BRB No. 11-0349 BLA

CLINARD BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY CARBON CORPORATION	)	DATE ISSUED: 02/21/2012
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Award of Benefits (2007-BLA-05878) of Administrative Law Judge Daniel F. Solomon, with respect to a subsequent claim filed on September 18, 2006, pursuant to the provisions of the Black Lung 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).[1] This case is before the Board for a second time. In its previous Decision and Order, issued on July 20, 2009, the Board reversed the administrative law judge's finding that claimant's 2006 subsequent claim was untimely filed and remanded the case to the administrative law judge for consideration of the claim. *C.B.* [*Bentley*] *v. Ky. Carbon Corp*., BRB No. 08-0876 BLA, slip op. at 3-4 (July 20, 2009)(unpub.).

On remand, the administrative law judge accepted the parties' stipulation to at least eighteen years of coal mine employment and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge determined, therefore, that the recent amendments to the Act are applicable to this claim and that claimant invoked the rebuttable presumption that his disabling impairment is due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge then found that the medical opinion evidence was insufficient to meet employer's burden to rebut the presumption. Consequently, the administrative law judge awarded benefits, without rendering a specific finding as to whether claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Employer appeals, arguing that the administrative law judge erred in determining that the opinions of Drs. Jarboe and Hippensteel were insufficient to rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of

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[1] Claimant initially filed a claim for benefits on July 15, 1985, which the district director denied by reason of abandonment on September 28, 1988. Director's Exhibits 1-1280, 1-1477. Claimant filed a second claim on October 31, 1994. Director's Exhibit 1-1588. In a Decision and Order dated August 19, 1996, Administrative Law Judge Paul H. Teitler found that the evidence did not establish the existence of pneumoconiosis, and denied benefits. Director's Exhibit 1-1053. Pursuant to claimant's appeal, the Board affirmed Judge Teitler's denial of benefits. *Bentley v. Ky. Carbon Corp.*, BRB No. 97-0376 BLA (Nov. 20, 1997)(unpub.). Claimant's two subsequent requests for modification were also denied, the second request being finally denied on August 2, 2005. Director's Exhibit 1-5.

[2] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this 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 supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

I. The Administrative Law Judge's Findings

Based on the stipulation of the parties to at least eighteen years of qualifying coal mine employment and total disability at 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant invoked the rebuttable presumption at amended Section 411(c)(4).[4] Decision and Order on Remand at 3-5. Relevant to the issue of rebuttal, the administrative law judge stated, "there was no basis for finding clinical pneumoconiosis through x-rays."[5] *Id*. at 7. The administrative law judge then determined that the opinions of Drs. Jarboe and Hippensteel, that claimant's disabling obstructive impairment was due solely to his cigarette smoking, were insufficient to rebut the presumption that claimant has legal pneumoconiosis. *Id*. at 9-11.

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[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[4] We affirm, as unchallenged on appeal, the administrative law judge's acceptance of the parties' stipulation to at least eighteen years of qualifying coal mine employment and that claimant is totally disabled under 20 C.F.R. §718.204(b)(2), and his finding that claimant invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

The administrative law judge determined that, because the literature that Dr. Jarboe cited in support of his conclusion, that smoking was the sole cause of claimant's chronic obstructive pulmonary disease (COPD), was not in the record, he was unable "to judge the accuracy of rendition." Decision and Order on Remand at 10. The administrative law judge also found that the literature Dr. Jarboe relied upon did not concern the amended definition of legal pneumoconiosis, "as all of them are preoccupied with clinical pneumoconiosis, much of the analysis is irrelevant and therefore the logic in their use and in their context is flawed."[6] *Id.* The administrative law judge further determined that neither Dr. Jarboe nor Dr. Hippensteel addressed the additive nature of coal dust exposure and smoking, "as set forth in the legislative facts from [the] rulemaking of the Department of Labor." *Id.* The administrative law judge also found that Dr. Hippensteel's opinion was entitled to less weight, as he did not explain how he determined that claimant's obesity contributed to his respiratory impairment. *Id.*

Lastly, the administrative law judge considered claimant's assertion that, although Dr. Jarboe cited the reversible portion of claimant's impairment as inconsistent with pneumoconiosis, claimant exhibited a severe impairment even after the administration of bronchodilators. Decision and Order on Remand at 11. The administrative law judge determined that, because Drs. Jarboe and Hippensteel did not address whether coal dust exposure was a contributing cause of claimant's residual impairment, which they acknowledged, their opinions had diminished probative value. *Id.* Based upon these findings, the administrative law judge concluded that the opinions of Drs. Jarboe and Hippensteel were insufficient to establish rebuttal of the presumption that claimant suffers from legal pneumoconiosis. *Id.*

The administrative law judge next considered whether employer rebutted the presumption by establishing that claimant's totally disabling respiratory impairment was not due to his coal mine employment. Decision and Order on Remand at 12. The administrative law judge stated that he gave "limited weight" to the opinions of Drs. Jarboe and Hippensteel because, contrary to the administrative law judge's finding, they did not diagnose clinical pneumoconiosis by x-ray. *Id.* Consequently, the administrative

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). A disease "arising out of coal mine employment" includes any respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

law judge concluded, based on the record as a whole, that employer did not rebut the presumption that claimant's totally disabling respiratory impairment is due to pneumoconiosis. *Id*. Accordingly, the administrative law judge awarded benefits. *Id*.

II. Arguments on Appeal

Employer asserts that the administrative law judge erred in discrediting Dr. Jarboe's opinion because the medical literature that he cited in support of his opinion was not in the record. Employer also argues that, contrary to the administrative law judge's finding, Dr. Hippensteel testified at his deposition about the effects of obesity and obstructive sleep apnea. Further, employer asserts that the administrative law judge erred in discounting the opinions of Drs. Jarboe and Hippensteel for failing to address the additive nature of coal dust exposure and cigarette smoking. Lastly, employer contends that the administrative law judge's determination regarding disability causation was flawed, as earlier in his Decision and Order, he found that claimant did not establish clinical pneumoconiosis based on the x-ray evidence, but then he discredited the opinions of Drs. Jarboe and Hippensteel because he "found above that clinical pneumoconiosis was established on x-ray." Employer's Brief at 19, *quoting* Decision and Order on Remand at 12.

Claimant responds, arguing that the administrative law judge permissibly discredited the opinions of Drs. Jarboe and Hippensteel concerning legal pneumoconiosis. In addition, claimant contends that the administrative law judge's inconsistency regarding his finding as to clinical pneumoconiosis was "clearly a typographical error which is *de minimis*." Claimant's Brief at 15.

Upon review of the administrative law judge's Decision and Order on Remand and the parties' arguments on appeal, we hold that the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption is rational and supported by substantial evidence. Regarding whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge rationally determined that Dr. Jarboe's opinion was entitled to little weight because he relied on literature that, contrary to the scientific view accepted by the Department of Labor, does not recognize a causal connection between coal dust exposure and COPD, unless there is x-ray evidence of at least simple pneumoconiosis. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *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). The administrative law judge also acted within his discretion in finding that the failure of Drs. Jarboe and Hippensteel to address whether coal dust exposure was a contributing cause of the disabling residual impairment observed on claimant's pulmonary function studies diminished the credibility of their

opinions.[7] *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483. Thus, the administrative law judge rationally concluded that the opinions of Drs. Jarboe and Hippensteel were insufficient to rebut the amended Section 411(c)(4) presumption that claimant has legal pneumoconiosis.

Regarding whether employer proved that claimant's totally disabling obstructive impairment did not arise out of, or in connection with, coal mine employment, we agree with claimant and employer that the administrative law judge's finding on this issue contains an error. Upon considering the issue of total disability causation, the administrative law judge noted that it was within his discretion "to accord less weight to the opinions of examining physicians to the extent that they did not diagnose *clinical coal workers' pneumoconiosis*, contrary to the determination that the existence of *clinical*

[7] The administrative law judge cited the Sixth Circuit's decision in *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), in support of his finding that employer was required to establish that coal dust exposure played no more than an infinitesimal role in claimant's disabling obstructive impairment. Decision and Order on Remand at 11. In *Smith*, the court addressed the disability causation standard set forth in 20 C.F.R. §718.204(b) (2000) and stated that "a miner is required to prove more than a *de minimis* or infinitesimal contribution by pneumoconiosis to his total disability." *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Subsequent to the court's decision, the Department of Labor (DOL) amended 20 C.F.R. §718.204(b) and moved the standard for establishing total disability causation to 20 C.F.R. §718.204(c). The amended version of 20 C.F.R. §718.204(c)(1) requires that pneumoconiosis be a "substantially contributing cause" of a miner's totally disabling impairment, i.e., that it have "a material adverse effect on the miner's respiratory or pulmonary condition" or "materially worsen[] a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). The DOL noted that it added the words "material" and "materially" to 20 C.F.R. §718.204(c)(1) and explained:

> In so doing, the [DOL] intends merely to implement the holdings of the courts of appeals. Thus, evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability.

65 Fed. Reg. 79,946 (Dec. 20, 2000). Therefore, the court's holding in *Smith* regarding the requisite link between pneumoconiosis and a miner's totally disabling respiratory impairment is consistent with the "substantially contributing cause" standard set forth in amended 20 C.F.R. §718.204(c).

pneumoconiosis was established." Decision and Order on Remand at 12 (emphasis added)(citations omitted). The administrative law judge then stated, "I found above that *clinical pneumoconiosis* was established by x-ray. . . ." *Id*. (emphasis added). The record reflects, however, that when the administrative law judge addressed the issue of the existence of pneumoconiosis earlier in his Decision and Order on Remand, he determined that "there was no basis for finding clinical pneumoconiosis through x-rays." *Id*. at 7. Furthermore, the bulk of administrative law judge's Decision and Order on Remand concerns his discussion of legal pneumoconiosis, the existence of which he determined was established, based on Dr. Rasmussen's opinion attributing claimant's pulmonary impairment to both smoking and coal dust exposure. *Id*. at 5-12. The conclusion is inescapable that in his discussion of disability causation, the administrative law judge mistakenly referred to the pneumoconiosis established as clinical, instead of legal. This is merely an editorial error, which did not unduly prejudice employer. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009)(Party alleging error must explain how the error to which he points could have made any difference).

When viewed from this perspective, the administrative law judge's determination that employer failed to prove that claimant's totally disabling obstructive impairment did not arise out of, or in connection with, coal mine employment was permissible. The administrative law judge acted within his discretion in finding that the opinions in which Drs. Jarboe and Hippensteel ruled out any connection between coal dust exposure and claimant's totally disabling obstructive impairment were entitled to little weight because, contrary to the administrative law judge's determination, they opined that claimant does not have legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15,

19 BLR 2-44 (6th Cir. 1995). We affirm, therefore, the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis.[8]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8] Although the administrative law judge did not make a specific finding at 20 C.F.R. §725.309, this omission is harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge's determination that the preponderance of the evidence established the existence of legal pneumoconiosis, was equivalent to a finding that claimant demonstrated a change in an applicable condition of entitlement, as pneumoconiosis was not established in the prior claim. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).