BRB No. 11-0509 BLA

WALTER L. LOCKHART	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	DATE ISSUED: 04/25/2012
	)	
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 on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PPLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2007-BLA-5429) of Administrative Law Judge Linda S. Chapman (the administrative law judge) rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung

[1] Claimant filed his first claim for benefits on June 19, 1973, which was finally denied by the district director on November 24, 1980. Director's Exhibit 1. Claimant's second claim, filed on December 21, 1987, was denied by Administrative Law Judge Charles P. Rippey on May 15, 1992. Director's Exhibit 2. Claimant filed his third claim

Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case has a lengthy procedural history, and the current claim, filed on April 5, 2006, is on appeal before the Board for the second time. In her original Decision and Order, issued on March 10, 2009, the administrative law judge credited claimant with thirty-nine years of coal mine employment, and adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that the newly-submitted evidence was sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, the Board vacated the administrative law judge's finding of clinical pneumoconiosis at Section 718.202(a)(1), and remanded the case for a reassessment of the x-ray evidence thereunder. The Board also vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4), because she failed to subject the conflicting opinions to the same scrutiny and did not explain why she credited the reports of Drs. Forehand and Rasmussen. Further, the Board vacated the administrative law judge's finding of total respiratory disability at Section 718.204(b)(2)(iv) for a reassessment of the medical opinions on remand, as the administrative law judge did not explain why she found that claimant's recent testimony was more credible than his earlier testimony with regard to the exertional requirements of claimant's last coal mine job duties.[2] Lastly, the

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on April 12, 1994, which was denied by Administrative Law Judge Samuel J. Smith on May 26, 1999. Director's Exhibit 3. Claimant's fourth claim, filed on August 28, 2000, was denied by Administrative Law Judge Daniel Solomon on June 25, 2002, and the Board affirmed the denial of benefits. *Lockhart v. U.S. Steel Mining Co.*, BRB No. 02-0685 BLA (May 8, 2003) (unpub.). Claimant's fifth claim, filed on May 24, 2004, was denied by the district director on January 19, 2005 because the evidence was insufficient to establish that claimant was totally disabled by pneumoconiosis. Director's Exhibit 5. Claimant filed the current claim on April 5, 2006.

[2] In his 2002 Decision and Order, Judge Solomon found that claimant's usual coal mine job was as a dispatcher for U.S. Steel Mining, which included occasional episodes of moderate to heavy manual labor, when he performed roof bolting duties. 2002 Decision and Order at 17.

Board vacated the administrative law judge's findings of disability causation at Section 718.204(c), and a change in an applicable condition of entitlement pursuant to Section 725.309(d), and remanded the case for further consideration of the appropriate relevant evidence in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a) (the APA). *Lockhart v. U.S. Steel Mining Co*., BRB No. 09-0489 BLA (Mar. 12, 2010)(unpub.).[3]

On remand, the administrative law judge noted the enactment of the recent amendments to the Act, and issued an Order directing the parties to file position statements addressing the applicability of the amendments to this claim. The administrative law judge additionally granted the parties time to submit one supplemental medical report from any physician who prepared an affirmative medical report, as defined at 20 C.F.R. §725.414(a)(1), and/or deposition testimony, as permitted by 20 C.F.R. §725.457. The administrative law judge subsequently admitted employer's supplemental medical reports from Drs. Hippensteel and Zaldivar into the record, but excluded the curricula vitae of Drs. Al-Asbahi and Smith proffered by employer. The administrative law judge then determined that the newly-submitted evidence in this claim was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the weight of the evidence established the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.202(a), 718.204(b), (c). The

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In his 1999 Decision and Order, Judge Smith found claimant's testimony, that he last worked as a dispatcher, to be credible. He determined that claimant performed a light level of manual labor with occasional episodes at a moderate level of manual labor. 1999 Decision and Order at 7.

[3] Subsequent to Board's 2010 decision in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to this living miner's claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

administrative law judge further found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to establish rebuttal. Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's evidentiary ruling, and contends that she erred in finding the newly-submitted evidence sufficient to establish total respiratory disability and a change in an applicable condition of entitlement pursuant to Sections 718.204(b) and 725.309(d). Employer also challenges the administrative law judge's finding that claimant was entitled to invocation of the presumption at amended Section 411(c)(4), and that employer failed to establish rebuttal.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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.[5] 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).

Turning first to the evidentiary issue raised in this appeal, employer contends that the administrative law judge erred in refusing to admit the curricula vitae of Drs. Al-Asbahi and Smith into the record on remand. Employer asserts that "the absence of evidence of the qualifications of these physicians represents an oversight, resulting in part from an inconsistency of policy within the Office of the Administrative Law Judges concerning the taking of judicial notice of published indicia of physician qualifications."

[4] Employer generally asserts that the PPACA is unconstitutional and, thus, is inapplicable to this claim. As employer has not identified any specific legal rationale for its argument, we decline to address this issue, but note that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has not declared the PPACA to be unconstitutional. *See Liberty University Inc. v. Geithner*, F.3d , No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011); *Virginia ex. rel. Cuccinelli v. Sebelius*, F.3d , Nos. 11-1057, 11-1058, 2011 WL 3925617 (4th Cir. Sept. 8, 2011), *pet. for cert. filed*, 80 USLW 3221 (Sept. 30, 2011); *see also Sarf v. Director,* OWCP, 10 BLR 1-119 (1987); *Fish v. Director,* OWCP, 6 BLR 1-107 (1983).

[5] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1-5, 8, 9.

Employer's Brief at 10. Employer argues that admission of the proffered evidence is consistent with the directive from the Board to address the comparative credentials of the physicians on remand. Employer's Brief at 9-11. Employer's arguments lack merit.

On remand, the administrative law judge granted claimant's motion to strike and excluded the proffered curricula vitae, noting that the record was re-opened on remand for the specific purpose of allowing the parties to submit supplemental medical evidence in light of the passage of the amendments to the Act, and not for any other purpose. As acknowledged by employer, the submission of the doctors' qualifications did not fall within the limited scope for which the administrative law judge opened the record on remand. As the administrative law judge has broad discretion in procedural matters, and our instructions on remand did not mandate that curricula vitae be admitted, we affirm the administrative law judge's ruling in this regard. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc).

Employer next challenges the administrative law judge's finding of total respiratory disability and a change in an applicable condition of entitlement, arguing that the administrative law judge erroneously determined that claimant's usual coal mine employment required him to perform heavy manual labor on a consistent basis. Employer asserts that claimant's usual coal mine employment involved light exertion as a dispatcher and, thus, the administrative law judge erred in evaluating the medical opinions of Drs. Forehand, Rasmussen, Hippensteel and Zaldivar. We disagree.

In finding a change in an applicable condition of entitlement established at Section 725.309(d), by means of the newly submitted medical opinion evidence at Section 718.204(b), the administrative law judge initially reiterated her finding that claimant's coal mine employment required him to perform heavy manual labor on a regular basis, consistent with claimant's testimony. As support for her finding, the administrative law judge recounted claimant's specific testimony at hearings in 1992, 1996, 2002, and 2008, Decision and Order on Remand at 10-14, noting that it "has been very consistent over the years and tracks with the information provided by the Employer,"[6] *i.e.*, employer's

[6] At the hearing in 1992, when asked to describe his main job during most of his years in the coal mining industry, claimant answered that there were too many of them, but that he was classified as a dispatcher before the mine started shutting down. He also stated that his last job classification was as a roof bolter, but that in the process of closing the mine, "we do everything." Director's Exhibit 2, Hearing Transcript at 20. In 1996, claimant listed his occupation as "motorman, trackman, dispatcher," and testified that, although he was classified as a dispatcher, he performed other jobs as needed and worked inside the mines sometimes during the week and on most weekends. Director's Exhibit 3, Hearing Transcript at 13. In 2002, claimant testified that he worked "off and on" as a dispatcher for the last fifteen years and that he was classified as a roof bolter for the last

records reflected that claimant worked from January 12, 1948 to December 19, 1986, and that "for a little more than 17 years of that time he was classified as a dispatcher. . . [while] for the remaining 22 years, he was classified as a laborer, diesel operator, motorman, trackman, and roof bolter," with his last classification listed as a roof bolter from August 11, 1986 to December 19, 1986. Decision and Order on Remand at 14; Director's Exhibit 9. Contrary to employer's argument, the record supports the administrative law judge's finding that, with the exception of his dispatcher duties, claimant performed heavy manual labor throughout his thirty-nine years with employer and in his most recent job of shutting down the coal mine. Decision and Order on Remand at 15; *see Clark*, 12 BLR at 1-153.

In evaluating the conflicting medical opinions at Section 718.204(b)(2)(iv), the administrative law judge accurately summarized the explanation and bases for the various physicians' conclusions, and acted within her discretion in finding that the opinions of Drs. Forehand[7] and Rasmussen,[8] that claimant has a totally disabling obstructive impairment and oxygen transfer impairment, were well-reasoned and entitled to full probative weight, as they were supported by the objective medical evidence and were based on an accurate understanding of claimant's coal mine employment duties involving heavy manual labor. Decision and Order on Remand at 16; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 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). The administrative law judge also noted that Dr. Zaldivar's original 2008 report supported the opinions of Drs. Forehand and Rasmussen, as the physician concluded that, from a

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four months of his employment and did what his employer told him to do. Director's Exhibit 4, Hearing Transcript at 26. In 2008, claimant stated that he did a little of everything in the mines: "roof bolt, run motor, run machinery, worked on track, rock dust, anything they wanted done." Director's Exhibit 6, Hearing Transcript at 22-23.

[7] Dr. Forehand performed the 2006 Department of Labor examination and testified at a deposition. He diagnosed coal workers' pneumoconiosis and a totally disabling respiratory impairment due to smoking and coal dust exposure. Director's Exhibit 15, Employer's Exhibit 3.

[8] Dr. Rasmussen examined claimant on January 17, 2007, and diagnosed coal workers' pneumoconiosis and a totally disabling lung disease due to cigarette smoking and coal dust exposure. Claimant's Exhibit 2. On January 29, 2008, Dr. Rasmussen performed another examination and diagnosed clinical and legal pneumoconiosis. He determined that claimant does not retain the pulmonary capacity to perform heavy manual labor, and opined that claimant's moderate impairment is due to both cigarette smoking and coal dust exposure. Claimant's Exhibit 1.

pulmonary standpoint, claimant was incapable of performing his usual coal mine employment requiring heavy manual labor.[9] Decision and Order on Remand at 15-16. By contrast, the administrative law judge permissibly found that the opinion of Dr. Hippensteel was entitled to less weight because, in his 2006 report, the doctor did not address the issue of whether claimant had a totally disabling respiratory impairment and, in his 2010 supplemental report, the doctor based his conclusions on the assumption that claimant's coal mine employment required only light exertion. Decision and Order on Remand at 15; Employer's Exhibit 1; *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469, 1-471 (1984). Similarly, the administrative law judge determined that Dr. Zaldivar's supplemental opinion was not probative on the issue of whether claimant retains the ability, from a respiratory or pulmonary standpoint, to return to his coal mine employment, as he relied on an inaccurate understanding of the exertional requirements of claimant's usual coal mine employment duties. Decision and Order on Remand at 16; Employer's Supplemental Exhibit 2; *see Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991).

After evaluating the medical opinions, the administrative law judge acted within her discretion in finding that the opinions of Drs. Forehand and Rasmussen, as supported by the original report of Dr. Zaldivar, were entitled to determinative weight. Decision and Order on Remand at 16; *see Clark*, 12 BLR at 1-53; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that claimant established total respiratory disability pursuant to Section 718.204(b) and a change in an applicable condition of entitlement under Section 725.309. Further, because she found that the weight of the evidence of record was sufficient to establish total respiratory disability pursuant to Section 718.204(b), the administrative law judge properly determined that claimant is entitled to invocation of the amended Section 411(c)(4) presumption of total

[9] Dr. Zaldivar examined claimant on January 16, 2008, and reviewed medical reports. He opined that from a pulmonary standpoint, claimant, at the age of 78, was incapable of performing his usual coal mine employment because his work required heavy manual labor. He found no evidence to justify a diagnosis of either clinical or legal pneumoconiosis, but he diagnosed asthma and emphysema due to smoking. Employer's Exhibit 2. On November 15, 2010, Dr. Zaldivar provided a supplemental report based on the understanding that claimant worked as a dispatcher with occasional episodes of moderate to heavy manual work as a roof bolter. He opined that claimant was capable of performing his coal mine employment as of his 2008 examination, based on the job requirements and the results of a breathing test. Employer's Supplemental Exhibit 2.

disability due to pneumoconiosis, and we affirm that finding. 30 U.S.C. §921(c)(4); *see* Decision and Order on Remand at 18.

We next address employer's challenges to the administrative law judge's weighing of the medical opinions of record in finding that employer failed to rebut the amended Section 411(c)(4) presumption, by establishing that claimant does not have pneumoconiosis or that his disabling respiratory impairment did not arise out of employment in a coal mine. Employer generally maintains that the opinions of Drs. Hippensteel and Zaldivar are sufficient to establish that claimant does not have pneumoconiosis, and that any respiratory impairment resulted from non-occupational processes, including asthma, bullous emphysema, atelectasis and cardiac insufficiency. Employer's Brief at 11-12, 18-19. Employer's argument lacks merit.

In evaluating the evidence relevant to rebuttal, the administrative law judge accurately summarized the conflicting medical opinions, and determined that Dr. Forehand and Dr. Rasmussen both diagnosed legal pneumoconiosis and persuasively explained why they concluded that claimant's coal mine dust exposure played a significant role in his disabling respiratory impairment. Decision and Order on Remand at 6-9, 16-19. The administrative law judge permissibly accorded little weight to the contrary opinion of Dr. Hippensteel, as she found that the physician failed to address the cause of claimant's impaired diffusing capacity; failed to explain why occasional reversibility in the pulmonary function study results automatically excluded coal dust exposure as a contributing cause of impairment; and offered no support for his summary conclusion that claimant's arterial hypoxemia on exercise was due to an abnormal cardiac response. Decision and Order on Remand at 8, 17, 19; Employer's Exhibit 1; *see Clark*, 12 BLR at 1-155. Similarly, the administrative law judge acted within her discretion in discounting Dr. Zaldivar's opinion, as the physician concluded that claimant had normal exercise blood gas results, contrary to the findings of Drs. Forehand, Rasmussen, and Hippensteel, and he did not explain why he found no relation between claimant's long history of coal dust exposure and the diagnosed conditions of asthma and emphysema. Decision and Order on Remand at 8, 18-19; Employer's Exhibit 2; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Clark*, 12 BLR at 1-155. Although employer challenges these findings, employer's arguments on appeal amount to little more than a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her reliance on the opinions of Drs. Hippensteel and Zaldivar to find that employer has failed to disprove a causal connection between claimant's disabling respiratory condition and his

coal dust exposure. Thus, we affirm the administrative law judge's conclusion that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption.[10]

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[10] As employer has failed to rebut the presumption that claimant has legal pneumoconiosis under amended Section 411(c)(4), we need not address employer's challenge to the administrative law judge's weighing of the x-ray evidence in finding clinical pneumoconiosis established under 20 C.F.R. §718.202(a)(1). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011).