BRB No. 13-0533 BLA

CHARLES E. BALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
APOGEE COAL COMPANY	)	DATE ISSUED: 06/24/2014
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Kathleen H. Kim (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-05782) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed on May 9, 2011, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant has twenty-two years of underground coal mine employment and, based on the filing date of the claim, considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C.

§921(c)(4).[1] Because claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4). The administrative law judge further found that employer failed to establish rebuttal of that presumption. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's determination that it did not rebut the amended Section 411(c)(4) presumption.[2] Employer contends that the administrative law judge erred in relying exclusively on the preamble to discredit Dr. Rosenberg's opinion, and also erred in finding that Dr. Dahhan's opinion was equivocal. In addition, employer argues that the administrative law judge "applied too lenient of a standard in assessing claimant's evidence." Employer's Reply Brief at [3] (unpaginated). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter, asserting that the administrative law judge properly consulted the preamble in assessing the credibility of the medical opinion evidence.

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).

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by proving that claimant does not have either clinical or legal

[1] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[2] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, because claimant's most recent coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 8.

pneumoconiosis,[4] or by establishing that his disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). In considering whether employer rebutted the presumed fact of legal pneumoconiosis,[5] the administrative law judge considered the medical opinions of Drs. Burrell, Fernandes, Rosenberg, and Dahhan. The administrative law judge noted that Dr. Burrell diagnosed claimant with chronic obstructive pulmonary disease (COPD) due to coal dust exposure and cigarette smoking, and found his opinion to be consistent with the position of the Department of Labor (DOL) that the effects of smoking and coal dust exposure are additive. *See* Decision and Order at 11; Director's Exhibit 10. The administrative law judge observed that while Dr. Fernandes treated claimant and diagnosed COPD, "she did not render an opinion as to its etiology." Decision and Order at 11; *see* Claimant's Exhibit 1. The administrative law judge noted that, in contrast, both of employer's physicians, Drs. Rosenberg and Dahhan, diagnosed COPD due to smoking with a component of asthma. *See* Decision and Order at 11-13; Employer's Exhibits 1-4. The administrative law judge determined that Dr. Rosenberg expressed views that were contrary to the preamble and that his opinion was not well-reasoned. Decision and Order at 13-15. He discredited Dr. Dahhan's opinion as "equivocal," and therefore entitled to little weight. *Id*. at 16. Thus, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. *Id*.

[4] Clinical pneumoconiosis consists of "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201 (a)(1). 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).

[5] The administrative law judge found that employer demonstrated the absence of clinical pneumoconiosis by a preponderance of the x-ray and medical opinion evidence. However, employer must also disprove the existence of legal pneumoconiosis in order to establish the first method of rebuttal. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Initially, employer contends that the administrative law judge erred in giving the preamble "dispositive effect" in determining the credibility of the medical opinion evidence. Employer's Brief in Support of Petition for Review at 12. Employer contends that the administrative law judge "misstated" the preamble in discrediting Dr. Rosenberg's opinion and failed to properly address Dr. Rosenberg's assertions that medical articles published subsequent to the preamble show that smoking has a more adverse impact on lung function than coal dust exposure. *Id*. at 14-16. We reject employer's assertions of error as they are without merit.

The preamble to the amended regulations sets forth how the DOL has chosen to resolve questions of scientific fact. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Multiple circuit courts, and the Board, have held that an administrative law judge, as part of his deliberative process, may permissibly evaluate expert opinions in conjunction with DOL's discussion of prevailing medical science contained in the preamble to the revised regulations. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 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). Based on our review, we hold that the administrative law judge conducted a proper analysis in this case, determining whether the physician's opinions were reasoned and documented, and also consistent with the principles underlying the regulations, as set forth in the preamble. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). Accordingly, we reject employer's assertion that the administrative law judge erred in using the preamble as guidance in evaluating the credibility of the medical opinion evidence.

Contrary to employer's argument, the administrative law judge did not misstate the preamble in rejecting Dr. Rosenberg's opinion.[6] The administrative law judge properly found that, to the extent Dr. Rosenberg relied on claimant's reduced FEV1/FVC ratio as a basis for attributing claimant's COPD to smoking and not coal dust exposure, his opinion is contrary to the findings of the DOL in the preamble that: "Epidemiological

[6] Dr. Rosenberg opined that it is possible to distinguish impairment related to smoking versus coal dust exposure, based on the pattern of impairment demonstrated on claimant's pulmonary function studies, stating that claimant "has a marked reduction of his FEV1 with preservation of his FVC. Hence, his FEV1/FVC ratio is markedly reduced and this is not consistent with legal [coal workers' pneumoconiosis]." Employer's Exhibit 1 at 5.

studies have shown that coal miners have an increased risk of developing COPD . . . [which] may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC." Decision and Order at 14, *quoting* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-211; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Obush*, 650 F.3d at 256-57, 24 BLR at 1-125-26.

Furthermore, contrary to employer's contention, the administrative law judge specifically considered Dr. Rosenberg's assertion that more recent medical articles show that smoking is "much more destructive" than coal dust exposure to lung function. Employer's Exhibit 1. However, the administrative law judge rationally found that "even if cigarette smoking played a role in [c]laimant's obstructive impairment, Dr. Rosenberg still fails to adequately explain why [c]laimant's impairment could not have been *aggravated* by his coal dust exposure." Decision and Order at 15 (emphasis added); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Moreover, we affirm the administrative law judge's determination that Dr. Rosenberg's logic fails to account for the position of the DOL that "coal dust is additive with smoking in causing clinically significant airways obstruction and chronic bronchitis." Decision and Order at 15, *quoting* 65 Fed. Reg. at 79,940-43; *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-211; *Obush*, 650 F.3d at 256-57, 24 BLR at 1-125-26.

We further reject employer's argument that the administrative law judge improperly substituted his opinion for those of the medical experts in finding that the "reversibility analysis used by Drs. Rosenberg and Dahhan is not persuasive."[7] Decision and Order at 14. The administrative law judge observed correctly that, "[a]though the pulmonary function tests indicate improvement post-bronchodilator, the results post-bronchodilator are still qualifying." *Id*. The administrative law judge acted within his discretion in finding that neither Dr. Rosenberg, nor Dr. Dahhan, adequately explained why coal dust exposure is not a cause of claimant's residual, disabling respiratory impairment. Decision and Order at 27-28; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). We therefore affirm, as supported by substantial evidence, the administrative law judge's determination that the opinions of Drs. Rosenberg and Dahhan are not well-reasoned, and are insufficient to satisfy employer's burden to affirmatively establish that claimant does not

[7] Drs. Rosenberg and Dahhan opined that coal dust exposure was not a causative factor for claimant's respiratory impairment because his pulmonary function study results improved after use of a bronchodilator. Employer's Exhibits 1-4.

have legal pneumoconiosis.[8] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-149 (1989) (en banc).

With regard to the second method of rebuttal, contrary to employer's contention, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Dahhan, relevant to the issue of disability causation, because they failed to diagnose legal pneumoconiosis. *See Ogle*, 737 F.3d at 1074; *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). Therefore, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's disability did not arise out of, or in connection with, coal mine employment.[9] *See Morrison*, 644 F.3d 473, 25 BLR 2-1.

[8] There is no merit to employer's argument that the administrative law judge selectively analyzed Dr. Dahhan's opinion in finding that it was equivocal. The administrative law judge properly noted that Dr. Dahhan attributed claimant's respiratory impairment "primarily" to smoking and asthma, and stated that coal dust exposure was not a "significant causative agent." Decision and Order at 16 *quoting* Employer's Exhibit 4. However, Dr. Dahhan also explained that he could not "a hundred percent" rule out coal dust exposure and testified that coal dust exposure "is less likely to be the cause of [claimant's] impairment." Employer's Exhibit 4.

[9] Employer argues that the administrative law judge did not apply the proper "disability causation standard" in assessing the credibility of claimant's evidence, insofar as he stated that Dr. Burrell's opinion is supportive of a finding that "pneumoconiosis *contributed* to claimant's totally disabling respiratory or pulmonary impairment." Employer's Brief in Support of Petition for Review at 21. However, because employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's finding that employer's evidence fails to affirmatively establish that claimant does not have legal pneumoconiosis or that claimant's disability did not arise out of, or in connection with coal mine employment, it is not necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge