BRB No. 12-0616 BLA

RONDAL D. CHARLES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 08/27/2013
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Micah S. Blankenship (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2010-BLA-5618) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) awarding benefits on a subsequent claim[1] filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with 27 years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge also found that claimant invoked 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 did not rebut the presumption.[2] Further, the administrative law judge found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). 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 also challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of legal pneumoconiosis and total disability due to

[1] Claimant filed his first claim on January 20, 2004. Director's Exhibit 1. It was finally denied by the district director on August 30, 2004, because claimant failed to establish either the existence of pneumoconiosis or total respiratory disability. *Id*. Claimant filed this claim on August 7, 2009. Director's Exhibit 3.

[2] Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) referred to 20 C.F.R. §718.305 in discussing the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Prior to its amendment, Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), was implemented by 20 C.F.R. §718.305, which includes a provision barring application of the rebuttable presumption in claims filed after January 1, 1982. 20 C.F.R. §718.305(e). Although Congress removed the portion of Section 411(c)(4) limiting the availability of the rebuttable presumption to claims filed before January 1, 1982, 20 C.F.R. §718.305 has not yet been amended to reflect this change. Therefore, by its own terms, 20 C.F.R. §718.305 is not currently applicable to claims, such as the present one, that were filed after January 1, 1982. *See* 20 C.F.R. §718.305(e). The administrative law judge's citation of 20 C.F.R. §718.305 does not constitute error requiring remand, however, as the portions of 20 C.F.R. §718.305 regarding invocation and rebuttal are virtually identical to the terms of amended Section 411(c)(4). *See Larioni v. Director, OWCP*, 12 BLR 1-1276 (1989).

pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits.[3] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's assertion that the administrative law judge failed to adequately notify employer of the rebuttal standard at amended Section 411(c)(4). The Director also urges the Board to reject employer's assertions that the presumption does not apply to responsible operators, and that the presumption does not have any effect, absent implementing regulations. Further, the Director urges the Board to decline to address employer's assertion that the rule out standard cannot be applied to rebut the presumption.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010). The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if 15 or more years of qualifying coal

[3] Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[4] Because the administrative law judge's length of coal mine employment finding and his findings that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, thus, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record indicates that claimant was employed in the coal mining industry in Virginia. Director's Exhibit 4. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we will address employer's contention that its due process rights were violated because it did not receive appropriate notice of the rebuttal standard applied at amended Section 411(c)(4). Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5 (2011), *aff'd sub nom. Mingo Logan Coal Co. v. Owens*, F.3d , 2013 WL 3929081 (4th Cir. July 31, 2013) (No. 11-2418), and we reject it here for the reason set forth in that decision. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 133 S.Ct. 127 (2012).

Next, we address employer's contention that this case should be held in abeyance until new regulations are promulgated by the Department of Labor (the Department). Consistent with our reasoning in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.), we reject employer's request that this case should be held in abeyance until new regulations are promulgated. *See also Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011).

Turning to the merits, we affirm the administrative law judge's application of Section 1556 of the PPACA to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We also affirm the administrative law judge's unchallenged finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on his determination that claimant established 27 years of underground coal mine employment and total respiratory disability at Section 718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With regard to rebuttal of the presumption at amended Section 411(c)(4), we affirm the administrative law judge's unchallenged finding that employer established the absence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4).[6] *See Skrack*, 6 BLR at 1-711.

[6] Although employer does not challenge the administrative law judge's finding that it established the absence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4), employer asserts that the administrative law judge erred in discounting Dr. Fino's opinion that claimant does not have clinical pneumoconiosis. Employer maintains that "a preponderance of the evidence supports Dr. Fino's finding of no clinical pneumoconiosis, a finding ultimately acknowledged by the [administrative law judge]." Employer's Brief at 7. In view of our disposition of the administrative law judge's finding regarding the

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by showing the absence of legal pneumoconiosis. The administrative law judge considered the reports of Drs. Rasmussen, Baker, Al-Khasawneh, Fino and Hippensteel. The opinions of Drs. Rasmussen, Baker and Al-Khasawneh, that claimant has legal pneumoconiosis,[7] do not support rebuttal of the presumption. By contrast, the opinions of Drs. Fino and Hippensteel, that claimant does not have legal pneumoconiosis, are supportive of a finding of rebuttal of the presumption.[8] The administrative law judge gave diminished probative value to the opinions of Drs. Rasmussen, Baker, Al-Khasawneh, Fino and Hippensteel. Based on his finding that there was no probative medical opinion of record to show that claimant does not have legal pneumoconiosis, the administrative law judge found that employer failed to rebut the presumption at amended Section 411(c)(4).

Employer asserts that the administrative law judge erred in discounting the opinions of Drs. Fino and Hippensteel because they conflict with the regulatory definition of pneumoconiosis. We disagree. The preamble to the revised regulations sets forth how the Department has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). An administrative law judge may, within his discretion, evaluate medical expert opinions in conjunction with the Department's discussion of sound medical science in the preamble to the revised regulations. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012). In this case, the administrative law judge permissibly discounted the opinions of Drs. Fino and Hippensteel because they are inconsistent with the Department's recognition that pneumoconiosis can be latent and progressive.[9] *See*

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issue of clinical pneumoconiosis, we need not address employer's assertion that the administrative law judge erred in discounting Dr. Fino's opinion. *See Larioni*, 12 BLR at 1-1278.

[7] Drs. Rasmussen and Baker diagnosed chronic obstructive pulmonary disease related to coal dust exposure. Director's Exhibit 1; Claimant's Exhibit 2. Dr. Al-Khasawneh opined that claimant has legal pneumoconiosis. Director's Exhibit 12.

[8] Drs. Fino and Hippensteel opined that claimant does not have legal pneumoconiosis. Employer's Exhibits 4, 7.

[9] The administrative law judge stated: "upon consideration of Dr. Fino's deposition testimony, and despite his stated disclaimer, I have diminished confidence that he objectively considered whether [claimant's] severe pulmonary obstruction which has developed since 2004 may have [been] caused in part by his coal mine dust exposure, even in the absence of clinical evidence of silicosis. Specifically, although he indicates

Peabody Coal Co. v. Groves, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); 20 C.F.R. §718.201(c) (recognizing that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"); 65 Fed. Reg. 79,971 (Dec. 20, 2000). In addition, the administrative law judge reasonably found that "Dr. Hippensteel's apparent disinclination to diagnose legal pneumoconiosis in the absence of clinical pneumoconiosis also adversely impacts his opinion since the regulatory definition of legal pneumoconiosis does not require the presence of clinical pneumoconiosis." Decision and Order at 23-24; *see Looney*, 678 F.3d at 311-12, 25 BLR at 2-125; *see also Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11. Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Fino and Hippensteel because they conflict with the regulatory definition of pneumoconiosis.[10]

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that he will accept the concept since he otherwise risks being determined hostile to the Act, Dr. Fino clearly is critical of [the Department of Labor's (the Department)] determination that pneumoconiosis is a latent and progressive disease based solely on studies of gold and hard rock miners with silicosis." Decision and Order at 23. Additionally, the administrative law judge stated that "Dr. Hippensteel's dismissal of coal mine dust-related bronchitis due to [claimant's] long absence from coal mine dust exposure also conflicts with the regulatory definition of pneumoconiosis." *Id*. at 24.

[10] Employer also asserts that the administrative law judge erred in discounting Dr. Fino's opinion "on the ground that he 'emphasizes the significant degree of [claimant's] improvement to bronchodilator therapy as a basis for identifying cigarette smoking, rather than coal mine dust exposure, as the sole cause of his obstructive pulmonary impairment,' despite 'stating that reversibility doesn't preclude a finding of legal pneumoconiosis.'" Employer's Brief at 8-9. Because the administrative law judge provided a valid basis for discounting Dr. Fino's opinion, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983), we hold that any error by the administrative law judge in this regard is harmless, *see Larioni*, 6 BLR at 1-1278. As discussed *supra*, the administrative law judge permissibly discounted Dr. Fino's opinion because it is inconsistent with the Department's recognition that pneumoconiosis can be latent and progressive. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F. 3d 248, 24 BLR 2-369 (3rd Cir. 2011); 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,971 (Dec. 20, 2000).

Employer also asserts that the administrative law judge erred in discounting Dr. Hippensteel's opinion "based on his reliance on the reversibility component of [claimant's] airways disease." Employer's Brief at 12. Contrary to employer's assertion, the administrative law judge permissibly discounted Dr. Hippensteel's opinion because Dr. Hippensteel did not adequately explain why partial reversibility in the results of a portion of claimant's pulmonary function studies necessarily eliminated a diagnosis of legal pneumoconiosis.[11] *See Crockett Collieries, 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); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis.

Finally, employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of total disability due to pneumoconiosis. Specifically, employer asserts that the administrative law judge violated the Administrative Procedure Act (APA) by failing to provide an independent, reasoned analysis regarding disability causation. We disagree.

The APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Here, in considering whether employer established the absence of disability causation, the administrative law judge considered the opinions of Drs. Rasmussen, Baker, Al-Khasawneh, Fino and Hippensteel.[12] The administrative law

[11] The administrative law judge stated that "[Dr. Hippensteel's] opinion that [claimant] also does not have legal pneumoconiosis suffers a loss of probative value due to reliance on the reversibility of [claimant's] pulmonary obstruction as the basis for his etiology conclusion that the obstructive impairment is not due to coal mine dust exposure when, as Dr. Hippensteel acknowledged, [claimant's] pulmonary function did not return to normal after bronchodilator therapy." Decision and Order at 23. The administrative law judge further stated, "[n]otably, Dr. Hippensteel did not address whether coal mine dust may nevertheless be a contributing factor to [claimant's] residual disabling impairment." *Id*.

[12] Dr. Rasmussen opined that coal dust exposure was a significant factor in claimant's impaired lung function. Director's Exhibit 1. Dr. Baker opined that

judge specifically stated, "[f]or the reasons previously discussed, the opinions of all five physicians, Dr. Rasmussen, Dr. Al-Khasawneh, Dr. Baker, Dr. Fino, and Dr. Hippensteel[,] who evaluated the cause of [claimant's] pulmonary impairment have diminished probative value." Decision and Order at 24.

As discussed *supra*, in considering whether employer established the absence of legal pneumoconiosis, the administrative law judge permissibly discounted the opinions of Drs. Fino and Hippensteel because they are inconsistent with the Department's recognition that pneumoconiosis can be latent and progressive. *See J.O.* [*Obush*], 24 BLR at 1-125; 65 Fed. Reg. 79,971 (Dec. 20, 2000). In addition, the administrative law judge permissibly discounted Dr. Hippensteel's opinion because it is inconsistent with the regulatory definition of legal pneumoconiosis, which "does not require the presence of clinical pneumoconiosis." Decision and Order at 23-24; *see Looney*, 678 F.3d at 311-12, 25 BLR at 2-125; *see also Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11. Moreover, the administrative law judge permissibly discounted Dr. Hippensteel's opinion because Dr. Hippensteel did not adequately explain why partial reversibility in the results of a portion of claimant's pulmonary function studies necessarily eliminated a diagnosis of legal pneumoconiosis. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Swiger*, 98 F. App'x at 237; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Because the administrative law judge reasonably found that "the record does not contain a probative medical opinion to show that [claimant's] totally disabling respiratory impairment is not due to his coal mine employment," Decision and Order at 24; *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we reject employer's assertion that the administrative law judge's weighing of the evidence on disability causation violated the APA.[13] We, therefore, affirm the administrative law judge's finding that employer

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claimant's coal dust exposure fully contributed to his total pulmonary disability. Claimant's Exhibit 2. Dr. Al-Khasawneh opined that claimant's legal pneumoconiosis substantially contributed to his pulmonary impairment. Director's Exhibit 12. By contrast, Dr. Fino opined that coal workers' pneumoconiosis did not contribute to claimant's disability. Employer's Exhibit 7. Dr. Fino opined that claimant's disabling respiratory impairment was secondary to smoking. *Id*. Dr. Hippensteel opined that claimant's pulmonary impairment was not caused by coal dust exposure. Employer's Exhibit 4.

[13] Employer contends that the limitations on rebuttal evidence at amended Section 411(c)(4) are not applicable to responsible operators. Employer argues that, "[t]o rebut the fifteen-year presumption, an operator need not prove pneumoconiosis played absolutely no role in the disability, but only that pneumoconiosis did not cause the disability." Employer's Brief at 27. Employer also argues that "[m]ild pneumoconiosis or proof that another lung disease caused the disability is sufficient to deny benefits." *Id*. Specifically, employer asserts that "[w]hile an operator's rebuttal evidence might satisfy

failed to establish that coal dust exposure did not contribute to claimant's disabling respiratory impairment.

Furthermore, because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order 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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BETTY JEAN HALL
Administrative Appeals Judge

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the contributing-cause standard, it might not satisfy the higher burden of the rule-out standard." *Id*. at 28. Because the administrative law judge acted within his discretion in finding that employer failed to establish the absence of disability causation because the opinions of Drs. Fino and Hippensteel have diminished probative value, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we need not address employer's assertion that the administrative law judge failed to apply the proper rebuttal standard at amended Section 411(c)(4).