BRB Nos. 12-0527 BLA
and 12-0527 BLA-A

BERNARD CLINE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ECONOMY FUEL COMPANY	)	DATE ISSUED: 05/24/2013
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND, c/o WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order on Remand (09-BLA-5408) of Administrative Law Judge Adele H. Odegard awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case, involving a subsequent claim filed on April 1, 2008,[1] is before the Board for the second time.

In the initial decision, Administrative Law Judge Janice K. Bullard credited claimant with 27.22 years of coal mine employment,[2] and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, Judge Bullard considered claimant's 2008 claim on the merits. Judge Bullard credited claimant with over fifteen years of qualifying coal mine employment, and found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Judge Bullard, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4). However, because the evidence did not establish the existence of

[1] Claimant had filed two previous claims for benefits, both of which were finally denied. Director's Exhibits 1, 2. Claimant's most recent prior claim, filed on April 11, 2001, was denied by Administrative Law Judge Richard A. Morgan on January 23, 2004, because claimant had not established any element of entitlement. Director's Exhibit 2.

[2] The record indicates that claimant'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 Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc).

[3] 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, Congress reinstated Section 411(c)(4) of the Act, which 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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

pneumoconiosis, Judge Bullard found that employer rebutted the presumption. Accordingly, Judge Bullard denied benefits.

Pursuant to claimant's appeal, the Board affirmed, as unchallenged, Judge Bullard's findings of 27.22 years of qualifying coal mine employment, that the evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309(d), and that claimant invoked the Section 411(c)(4) presumption. *Cline v. Economy Fuel Co.*, BRB No. 11-0114 BLA, slip op. at 3 n.4 (Oct. 24, 2011) (Boggs, J., concurring) (unpub.). However, the Board held that in addressing rebuttal of the Section 411(c)(4) presumption, Judge Bullard improperly shifted the burden of proof to claimant to establish the existence of pneumoconiosis. *Cline*, slip op. at 3-4. Consequently, the Board vacated Judge Bullard's rebuttal determination, and remanded the case for reconsideration under the appropriate standard. *Id.* Further, finding merit in claimant's argument that Judge Bullard selectively analyzed the evidence regarding claimant's smoking history, the Board instructed Judge Bullard, on remand, to determine the length and extent of claimant's smoking history, and to reevaluate the conflicting medical opinion evidence in light of that factual determination, with the burden of proof on employer to establish rebuttal. *Cline*, slip op. at 4-5.

On remand, due to Judge Bullard's unavailability, the case was reassigned, without objection, to Administrative Law Judge Adele H. Odegard (the administrative law judge). In a Decision and Order on Remand dated June 14, 2012, the administrative law judge initially found that claimant had a smoking history of approximately thirty-five pack years. The administrative law judge also found that employer did not rebut the Section 411(c)(4) 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 claim. Employer further contends that the administrative law judge applied an improper rebuttal standard, and erred in her analysis of the evidence in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contentions that Section 411(c)(4) may not be applied in this case, and that the administrative law judge applied an improper rebuttal standard. In a reply brief, employer reiterates its previous contentions. In his cross-appeal, claimant asserts that the administrative law judge erred in her calculation of claimant's smoking history. Employer responds in support of the administrative law judge's determination regarding the length of claimant's smoking history. The Director has not filed a brief in response to claimant's cross-appeal.

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 contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the reasons set forth in that decision.[4] We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to this claim.

Rebuttal of 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 claimant's disabling respiratory impairment. Employer's Brief at 6-13. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption of total disability 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 proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order on Remand at 11; 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Moreover, the United States Court of Appeals for the Fourth Circuit has stated, explicitly, that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard.

Employer next argues that the administrative law judge erred in finding that the x-ray evidence failed to disprove the existence of pneumoconiosis. In considering whether

[4] Employer's request, that this case be held in abeyance pending a decision by the Fourth Circuit in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), is denied.

the x-ray evidence disproved the existence of clinical pneumoconiosis,[5] the administrative law judge considered nine interpretations of three x-rays taken on April 16, 2008, September 24, 2008, and May 20, 2009. Because each of the x-rays was interpreted as both positive and negative for pneumoconiosis by the best qualified physicians interpreting the respective films,[6] the administrative law judge permissibly found that the x-ray evidence was "in equipoise" and, therefore, insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order on Remand at 12-13. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not assist employer in disproving the existence of clinical pneumoconiosis. Moreover, because employer does not challenge the administrative law judge's additional findings that the CT scan evidence and medical opinion evidence failed to disprove the existence of clinical pneumoconiosis, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 13 n.16, 15, 17. We, therefore, affirm the administrative law judge's determination that employer did not 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.

In evaluating whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, the administrative law judge considered the opinions of Drs. Castle and Zaldivar. Dr. Castle

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[5] "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).

[6] While Dr. Wiot, a B reader and Board-certified radiologist, interpreted the April 16, 2008 x-ray as negative for pneumoconiosis, Director's Exhibit 13, Dr. Alexander, a B reader and Board-certified radiologist, and Dr. Forehand, a B reader, interpreted this x-ray as positive for clinical pneumoconiosis. Director's Exhibit 12; Claimant's Exhibit 1. Although Dr. Meyer, a B reader and Board-certified radiologist, interpreted the September 24, 2008 x-ray as negative for pneumoconiosis, Employer's Exhibit 1, Dr. Miller, an equally qualified physician, interpreted the x-ray as positive for the disease. Claimant's Exhibit 2. Finally, while two dually-qualified physicians, Drs. Wiot and Meyer, interpreted the May 20, 2009 x-ray as negative for pneumoconiosis, Employer's Exhibits 6, 8, two equally qualified physicians, Drs. Miller and Alexander, interpreted the same x-ray as positive for the disease. Claimant's Exhibits 3, 12.

opined that claimant is "totally disabled as a result of tobacco smoke induced airway obstruction with a significant asthmatic component." Employer's Exhibit 12. Dr. Zaldivar opined that claimant's pulmonary impairment is due to "emphysema superimposed on asthma," both of which are attributable to cigarette smoking. Employer's Exhibit 4. Drs. Castle and Zaldivar each opined that claimant's pulmonary impairment is unrelated to his coal mine dust exposure. Employer's Exhibits 11, 12.

The administrative law judge discounted the opinions of Drs. Castle and Zaldivar because they failed to adequately explain how they eliminated claimant's 27.22 years of coal mine dust exposure as a contributor to claimant's disabling pulmonary impairment. Decision and Order at 12-13. The administrative law judge, therefore, found that employer failed to prove that claimant's pulmonary impairment "did not arise out of, or in connection with," coal mine employment. *Id.* at 14-17.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Castle and Zaldivar. We disagree. The administrative law judge noted that both Drs. Castle and Zaldivar relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration, to exclude coal mine dust exposure as a cause of claimant's obstructive impairment. Decision and Order at 14-17. The administrative law judge found, as was within her discretion, that neither Dr. Castle nor Dr. Zaldivar adequately explained why the irreversible portion of claimant's pulmonary impairment[7] was not due, in part, to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's disabling pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). As the administrative law judge's basis for discrediting the opinions of Drs. Castle and Zaldivar

[7] Drs. Castle and Zaldivar reviewed the results of claimant's pulmonary function studies conducted on April 16, 2008, September 24, 2008, and May 20, 2009. As the administrative law judge accurately noted, each of these pulmonary function studies produced qualifying results both before and after the administration of a bronchodilator. Director's Exhibits 12, 13; Employer's Exhibit 4. Although Dr. Castle interpreted the pulmonary function studies as showing a significant degree of reversibility, he did not address the significance of the residual impairment remaining after the administration of a bronchodilator. Director's Exhibit 13; Employer's Exhibit 10 at 35. Although Dr. Zaldivar characterized claimant's April 16, 2008 pulmonary function study as demonstrating a remarkable degree of reversibility after the administration of a bronchodilator, Employer's Exhibit 9 at 31, the doctor acknowledged that the May 20, 2009 pulmonary function study revealed abnormal results "without much improvement after bronchodilator." *Id.* at 28.

is rational and supported by substantial evidence, it is affirmed.[8] We, therefore, affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment.

Therefore, we affirm the administrative law judge's determination that employer failed to meet its burden to establish rebuttal,[9] and we affirm the award of benefits. 30 U.S.C. §921(c)(4); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). Consequently, we need not address claimant's contentions of error raised in his cross-appeal challenging the administrative law judge's determination of the extent of claimant's smoking history.

[8] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Castle and Zaldivar, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[9] Thus, we need not address employer's arguments regarding the weight that the administrative law judge accorded the opinions of Drs. Forehand and Patel, submitted by claimant. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge