BRB No. 12-0183 BLA

VALERIA BOWEN[1] (o/b/o of CARL JONES)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 12/20/2012
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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Micah S. Blankenship (Wolfe Williams Rutherford & Reynolds), Charleston, West Virginia, for employer.

Paul E. Frampton (Bowles Rice McDavid Graff & Love, PLLC), Charleston, West Virginia, for employer.

Jonathan Rolfe (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

[1] Claimant is the administratrix of the miner's estate, and is pursuing his claim on his behalf. By Order dated May 11, 2012, the Board designated Ms. Bowen as a party to the case.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2010-BLA-05493) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's claim filed on June 19, 2009. Director's Exhibit 2.

The administrative law judge credited the miner with more than twenty-six years of underground coal mine employment,[2] based on claimant's testimony and his Social Security Administration earnings records, and noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that claimant established that the miner had more than twenty-six years of underground coal mine employment. Additionally, the administrative law judge found that the medical evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of Section 411(c)(4) to this claim. Employer further asserts that the administrative law

[2] The miner's coal mine employment was in Virginia. Director's Exhibit 5; Hearing Tr. at 17. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments regarding the application of Section 411(c)(4).[3]

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).

Employer contends that the retroactive application of amended Section 411(c)(4) constitutes a due process violation and an unconstitutional taking of private property, and that its rebuttal provisions do not apply to claims brought against a responsible operator. Employer's Brief at 11-12 n.1. Employer's contentions are substantially similar to the ones 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 them here for the reasons set forth in that decision. Further, we reject employer's argument that the application of amended Section 411(c)(4) to this case is premature for lack of implementing regulations. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4).

[3] Employer does not challenge the administrative law judge's findings that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Nor does employer challenge the administrative law judge's finding that the miner had more than twenty-six years of underground coal mine employment, sufficient to satisfy the requirement of Section 411(c)(4). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer next 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 the miner's disabling respiratory impairment. Employer's Brief at 13-14 n.3. 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 the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 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); Decision and Order at 5, 7. Moreover, the Fourth Circuit explicitly held that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to the miner's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The administrative law judge found that employer failed to establish either method of rebuttal. Decision and Order at 23.

Weighing the medical evidence relevant to rebuttal, the administrative law judge initially found, based upon computerized tomography evidence, that employer disproved the existence of clinical pneumoconiosis.[4] Decision and Order at 14-15. The administrative law judge then considered whether the medical opinions of Drs. Hippensteel and Spagnolo, submitted by employer, disproved the existence of legal pneumoconiosis.[5] Dr. Hippensteel concluded that the miner did not have legal pneumoconiosis, and that his disabling pulmonary impairment was due to cardiac-induced lung congestion and basilar pulmonary inflammation, unrelated to coal mine dust exposure. Employer's Exhibit 2 at 4-5. Dr. Spagnolo also concluded that the miner did not have legal pneumoconiosis, but suffered from a disabling pulmonary impairment due to "left heart failure, asthma/asthmatic bronchitis, and early emphysema most likely due to his cigarette smoking," with no contribution by coal mine dust exposure. Employer's

[4] Clinical pneumoconiosis is defined as "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).

[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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

Exhibit 4 at 5. The administrative law judge found that the opinions of Drs. Hippensteel and Spagnolo were not sufficiently reasoned to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Hippensteel and Spagnolo. We disagree. The administrative law judge noted that, although Dr. Hippensteel initially provided a reasoned explanation for his opinion that the miner's pulmonary impairment was solely due to left-sided heart failure, Dr. Hippensteel subsequently opined that a portion of the miner's obstructive lung disease was due to allergies.[6] In light of the rebuttal standard which requires employer to rule out a causal connection between the miner's coal mine dust exposure and his disabling impairment, the administrative law judge permissibly concluded that Dr. Hippensteel did not adequately explain why the miner's more than twenty-six years of coal mine dust exposure did not contribute, along with his allergies, to his pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2); *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); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 21.

Evaluating Dr. Spagnolo's opinion, the administrative law judge noted that the physician's conclusion, that the miner's asthma and early emphysema were not related to coal mine dust exposure, was based in part on the significant reversibility of the miner's impairment after bronchodilator administration.[7] Decision and Order at 21 n.27;

[6] In his July 27, 2010, report Dr. Hippensteel diagnosed cardiac-induced lung congestion and basilar pulmonary inflammation, and severe airflow obstruction that mildly improved following the administration of bronchodilators. Employer's Exhibit 2 at 2, 4-5. Dr. Hippensteel explained that these conditions were unrelated to coal mine dust exposure. *Id.* At his October 7, 2010 deposition, Dr. Hippensteel added that while "at least part" of the miner's obstructive impairment was due to cardiac-induced fluid congestion, the miner also had a "history of allergies and obstructive lung disease tied in with those allergies that is partially reversible." Employer's Exhibit 5 at 20. Dr. Hippensteel concluded that "this combination of findings is the reason for the [miner's] ventilatory function impairment." Employer's Exhibit 5 at 20.

[7] Dr. Spagnolo opined that the cause of the miner's obstructive impairment was "multifactorial," including left heart failure, asthma/asthmatic bronchitis and early emphysema." Employer's Exhibit 4 at 5. In opining that coal mine dust exposure did not contribute to the miner's impairment, Dr. Spagnolo explained that the miner's impairment significantly improved after bronchodilator administration, and that reversible airflow obstruction is not a feature of pneumoconiosis. Employer's Exhibit 4 at 4, 5.

Employer's Exhibit 4 at 4-5. Noting that the miner's obstructive impairment was not completely reversed upon the application of a bronchodilator, the administrative law judge found, as was within his discretion, that like Dr. Hippensteel, Dr. Spagnolo did not adequately explain how he excluded coal mine dust as an additional, contributing factor to the miner's residual totally disabling pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Swiger*, 98 F. App'x at 237; Decision and Order at 21 n.27.

The administrative law judge further discounted Dr. Spagnolo's pulmonary diagnoses of asthmatic bronchitis and early emphysema, as speculative. The administrative law judge correctly noted that Dr. Spagnolo based his conclusion that the miner had asthma or asthmatic bronchitis, unrelated to coal mine dust exposure, on the miner's history of "taking Singulair and prednisone [which are] . . . among the primary agents used for the treatment of asthma and asthmatic bronchitis." Employer's Exhibit 4 at 4. The administrative law judge found, however, that the record reflected that the miner had been prescribed these two drugs for his arthritis and allergies.[8] Decision and Order at 21. Consequently, the administrative law judge permissibly found that Dr. Spagnolo's reliance on the possible use of Singulair and prednisone to treat asthma and asthmatic bronchitis as a basis for his pulmonary diagnosis, was speculative, and entitled to little weight. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87, 24 BLR 2-269, 2-282-84 (4th Cir. 2010); *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-652-53 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 21.

Similarly, the administrative law judge concluded that Dr. Spagnolo's diagnosis of early emphysema, unrelated to coal mine dust exposure, was premised on his assumption that the miner's cigarette smoking history was understated. Dr. Spagnolo opined that while the record suggested a limited smoking history, ending in 1955, it also reflected that the miner's daughter provided assistance with the miner's medical history. Decision and Order at 21; Employer's Exhibit 4 at 4. Thus, Dr. Spagnolo concluded that the miner's memory may have been impaired, and that the miner's smoking may have placed him at an increased risk for chronic bronchitis, emphysema, and other lung conditions. Decision and Order at 21; Employer's Exhibit 4 at 4. The administrative law judge found, however, that the record contains no evidence that the miner's daughter assisted him with the cigarette smoking portion of his histories, and that the miner credibly testified at the hearing, without any hesitation, that he stopped smoking cigarettes in the

[8] In his July 27, 2010 report, which was reviewed by Dr. Spagnolo, Dr. Hippensteel stated that the miner had "been on prednisone for . . . degenerative arthritis over the last [twenty] years," and had been on "Singulair (a medication for allergies) for several years." Employer's Exhibit 2 at 2; Employer's Exhibit 4 at 2-3.

mid-1950s when he started mining coal. Decision and Order at 21. The administrative law judge further found that Dr. Al-Khasawneh obtained a similar cigarette smoking history, and that the miner's treatment records also do not reflect any significant cigarette smoking history. Decision and Order at 21-22; Director's Exhibit 9; Claimant's Exhibit 3. Thus, the administrative law judge permissibly concluded that Dr. Spagnolo's diagnosis of early emphysema, unrelated to coal mine dust exposure, was also premised on conjecture. *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84; *Jarrell*, 187 F.3d at 391, 21 BLR at 2-652-53; *Justice*, 11 BLR at 1-94; Decision and Order at 21-22; Employer's Exhibit 4 at 4.

Employer next contends that the administrative law judge erred in discounting the opinions of Drs. Hippensteel and Spagnolo, that the miner's obstructive impairment was due to cardiac-induced lung congestion, and not coal mine dust exposure, without considering that the CT scan evidence of record supports their diagnoses. Employer's Brief at 12-16. Contrary to employer's assertion, there is no dispute that the miner suffered from cardiac disease that contributed to his obstructive ventilatory impairment, and the administrative law judge did not discredit their diagnoses of heart-related illness. Rather, the administrative law judge permissibly found that Drs. Hippensteel and Spagnolo did not adequately explain the bases for their opinions that the additional portion of the miner's impairment attributable to allergies or asthma, was not contributed to, or aggravated by, his more than twenty-six years of coal mine dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Decision and Order at 21. We, therefore affirm, as supported by substantial evidence, the administrative law judge's determination that the opinions of Drs. Hippensteel and Spagnolo are not sufficiently reasoned to meet employer's burden to disprove the existence of legal pneumoconiosis. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997); Decision and Order at 21-22.

Because the opinions of Drs. Hippensteel and Spagnolo are the only opinions potentially supportive of a finding that the miner did not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to establish the first method of rebuttal by disproving the existence of legal pneumoconiosis. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that the miner did not have 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. Therefore, we need not address employer's additional contention that the administrative law judge erred in weighing the x-ray evidence in finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986); Employer's Brief at 10-11.

Finally, the administrative law judge found that the same reasons for which he discredited the opinions of Drs. Hippensteel and Spagnolo, on the issue of pneumoconiosis, also undercut their opinions that the miner's impairment was unrelated to his coal mine employment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 22. Because the opinions of Drs. Hippensteel and Spagnolo are the only opinions supportive of a finding that the miner's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal.[9] *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

Based on the foregoing, we affirm the administrative law judge's determination that employer did not meet its burden to rebut the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. Therefore, we affirm the award of benefits. *See* 30 U.S.C. §921(c)(4).

[9] Thus, we need not address employer's allegation of error in the administrative law judge's determination of the weight to be accorded to the medical opinions of claimant's physicians. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge