**U.S. Department of Labor**

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

BRB No. 15-0266 BLA

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| PAUL M. DAYTON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| ISLAND CREEK COAL COMPANY | ) | |
| | ) | DATE ISSUED: 04/05/2016 |
| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-5469) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on February 28, 2011.[1]

[1] Claimant initially filed a claim for benefits on February 8, 1985. Director's

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with over fifteen years of qualifying coal mine employment,[3] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment. The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption. Consequently, the administrative law judge also found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(c). Finally, the administrative law judge determined that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that employer did not 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 not filed a response brief.[4]

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Exhibit 1A. In a Decision and Order dated March 15, 1989, Administrative Law Judge Daniel L. Leland found that the evidence did not establish the existence of pneumoconiosis. *Id.* Accordingly, Judge Leland denied benefits. *Id.* Claimant filed a second claim on November 2, 2000. *Id.* In a Decision and Order dated July 14, 2004, Administrative Law Judge Richard A. Morgan (the administrative law judge) found that the evidence did not establish the existence of pneumoconiosis. *Id.* Accordingly, the administrative law judge denied benefits. Claimant took no further action until he filed the current subsequent claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is 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) (2012); *see* 20 C.F.R. §718.305.

[3] Claimant's coal mine employment was in Pennsylvania. Director's Exhibits 3, 5-7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 1989) (en banc).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, and his determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 1-711 (1983).

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).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[5] 20 C.F.R. §718.305(d)(1)(i), or 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." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer disproved the existence of legal pneumoconiosis,[6] the administrative law judge considered the medical opinions of Drs. Zlupko, Basheda, and Rosenberg. Dr. Zlupko diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking. Director's Exhibit 13. Drs. Basheda and Rosenberg diagnosed claimant with COPD/emphysema due to cigarette smoking, and each opined that claimant's COPD/emphysema was not due to his coal mine dust exposure. Employer's Exhibits 1, 2, 11, 12.

The administrative law judge found that Dr. Zlupko's opinion was not sufficiently reasoned, noting that the doctor's "bare bones opinion provide[d] little useful analysis." Decision and Order at 25. The administrative law judge also discredited the opinions of Drs. Basheda and Rosenberg because he found that each was inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. *Id.* at 25-29. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 29.

[5] "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). "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[6] The administrative law judge noted that employer conceded that claimant suffers from clinical pneumoconiosis. Decision and Order at 22.

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. It was within the administrative law judge's discretion to rely on the preamble as a guide to assess the credibility of the medical evidence in this case. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

We also reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Basheda and Rosenberg.[7] The administrative law judge discredited Dr. Basheda's opinion because he found that the doctor's view, that coal dust causes focal, as opposed to centrilobular, emphysema has not been adopted by the DOL.[8] Decision and Order at 26. Employer does not challenge this basis for discrediting Dr. Basheda's opinion. Consequently this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983).

We also reject employer's contention that the administrative law judge erred in according less weight to Dr. Rosenberg's opinion. The administrative law judge correctly noted that Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's COPD, in part, because he found a significant reduction in claimant's FEV1/FVC ratio which, in his opinion, was inconsistent with obstruction due to coal mine dust exposure.[9] Decision and Order at 26; Employer's Exhibit 2 at 10. The

[7] Because it is unchallenged on appeal, we affirm the administrative law judge's discrediting of Dr. Zlupko's opinion. *Skrack*, 6 BLR at 1-711.

[8] In explaining why he attributed claimant's chronic obstructive pulmonary disease (COPD) to cigarette smoking, Dr. Basheda explained that "[c]entrilobular emphysema is the hallmark of tobacco-induced COPD," while "[c]oal worker's [sic] pneumoconiosis typically produces focal emphysema." Employer's Exhibit 1 at 35. The administrative law judge found this was inconsistent with the scientific evidence credited by the Department of Labor in the preamble to the 2001 regulatory revisions. Decision and Order at 26, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (recognizing that the medical literature supports the theory that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms . . . .").

[9] In attributing claimant's COPD to cigarette smoking instead of coal mine dust exposure, Dr. Rosenberg specifically opined that "when coal mine dust exposure causes obstruction, the general pattern is that of a reduced FEV1, with a symmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved." Employer's Exhibit 2 at 10. Specific to claimant's situation, Dr. Rosenberg noted there was an "extreme decline"

administrative law judge permissibly discredited Dr. Rosenberg's opinion because his reasoning for eliminating coal mine dust exposure as a source of claimant's COPD is in conflict with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 26.

Because the administrative law judge permissibly discredited the opinions of Drs. Basheda and Rosenberg,[10] we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis. Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

With regard to the second method of rebuttal, the administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Basheda and Rosenberg that claimant did not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling impairment is unrelated to his coal mine employment. 20 C.F.R. §718.305(d)(1)(ii); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, BLR (6th Cir. 2015); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013); Decision and Order at 37. Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

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, claimant has established his entitlement to benefits.

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in his FEV1/FVC ratio, indicating claimant's obstruction was entirely related to cigarette smoking. *Id.*

[10] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Basheda and Rosenberg, any error he may have made in according less weight to their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Basheda and Rosenberg.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge