BRB No. 13-0582 BLA

STEVIE A. WARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
C&O MINING, INCORPORATED	)	
	)	
and	)	
	)	
FRONTIER INSURANCE COMPANY	)	DATE ISSUED: 06/25/2014
	)	
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 Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

John Honeycutt (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (12-BLA-05391) of Administrative Law Judge Stephen R. Henley rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on July 1, 2010.[1] Director's Exhibit 3.

Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with 28.55 years of qualifying coal mine employment,[3] and found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[4] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant filed a prior claim on February 19, 2002, which was finally denied on January 16, 2004, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] The record indicates that claimant's last coal mine employment was in Virginia. Director's Exhibits 1, 4, 7. Accordingly, the Board will apply the law 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).

[4] The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

On appeal, employer asserts that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has submitted a brief in this appeal.[5]

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).

Because claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted to employer to rebut the presumption by disproving the existence of both clinical and legal pneumoconiosis,[6] or by proving that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that employer did not establish rebuttal by either method.

After finding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis. The administrative law judge considered the medical opinions of Drs. Fino and Hippensteel.[7] Dr. Fino diagnosed chronic obstructive pulmonary disease

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[5] Employer does not challenge the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, that he established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309, and that he invoked the Section 411(c)(4) presumption. Therefore, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] "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." 20 C.F.R. §718.201(a)(1). "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).

[7] The administrative law judge also considered the medical opinion of Dr. Forehand, who diagnosed legal pneumoconiosis, in the form of chronic obstructive

(COPD) and emphysema, and opined that claimant's disabling obstructive impairment is due entirely to smoking. Employer's Exhibits 2, 4. Dr. Hippensteel opined that claimant's disabling COPD is due to cigarette smoking, and is unrelated to coal mine dust exposure. Employer's Exhibit 3.

The administrative law judge discredited the opinions of Drs. Fino and Hippensteel because he found that each was inadequately explained and inconsistent with both the regulations, and the scientific views endorsed by the Department of Labor (DOL) in the preamble to the 2000 regulatory revisions. Decision and Order at 13-14. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 14.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Fino and Hippensteel did not disprove the existence of legal pneumoconiosis. Employer's Brief at 9-10. We disagree. The administrative law judge noted, accurately, that both Drs. Fino and Hippensteel relied, in part, on the fact that claimant stopped mining in 1999, but continued to smoke cigarettes, to conclude that coal mine dust did not contribute to claimant's COPD. Decision and Order at 13; Employer's Exhibits 2 at 12; 3 at 15. The administrative law judge permissibly discredited that reasoning as inconsistent with DOL's recognition that pneumoconiosis is "a latent and progressive disease that may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012). Further, the administrative law judge accurately noted that the preamble acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive. Decision and Order at 13, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000). In light of this accepted principle, the administrative law judge permissibly found the opinions of Drs. Fino and Hippensteel, that claimant's obstructive impairment is unrelated to coal mine dust exposure, to be not well-reasoned. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012).

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pulmonary disease due to a combination of cigarette smoking and coal mine dust exposure. Director's Exhibit 11. The administrative law judge properly found that Dr. Forehand's opinion "did not assist" employer in establishing rebuttal. Decision and Order at 11-14.

Additionally, the administrative law judge noted, accurately, that Dr. Fino eliminated coal mine dust exposure as a source of claimant's COPD, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC value which, in Dr. Fino's view, is characteristic of cigarette smoke-induced lung disease, but not of lung disease caused by coal mine dust exposure. Employer's Exhibits 2, 4. The administrative law judge permissibly discounted Dr. Fino's opinion, as inconsistent with the medical science accepted by DOL, recognizing that coal mine dust can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Cochran*, 718 F.3d at 323; *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 13.

In addition, the administrative law judge discounted Dr. Hippensteel's opinion because he relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to exclude coal mine dust exposure as a cause of claimant's obstructive impairment. Decision and Order at 13; Employer's Exhibit 3 at 15-16. Noting that claimant's pulmonary function study demonstrated the presence of a totally disabling impairment even after the administration of bronchodilators, the administrative law judge permissibly found this aspect of Dr. Hippensteel's reasoning to be "problematic." *See* 20 C.F.R. §718.201(a)(2); *Banks*, 690 F.3d at 477, 489, 25 BLR at 2-135, 2-152-53; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Milburn Colliery Co. v. Hicks*, 138 F.3d 536, 21 BLR 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 440-41, 21 BLR 2-275-76; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 14. The administrative law judge also correctly observed that, to the extent that Dr. Hippensteel eliminated coal mine dust exposure as a source of claimant's impairment because claimant's pulmonary function studies reflected significant obstruction, without restriction, this premise is inconsistent with the regulations, which define legal pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 14; Employer's Exhibit 3 at 15-16. For the foregoing reasons, we affirm the administrative law judge's findings that the opinions of Drs. Fino and Hippensteel were not well-reasoned and were therefore entitled to little weight. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 14.

The determination of whether a medical opinion is sufficiently documented and reasoned is a credibility matter within the purview of the administrative law judge. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. As the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Hippensteel, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that

claimant does 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.

Employer next argues that, in finding that employer did not establish rebuttal by showing that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment, pursuant to 30 U.S.C. §921(c)(4), the administrative law judge failed to provide valid reasons for discrediting the opinions of Drs. Fino and Hippensteel. Employer's Brief at 4-9. Contrary to employer's contention, the administrative law judge permissibly discounted the disability causation opinions of Drs. Fino and Hippensteel because the physicians did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 14-15. Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's disabling impairment did not arise out of, or in connection with, his coal mine employment.[8]

Claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption. Therefore, we affirm the award of benefits. 30 U.S.C. §921(c)(4).

[8] Thus, we need not address employer's arguments regarding the weight the administrative law judge accorded to Dr. Forehand's opinion. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986); Employer's Brief at 8-9.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge