BRB No. 11-0372 BLA

ARNOLD R. STREET	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 02/14/2012
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Rita Roppolo (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 (10-BLA-5225) of Administrative Law Judge Linda S. Chapman awarding benefits on a claim filed 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). This case involves a subsequent claim filed on February 23, 2009.[1] After crediting claimant with at least twenty years of underground coal mine employment,[2] the administrative law judge found that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), 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. The administrative law judge, therefore, considered claimant's 2009 claim on the merits.

In considering the merits of claimant's 2009 claim, the administrative law judge properly noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's 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 qualifying coal mine employment, 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(a), 124 Stat. 119 (2010) (to be 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 claimant'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 the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment and, therefore, she found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed three previous claims on September 17, 1993, October 25, 1996, and May 8, 2003. Director's Exhibits 1-3. Each of these claims was finally denied because claimant did not establish the existence of pneumoconiosis. *Id.*

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 6. 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*).

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also argues that the administrative law judge erred in not allowing employer the opportunity to submit new evidence in response to the recent amendment. Employer further contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contention that it was denied an opportunity to submit supplemental evidence. Claimant has not filed a response brief.[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).

Invocation of the Section 411(c)(4) Presumption

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

Employer initially asserts that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's due process rights. Employer's Brief at 10. This argument made by employer is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011). We, therefore, reject it here for the reasons set forth in that decision.[4] *Owens*, slip op. at 4; *see also W.*

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least twenty years of underground coal mine employment, and her finding pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Noting that legal challenges to Public Law No. 111-148 are pending in federal court, employer contends that "it is possible that [Public Law 111-148] is invalid in its entirety." Employer's Brief at 11. To the extent that employer is requesting that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148, its request is denied. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.),

Va. CWP Fund v. Stacy, No. 11-1020, 2011 WL 6396510, at *3 n.2 (4th Cir. Dec. 21, 2011).

Employer next contends that it was denied an opportunity to submit new evidence in response to the recent amendments. We disagree. As the Director accurately notes, the administrative law judge issued an Order on September 2, 2010, wherein she provided the parties with two weeks in which to submit any additional evidence. Although employer submitted its Evidence Summary Form, it did not submit any additional evidence. By Order dated November 23, 2010, the administrative law judge closed the record, and provided the parties thirty days in which to submit briefs. Employer did not submit a brief. On appeal, employer does not explain why it did not submit any new evidence. Under these circumstances, where employer chose not to submit new evidence, we reject employer's assertion that the administrative law judge deprived employer of the opportunity to respond to the change in the law. *See Betty B Coal Co. Director, OWCP* [*Stanley*], 194 F.3d 491, 503, 22 BLR 2-1, 2-21 (4th Cir. 1999).

Employer next argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] In addressing whether the medical opinion evidence established total disability, the administrative law judge considered the medical opinions of Drs. Rasmussen and Hippensteel.[6] The administrative law judge noted that Dr. Rasmussen

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appeal docketed, No. 11-1620 (4th Cir. June 13, 2011).

[5] The administrative law judge found that the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), but that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Because these findings are unchallenged on appeal, they are affirmed. *Skrack*, 6 BLR at 1-711. Because there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

[6] Drs. Rasmussen and Hippensteel identified claimant's usual coal mine employment as that of a shuttle car operator. As a shuttle car operator, Dr. Rasmussen noted that claimant loaded and unloaded supplies, set timbers, shoveled coal at the feeder, rock dusted along the belt line, and helped to move cable. Director's Exhibit 20. Dr. Rasmussen characterized claimant's usual coal mine employment as requiring "heavy and some very heavy manual labor." *Id.* Dr. Hippensteel similarly characterized claimant's shuttle car operator job as one requiring heavy manual labor, noting that claimant was required to perform heavy lifting up to twenty times per shift. Director's Exhibit 21.

opined that claimant's diffusion capacity testing and arterial blood gas study results reflected a severe and totally disabling respiratory impairment,[7] while Dr. Hippensteel opined that, from "an intrinsic pulmonary function standpoint," claimant has the respiratory capacity to perform his usual coal mine employment as a shuttle car operator.[8] Decision and Order at 11; Director's Exhibits 20, 21. The administrative law judge, however, found that Dr. Hippensteel "did not sufficiently explain why he excluded [claimant's] pneumoconiosis as a factor, if not the only factor, in his disabling hypoxemia." *Id.* at 12. The administrative law judge also found that Dr. Hippensteel's opinion was "not contrary probative evidence to rebut the presumption of total disability raised by [claimant's] qualifying arterial blood gas study results." *Id.* The administrative law judge, therefore, found that the medical opinion evidence established a totally disabling respiratory impairment. *Id.*

Employer argues that the administrative law judge erred in her consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). We agree. The administrative law judge never weighed the opinions of Drs. Rasmussen and Hippensteel in order to determine whether the medical opinion evidence established the existence of a totally disabling pulmonary or respiratory impairment. Instead, the administrative law judge focused upon whether Dr. Hippensteel adequately explained his basis for ruling out pneumoconiosis as a cause of claimant's pulmonary impairment. Decision and Order at 12. Contrary to the administrative law Judge's analysis, whether a miner suffers from a totally disabling pulmonary impairment, and whether a miner's totally disabling pulmonary impairment is due to pneumoconiosis, are separate issues. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b)(1), (c). The administrative law judge also erred in finding that Dr. Hippensteel's opinion was "not contrary probative evidence to rebut the presumption of total disability raised by [claimant's] qualifying arterial blood gas study results." *Id.* The administrative law judge's finding, that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), does not

[7] Dr. Rasmussen opined that claimant's diffusion capacity testing and arterial blood gas study results revealed a severe totally disabling respiratory insufficiency, as evidenced by a reduction in diffusing capacity and a marked impairment in oxygen transfer and hypoxia during light exercise. Director's Exhibit 20. Dr. Rasmussen opined that claimant "does not retain the pulmonary capacity to perform his regular coal mine employment." *Id.*

[8] Dr. Hippensteel opined that, from "an intrinsic pulmonary function standpoint," claimant has the respiratory capacity to perform his usual coal mine employment as a shuttle car operator, but he is "disabled as a whole man." Director's Exhibit 21. Dr. Hippensteel opined that claimant suffers from a gas exchange impairment caused by the effects of obstructive sleep apnea, obesity, cardiac deconditioning, impaired cardiac performance with exercise, a pulmonary embolism, and chronic narcotic therapy. *Id.*

provide claimant with a presumption that he suffers from a totally disabling pulmonary impairment. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*). We, therefore, vacate the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. On remand, the administrative law judge should weigh the opinions of Drs. Rasmussen and Hippensteel, and provide a basis for her finding as to whether the medical opinion evidence establishes the existence of a totally disabling or respiratory impairment. 20 C.F.R. §718.204(a), (b)(2)(iv); *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).

After making a finding regarding whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

In light of our decision to vacate the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Rebuttal of the Section 411(c)(4) Presumption

Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Employer specifically challenges the administrative law judge's determination that employer did not satisfy its burden to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[9] 30 U.S.C. §921(c)(4).

In addressing whether employer established that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine

[9] Employer does not challenge the administrative law judge's determination that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, this finding is affirmed. *Skrack*, 6 BLR at 1-710. In light of this finding, the administrative law judge properly found that employer is precluded from rebutting the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. Decision and Order at 13.

employment, the administrative law judge considered the medical opinions of Drs. Rasmussen and Hippensteel. Dr. Rasmussen diagnosed both clinical pneumoconiosis, and legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/emphysema due to both coal mine dust exposure and cigarette smoking.[10] Director's Exhibit 20. Dr. Rasmussen opined that claimant's clinical pneumoconiosis and legal pneumoconiosis are "material contributing causes of his disabling chronic lung disease." *Id.*

Dr. Hippensteel opined that claimant's other conditions, not his clinical pneumoconiosis, caused his disabling impairment:

> [Claimant] has evidence of simple coal workers' pneumoconiosis. The objective evidence in this case, however, does not show that he has significant pulmonary impairment from this disease. His spirometry shows no more than mild airflow obstruction with significant reversibility post bronchodilator not consistent with the fixed and irreversible impairment expected from coal workers' pneumoconiosis. His lung volumes are normal. At my examination his DLCO was low, but his DLCO/VA was essentially normal which is not suggestive of intrinsic lung disease as a cause for gas exchange impairment in this man.
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> [Claimant] is obese with objective findings of obstructive sleep apnea, which is aggravated by his obesity and associated with oxygen desaturation on testing. He also has evidence of cardiac impairment and deconditioning with exercise. He reported to me a history of pulmonary embolism. His requirement for chronic narcotic therapy also adds to his gas exchange problems related to side effects of impairing mucous clearance, and affecting ventilation distribution into his lungs from his significant chronic narcotic use. With a reasonable degree [of] medical certainty, it is impairment from these factors, unrelated to his coal worker's pneumoconiosis that cause [claimant's] gas exchange impairment.

Director's Exhibit 21.

[10] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses." 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id.* "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).

In her consideration of whether employer established rebuttal of the Section 411(c)(4) presumption, the administrative law judge initially found that Dr. Rasmussen "did not persuasively address the contribution of [claimant's] coal mine dust exposure to his disabling blood gas impairment." Decision and Order at 13. The administrative law judge also found that Dr. Hippensteel's opinion did not assist employer in establishing rebuttal of the Section 411(c)(4) presumption because it was speculative:

> Dr. Hippensteel's attribution of [claimant's] disabling gas exchange impairment solely to conditions other than intrinsic pulmonary function is speculative, and not supported by the objective medical evidence of record. I find that he did not sufficiently explain why he excluded [claimant's] pneumoconiosis as a factor, if not the only factor, in his disabling hypoxemia . . . .

Decision and Order at 12.

Employer contends that the administrative law judge erred in her consideration of Dr. Hippensteel's opinion. We agree. The administrative law judge failed to explain her basis for finding that Dr. Hippensteel's opinion was "speculative." Moreover, the administrative law judge's statement, that Dr. Hippensteel did not explain why he excluded pneumoconiosis as a cause of claimant's disabling hypoxemia, is inaccurate. *See* Tackett *v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). The record reflects that Dr. Hippensteel explained that claimant's pulmonary function study results, *i.e.*, mild airflow obstruction with significant reversibility post bronchodilator, were "not consistent with the fixed and irreversible impairment expected from coal workers' pneumoconiosis." Director's Exhibit 21. Dr. Hippensteel also explained that claimant's "essentially normal" DLCO/VA value was "not suggestive of intrinsic lung disease as a cause for [claimant's] gas exchange impairment." *Id.*

The administrative law judge also erred in dismissing the factors that Dr. Hippensteel determined were responsible for claimant's pulmonary impairment, namely, (1) obstructive sleep apnea, which Dr. Hippensteel found was aggravated by claimant's obesity, (2) cardiac deconditioning and impaired cardiac performance with exercise, (3) a history of a pulmonary embolism, and (4) the effects of chronic narcotic therapy. Director's Exhibit 21.

Although the administrative law judge questioned Dr. Hippensteel's opinion, that claimant's obstructive sleep apnea contributed to his impairment, the administrative law judge did not cite evidence in the record calling into question the fact that claimant was diagnosed with mild obstructive sleep apnea, or that such a condition could contribute to his gas exchange impairment. The sole reason for which the administrative law judge discounted Dr. Hippensteel's opinion regarding the contribution of claimant's pulmonary

embolism was that there is no evidence that claimant's pulmonary embolism was "recent." Decision and Order at 11-12. However, by inferring that claimant's pulmonary embolism needed to be recent in order to have affected his gas exchange, the administrative law judge made an improper medical determination. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

The administrative law judge did not provide any basis for discounting Dr. Hippensteel's opinion that claimant's gas exchange abnormalities are due, in part, to cardiac deconditioning and impaired cardiac performance on exercise,[11] and to the effects of chronic narcotic therapy.[12] Because the administrative law judge did not set forth valid reasons for discounting Dr. Hippensteel's opinion regarding the cause of claimant's gas exchange abnormalities, we vacate the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption.

On remand, if reached, the administrative law judge must reconsider whether employer has rebutted the 411(c)(4) presumption by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). In considering that issue, the administrative law judge, on remand, should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions, and must explain her findings. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

[11] After limited exercise on a treadmill, Dr. Hippensteel noted that claimant had a rapid increase in heart rate with non-specific S-T, T wave changes "consistent with cardiac deconditioning and impaired cardiac performance." Director's Exhibit 21.

[12] Dr. Hippensteel noted that claimant has been taking hydrocodone and morphine since a 1993 back operation. Director's Exhibit 21.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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