopsy report, Dr. Oesterling diagnosed "moderate micronodular [coal workers'] pneumoconiosis." Employer's Exhibit 2a at 2. However, Dr. Oesterling opined that any pulmonary disability experienced by the miner was unrelated to his coal mine dust exposure, but was due to his panacinar emphysema, adenocarcinoma, and upper right lobectomy performed on July 13, 2007. *Id*. at 6-7. In a supplemental biopsy report, Dr. Oesterling reaffirmed his opinion that "[c]oal dust inhalation . . . was in no way a factor in producing significant functional change" in the miner. Employer's Exhibit 2b at 3. The administrative law judge found Dr. Oesterling's opinion insufficient to support employer's burden on rebuttal, because Dr. Oesterling opined only "that there was no evidence that [the] miner was disabled by coal dust inhalation . . . ." Decision and Order at 16.

Employer argues that the administrative law judge erred in his consideration of Dr. Oesterling's opinion. Employer's Brief at 12-14. We agree. The administrative law judge discounted Dr. Oesterling's opinion because the physician did not specifically conclude that that the miner's totally disabling respiratory impairment was unrelated to coal mine dust exposure. *See* Decision and Order at 16. However, the record reflects that Dr. Oesterling opined that the miner would have suffered from "some component of respiratory distress," and recognized that the miner may have experienced "respiratory symptomatology" and "pulmonary disability." Employer's Exhibit 2a at 6-7. Dr. Oesterling further opined that any pulmonary disability suffered by the miner would not have been due to coal workers' pneumoconiosis, and noted several nonoccupational "factors," namely, the miner's smoking-related emphysema, adenocarcinoma, and upper right lobectomy. *Id*. at 6-7. Because the administrative law judge did not address the entirety of Dr. Oesterling's opinion in light of its underlying reasoning, we must vacate the administrative law judge's determination to discount Dr. Oesterling's rebuttal opinion. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Abshire v. D&L Coal Co*., 22 BLR 1-202, 1-214-15 (2002) (en banc).

The administrative law judge also considered the medical reports of Drs. Rasmussen, Rosenberg, and Zaldivar in determining whether employer established that the miner's impairment did not arise out of, or in connection with, coal mine employment. Dr. Rasmussen diagnosed clinical pneumoconiosis and legal pneumoconiosis,[6] and opined that the miner's legal pneumoconiosis, in the form of chronic obstructive lung disease (COPD)/emphysema due to both cigarette smoking and coal mine dust exposure, was "a material cause of [the miner's] disabling lung disease." Director's Exhibit 12; Claimant's Exhibit 8 at 10-11. In contrast, Dr. Rosenberg

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

concluded that the miner did not have legal pneumoconiosis, but had "a very minimal degree of clinical CWP" that was not disabling.[7] Employer's Exhibits 4, 13. Dr. Rosenberg stated that he could rule out coal mine dust exposure as a cause of the miner's impairment, because of the improvement to normal, over time, that was seen on the miner's pulmonary function studies, diffusion capacity tests, and blood oxygenation. Employer's Exhibits 4 at 3; 13 at 18. Dr. Rosenberg determined that the miner was totally disabled due to lung cancer unrelated to coal mine dust exposure. Employer's Exhibit 4 at 3. Dr. Zaldivar diagnosed coal workers' pneumoconiosis, and concluded that the miner suffered from a totally disabling pulmonary impairment; however, Dr. Zaldivar attributed this impairment to smoking-related emphysema, asthma, radiation therapy, and the miner's upper right lobectomy.[8] Employer's Exhibits 3, 12.

The administrative law judge initially found Dr. Rasmussen's opinion unsupportive of employer's burden, as Dr. Rasmussen attributed the miner's total disability to coal mine dust exposure. Decision and Order at 16. The administrative law judge further gave little weight to Dr. Rosenberg's opinion, finding that Dr. Rosenberg improperly relied on the improvement of the miner's pulmonary function studies and arterial blood gas studies over time in ruling out coal mine dust exposure as a cause of the miner's impairment. *Id.* In support, the administrative law judge stated that Dr. Rosenberg's "explanation actually goes to whether [the] miner had a respiratory impairment, not to whether coal dust exposure caused that impairment." *Id.* The administrative law judge also gave little weight to Dr. Zaldivar's opinion, finding that he ruled out coal mine dust exposure as a cause of the miner's pulmonary impairment based on the "minute number of nodules in [the] miner's lung." *Id.* The administrative law judge found Dr. Zaldivar's opinion to be contrary to the regulations and the preamble, which recognize that exposure to coal mine dust "can produce a disabling impairment, even in the absence of findings of clinical pneumoconiosis, i.e. x-ray correlation of the disease." *Id.*, *citing* 20 C.F.R. §718.201; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). As the administrative law judge found no credible opinion ruling out coal mine dust as a cause of the miner's impairment, the administrative law judge found that employer did not establish rebuttal, and awarded benefits.

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[7] In an initial report, Dr. Rosenberg opined that the miner did not have clinical pneumoconiosis or legal pneumoconiosis, as his COPD and lung cancer were smoking-related. Director's Exhibit 33. Dr. Rosenberg further opined that the miner had "a mild degree of airflow obstruction" and a decrease in oxygenation, but that these pulmonary impairments were not totally disabling. *Id.*

[8] Like Dr. Rosenberg, Dr. Zaldivar initially opined that the miner did not suffer from clinical pneumoconiosis, only diagnosing the existence of the disease upon review of Dr. Oesterling's biopsy report. Director's Exhibit 31; Employer's Exhibit 12 at 40.

Employer contends that the administrative law judge erred in his consideration of its physicians' opinions. We agree. The administrative law judge inaccurately stated that Dr. Rosenberg's opinion, regarding the improvement to normal of the miner's pulmonary function studies and blood gas studies, "goes to whether [the] miner had a respiratory impairment, not whether coal mine dust exposure caused that impairment." Decision and Order at 16; *see Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). The record reflects that Dr. Rosenberg explained that he was able to determine that coal mine dust exposure did not cause the miner's impairment, based on the improvement of the miner's pulmonary function studies, his diffusion capacity measurements, and his blood oxygenation values. Employer's Exhibit 13 at 17-18. A qualified physician may rely on such objective tests, as well as other relevant evidence and his or her experience, in formulating an opinion as to the etiology of a miner's pulmonary impairment. *See* 20 C.F.R. §718.204(c); *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41-42 (1987). Remand is therefore required to provide the administrative law judge with the opportunity to fully address Dr. Rosenberg's opinion. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Abshire*, 22 BLR at 1-214-15.

We also agree with employer that the administrative law judge mischaracterized and selectively analyzed Dr. Zaldivar's opinion. The administrative law judge discredited Dr. Zaldivar's opinion as contrary to the regulations and the preamble, which the administrative law judge said "recognize that coal dust exposure can produce a disabling impairment, even in the absence of findings of clinical pneumoconiosis, i.e. x-ray correlation of the disease." Decision and Order at 16. However, Dr. Zaldivar opined that the miner's clinical pneumoconiosis was too minimal to contribute to any significant degree to the miner's pulmonary impairment. Director's Exhibit 31; Employer's Exhibits 3, 12. Furthermore, he opined that the miner did not have legal pneumoconiosis, as his lung cancer and emphysema were due to smoking, and his asthma was due to smoking and genetics. *Id.* In this case, the administrative law judge mischaracterized and selectively analyzed Dr. Zaldivar's opinion, as the administrative law judge focused on only one factor relied upon by Dr. Zaldivar to support his disability causation opinion, when Dr. Zaldivar provided several reasons for opining that the miner's totally disabling pulmonary impairment was unrelated to coal mine dust exposure. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). As the administrative law judge has not fully addressed the opinion of Dr. Zaldivar, remand is required to provide the administrative law judge with the opportunity to consider the entirety of Dr. Zaldivar's opinion.[9]

[9] We also note that, while employer conceded that the evidence established the existence of clinical pneumoconiosis, employer did not concede that the evidence established the existence of legal pneumoconiosis. Although claimant, by invoking the Section 411(c)(4) presumption, is entitled to a presumption that the miner suffered from

In light of the foregoing, we vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. On remand, the administrative law judge must reconsider whether employer has disproved the existence of legal pneumoconiosis, and whether it has established that the miner's impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). In considering these issues on remand, the administrative law judge should fully address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. In so doing, the administrative law judge must provide a full rationale for his findings and credibility determinations.[10] *Milburn Colliery Co. v. Hicks*, 138 F.3d524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

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legal pneumoconiosis, i.e., that the miner's chronic lung diseases arose out of coal mine employment, it is a rebuttable presumption. In this case, whether employer can disprove the existence of legal pneumoconiosis is relevant to whether employer can establish that the miner's pulmonary impairment did not arise out of, or in connection with, coal mine employment. Accordingly, on remand, the administrative law judge should determine whether employer has disproved the existence of legal pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.201.

[10] In light of our decision to vacate the administrative law judge's weighing of the medical opinion evidence and remand the case for him to further consider this evidence on rebuttal, we need not address the issues raised in claimant's cross-appeal, as claimant may raise those credibility issues with the administrative law judge on remand.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

For the reasons set forth by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), since there are no regulations currently in force applying the limitations on rebuttal set forth in 30 U.S.C. §921(c)(4) to employers, I would not instruct the administrative law judge to apply those limitations to the instant case. I concur with my colleagues in all other respects.

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JUDITH S. BOGGS
Administrative Appeals Judge