BRB No. 13-0133 BLA

JEROME R. DIXON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HIGHLAND MINING COMPANY	)	
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE, COMPANY	)	DATE ISSUED: 12/11/2013
	)	
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 Awarding Benefits of John P. Sellers III, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, DC, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5776) of Administrative Law Judge John P. Sellers III rendered on a 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).[2] The administrative law judge credited the parties' stipulation that claimant worked in underground coal mine employment for thirty-seven years and, adjudicating this claim pursuant to 20 C.F.R. Part 718, found that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge further found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings of total respiratory disability at Section 718.204(b) (2013) and invocation of the amended Section 411(c)(4) presumption. Employer also maintains that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption under amended Section 411(c)(4), and erred in his weighing of the medical opinion evidence relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he is not participating in this appeal.

---

[1] Claimant, Jerome R. Dixon, filed his claim for benefits on October 30, 2009. Director's Exhibit 2.

[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 the claimant's total disability was due to pneumoconiosis if the claimant establishes that he or she suffered from a totally disabling respiratory or pulmonary impairment and worked at least fifteen years in 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). 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. 59102 (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)."

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).

Employer initially contends that the administrative law judge's finding, that the medical opinions of Drs. Houser, Rasmussen and Rosenberg outweighed the non-qualifying pulmonary function studies and blood gas studies of record and established total respiratory disability pursuant to Section 718.204(b) (2013), is irrational and fails to comport with Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer asserts that the administrative law judge mischaracterized the opinions of Drs. Houser and Rasmussen as well-reasoned and well-documented, when the physicians did not explain why claimant was unable to work in the face of non-qualifying objective studies that did not support their conclusions.[4] Employer's arguments lack merit.

With regard to the issue of total disability at Section 718.204(b)(2)(iv) (2013), we reject employer's argument that, in light of the non-qualifying pulmonary function studies and blood gas studies, the administrative law judge should have found the opinions of Drs. Houser and Rasmussen, that claimant does not retain the respiratory capacity to perform his usual coal mine employment, to be unreasoned and unsupported. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the regulations explicitly provide that a physician may base a reasoned medical judgment that a miner is totally disabled on non-qualifying test results,

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

[4] Employer additionally argues that the administrative law judge "overlooked" Dr. Rosenberg's equivocal statement that claimant "probably has a disabling level of obstructive lung disease" and, in so doing, erred in relying on this opinion. Employer's Brief at 17. Contrary to employer's contention, the administrative law judge acknowledged Dr. Rosenberg's statement, but acted within his discretion in finding that, "[e]ven though Dr. Rosenberg stated that the Claimant was 'probably' disabled, his opinion supports a finding of total disability," as the physician had an accurate understanding of the heavy exertional requirements of claimant's job, and concluded that his obstructive impairment would preclude him from performing comparable work. Decision and Order at 25; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). We, therefore, reject employer's argument.

see Cornett v. Benham Coal, Inc., 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000), and that a physician should demonstrate knowledge of the exertional requirements of a miner's usual coal mine employment in assessing whether a respiratory impairment precludes the performance of a miner's usual duties, *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996). In the present case, the administrative law judge determined that Dr. Houser based his disability assessment on a physical examination, pulmonary function studies, and an accurate understanding of claimant's job duties. Dr. Houser described the exertional requirements of claimant's duties as a continuous miner operator as "lifting and dragging cable and water lines, which weighed 50 pounds or more, … hanging curtains" and "building brattice, which involved lifting 50-pound concrete blocks." Claimant's Exhibit 2. The administrative law judge permissibly found that Dr. Houser's opinion was "particularly persuasive" because the physician's "fully documented examination of the Claimant" and "sufficient understanding of the claimant's job duties in light of his measured impairment" resulted in an "adequately reasoned" opinion. Decision and Order at 26; *see Cornett*, 227 F.3d at 577, 22 BLR 2-123; *Ward*, 93 F.3d at 218-219, 20 BLR at 2-374; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Likewise, the administrative law judge permissibly credited Dr. Rasmussen's opinion that claimant's obstructive lung disease would preclude him from performing his last job. Based on his review of the medical evidence of record, Dr. Rasmussen acknowledged that claimant's pulmonary function studies yielded values that were "slightly above" values that qualify under Part 718, Appendix B, but opined that these test results were nevertheless "sufficient to render [claimant] totally disabled to perform his last regular coal mine employment work" as a continuous miner operator. Claimant's Exhibit 7. Ultimately, the administrative law judge acted within his discretion in finding that the opinions of Drs. Houser, Rasmussen, and Rosenberg, all of whom possessed an accurate assessment of the arduous exertional requirements of claimant's last coal mine job as a continuous miner, were well-reasoned and well-documented, as their opinions were based on a "broad view" of the medical records, physical examination findings, and objective tests, contrary to the opinions of Drs. Chavda and Repsher, who offered no rationale for finding that claimant was not disabled, other than non-qualifying test values. Decision and Order at 26; *see Cornett*, 227 F.3d at 578, 22 BLR at 2-123-24; *Ward*, 93 F.3d. 211, 20 BLR 2-360. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the weight of the evidence is sufficient to establish total respiratory disability at Section 718.204(b) (2013), based on his conclusion that the medical opinion evidence was the most probative. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987). Consequently, we affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on the administrative law judge's unchallenged finding that claimant established more than

fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer next contends that the administrative law judge selectively analyzed the conflicting medical opinions of record, applied an incorrect rebuttal standard, and failed to provide valid reasons for finding the opinions of Drs. Repsher and Rosenberg insufficient to establish rebuttal of the amended Section 411(c)(4) presumption, in violation of the APA. Employer maintains that the administrative law judge looked outside the record and improperly substituted his own opinion in weighing the medical opinions of record on the issues of legal pneumoconiosis and disability causation. Employer also avers that the administrative law judge's "entire discussion of the issue of legal pneumoconiosis relied on the *preamble* to the revised regulations," treating it as mandatory in gauging the credibility of the conflicting medical opinions when, in fact, consideration of the preamble is neither binding nor dispositive. Employer's Brief in Support of Petition for Review at 19 [emphasis in original]. Thus, employer asserts that the administrative law judge improperly relied on the premise that smoking and coal dust exposure cause significant obstructive disease at approximately the same incidence, and that the combined effect is additive, in finding that the opinions of Drs. Repsher and Rosenberg are inconsistent with the regulations. Employer's arguments lack merit.

At the outset, we note that, contrary to employer's argument, the administrative law judge may properly consider whether a medical opinion is based on premises that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science underlying the current regulations, as determined by the Department of Labor (DOL) and set forth in the preamble to the revised regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Thus, we reject employer's assertion that the administrative law judge erred by relying on the preamble and the regulatory definition of legal pneumoconiosis in determining the credibility of the medical opinion evidence in this case. A review of the Decision and Order reveals that the administrative law judge provided a comprehensive discussion of the opinions of Drs. Repsher and Rosenberg, and fully delineated the doctors' findings and the bases supporting their conclusion that smoking caused claimant's chronic obstructive pulmonary disease (COPD). Decision and Order at 13-16, 18-19, 30-34; Director's Exhibit 17; Employer's Exhibits 5, 6. The administrative law judge found that Dr. Repsher's opinion was premised on the belief that, because claimant's coal mine employment occurred after the imposition of mandatory safety and health regulations, which minimized health hazards and promoted improved safety and health conditions in the mines, claimant's COPD was not attributable to coal dust exposure. Employer's Exhibit 5 at 12. However, because the administrative law judge determined that Dr. Repsher possessed no actual knowledge of the specific dust

conditions in the coal mines where claimant worked, and claimant testified that his continuous exposure to dust at the face was so bad that even when he wore his respirator, the dust would come through the mask and get into his nose and mouth, the administrative law judge properly discredited Dr. Repsher's opinion on the grounds that it was "entirely speculative" and, therefore, unpersuasive. Decision and Order at 30; Hearing Transcript at 18-19; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.3d 251, 255, 5 BLR 2-103 (6th Cir. 1983); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge similarly found that Dr. Repsher's reliance on the theory that "the contribution of coal dust to the Claimant's impairment… would be minimal compared to smoking because, in Dr. Repsher's opinion, miners working in the mines after imposition of dust control regulations could be expected to lose two to three cc's of their FEV_1 per year, whereas susceptible smokers could be expected to lose eighty-three cc's per year on average" was unpersuasive. In so finding, the administrative law judge noted that the Department of Labor (DOL) has discredited such statistical reasoning in the preamble. Decision and Order at 30-31, *citing* 65 Fed. Reg. 79,920, 79,940-41, 79,943 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2007). Likewise, the administrative law judge found that several factors detracted from the reliability of Dr. Rosenberg's opinion. The administrative law judge was not persuaded by Dr. Rosenberg's conclusion, that claimant's pulmonary function study results were attributable to smoking but were not compatible with a dust-induced lung disease because they demonstrated reduced FEV_1 values and a reduced FEV_1/FVC ratio, as he found it to be contrary to DOL's position that coal dust exposure may cause chronic obstructive pulmonary disease with associated decrements in FEV_1 and the FEV_1/FVC ratio. Decision and Order at 32; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000). Further, the administrative law judge reasonably discounted Dr. Rosenberg's opinion because the physician failed to adequately explain why claimant's lung disease was solely attributable to smoking, rather than to multiple causes, including pneumoconiosis, or why the reversibility demonstrated on claimant's pulmonary function studies necessarily eliminated a finding of legal pneumoconiosis. Decision and Order at 33-34; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-484 (6th Cir. 2007). Since Dr. Rosenberg failed to adequately explain how he eliminated claimant's thirty-seven years of coal dust exposure as a contributing or aggravating factor in claimant's totally disabling respiratory impairment, or sufficiently support his opinion that smoking was the sole causative factor in claimant's impairment, the administrative law judge permissibly concluded that Dr. Rosenberg's opinion was entitled to little weight. Decision and Order at 32-34; *see Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have legal pneumoconiosis, and that, as a result, employer failed to establish that claimant's "total disability did not arise in whole or in

part out of his coal mine employment." Decision and Order at 36; *see* 20 C.F.R. §718.305(d)(1); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge