BRB No. 13-0305 BLA

HERMAN SALYERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPRING HOLLOW MINING, INCORPORATED	)	DATE ISSUED: 03/25/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 - Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (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.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Awarding Benefits (2011-BLA-05397) of Administrative Law Judge Theresa C. Timlin rendered on a miner's claim filed on May 4, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited claimant with twenty-one and one-third years of underground coal mine employment. Addressing the merits of the claim, the administrative law judge found the evidence sufficient to establish the existence of clinical pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b).[1] The administrative law judge also found the evidence sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Further, because she credited claimant with over twenty-one years of underground coal mine employment and found a total respiratory disability, the administrative law judge concluded that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge additionally found that employer failed to establish rebuttal of the presumption.[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying the rebuttal provisions at amended Section 411(c)(4) to employer and erred in requiring employer to *rule out* coal mine employment as the cause of his disability in order to rebut the presumption. Employer also contends that the administrative law judge erred in her evaluation of the relevant rebuttal evidence. Claimant has not filed a brief in response to

[1] The administrative law judge found that the existence of legal pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a).

[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. In pertinent part, amended Section 411(c)(4), 30 U.S.C. §921(c)(4)(2012), provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes at least fifteen years of underground, or substantially similar, coal mine employment and a totally disabling respiratory impairment.

[3] If the presumption at amended Section 411(c)(4) is invoked, the burden of proof shifts to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by establishing that the miner's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4)(2012); *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, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the Board need not address employer's arguments concerning the application of the rebuttal provisions of amended Section 411(c)(4) to employer and the administrative law judge's application of the appropriate rebuttal standard to employer, as the administrative law judge properly rejected the evidence relevant to rebuttal as not credible.[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 rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

Application of the Amended Section 411(c)(4) Rebuttal Provisions

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 5-12, *citing Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976). This argument is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring).[6] We, therefore, reject it for the reasons set

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings: that claimant established twenty-one and one-third years of underground coal mine employment; that he established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b); that he established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b); and that he was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[6] As the United States Court of Appeals for the Fourth Circuit has issued its decision in *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013)(Niemeyer, J. concurring), employer's request to hold this case in abeyance pending that decision is moot.

forth in that decision.[7] *Owens*, 25 BLR at 1-4; *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Employer also contends that the administrative law judge applied an incorrect rebuttal standard under amended Section 411(c)(4), by requiring employer to *rule out* coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 13-20. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises has held, however, that, in order to rebut the presumption at amended Section 411(c)(4) by establishing that claimant's disability is not related to coal mine employment, employer must "effectively . . . *rule out*" any contribution to a miner's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44 [emphasis added]. Thus, we reject employer's contention that the administrative law judge applied an incorrect rebuttal standard in this case.

Rebuttal of the Presumption at Amended Section 411(c)(4)
Evaluation of the Evidence

Employer asserts that the administrative law judge erred in finding that the presumption at amended Section 411(c)(4) was not rebutted. Specifically, employer asserts that the administrative law judge erred in finding that employer failed to establish that claimant's disabling respiratory impairment was not related to coal mine employment.[8] The administrative law judge determined that the opinions of Drs. Fino[9]

[7] The Department of Labor (DOL) dismissed this same argument in the comments to the regulations implementing amended Section 411(c)(4). 78 Fed. Reg. 59,101, 59,109 (Sept. 25, 2013). The DOL explained that the 1978 revision of the definition of pneumoconiosis, to include any chronic lung disease or impairment arising out of coal mine employment, eliminated the concern regarding the application of the statutory limitations on rebuttal to responsible operators expressed by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976). *Id*.

[8] Because the administrative law judge found that claimant has clinical pneumoconiosis, employer cannot rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) by showing the absence of legal pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

[9] Dr. Fino diagnosed severe emphysema due to smoking. Employer's Exhibits 3, 16, 20. Specifically, Dr. Fino opined that claimant does not suffer from either clinical or legal pneumoconiosis, and that his primary respiratory abnormality is emphysema.

and Hippensteel,[10] that claimant's total respiratory disability was due solely to his smoking, were inconsistent with the scientific views adopted by the Department of Labor (DOL) regarding the existence of a disabling respiratory impairment related to coal mine employment.

The preamble to the 2001 revised regulations sets forth the DOL's resolutions to 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 evaluate the opinions of medical experts in conjunction with the medical science adopted by the DOL in the preamble. *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).

Thus, contrary to employer's argument, the administrative law judge properly discounted the opinion of Dr. Fino, attributing all of claimant's respiratory disability to cigarette smoking, because Dr. Fino relied on claimant's negative chest x-ray to find that coal dust exposure did not contribute to claimant's emphysema and respiratory disability.[11] The administrative law judge properly noted that Dr. Fino's reasoning conflicts with the science credited in the preamble, which permits a finding that claimant's disabling respiratory impairment is related to coal mine employment, notwithstanding the absence of radiographic evidence of clinical pneumoconiosis.[12] *See*

While opining that claimant is totally disabled from a respiratory standpoint, Dr. Fino stated that smoking caused claimant's respiratory disability, and ruled out pneumoconiosis as a contributing cause. Employer's Exhibit 3 at 10-11.

[10] Dr. Hippensteel diagnosed chronic bronchitis due to cigarette smoking and further opined that that there is no objective evidence of either clinical or legal pneumoconiosis. Employer's Exhibits 6, 17, 18. Dr. Hippensteel also opined that claimant had developed a hypercarbic respiratory failure which is not indicative of a significant diffusion impairment or of an impairment due to emphysema, but is consistent with smoking-induced chronic bronchitis. Employer's Exhibit 6 at 6. Additionally, Dr. Hippensteel stated that claimant has developed problems secondary to coronary artery disease, aggravated by his continued smoking. *Id.*

[11] Dr. Fino opined that claimant's severe emphysema was unrelated to his coal mine employment, citing literature for the proposition that, in the absence of clinical pneumoconiosis on pathology, the amount of emphysema that is related to coal mine dust is minimal. Employer's Exhibit 3.

[12] The administrative law judge also properly discounted Dr. Fino's opinion because he failed to provide a sufficient explanation for his opinion, even when he was

J.O. [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-382-83 (3d Cir. 2011); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2008); Decision and Order at 26-27.

Further, contrary to employer's contention, the administrative law judge properly discounted Dr. Hippensteel's opinion that claimant's total disability is the result of his chronic bronchitis due to smoking and coronary artery disease. As noted by the administrative law judge, Dr. Hippensteel concluded that claimant's bronchitis is unrelated to his coal mine dust exposure because industrial chronic bronchitis should subside within a year after leaving work in the mines, and claimant last worked in the mines in 1992. Decision and Order at 26; Employer's Exhibit 6. Therefore, the administrative law judge properly discounted Dr. Hippensteel's opinion because Dr. Hippensteel's view is contrary to the scientific evidence accepted by the DOL that "pneumoconiosis is a latent and progressive condition that may be detectable after exposure to coal dust has ceased." 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,971 (Dec. 20, 2000); Decision and Order at 26-27. Moreover, the administrative law judge properly discounted Dr. Hippensteel's opinion because he failed to adequately explain why claimant's disabling respiratory impairment was not related to his twenty-one years of coal dust exposure. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(en banc).

As substantial evidence supports the administrative law judge's decision to discount the opinions of Drs. Fino and Hippensteel on the issue of disability causation, we affirm her finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4). 30 U.S.C. §921(c)(4) (2012); *see Rose*, 614 F.2d at 938-40, 2 BLR at 2-43-44; *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011).

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presented with evidence of positive x-rays. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 26; Employer's Exhibit 20.

Accordingly, the administrative law judge's Decision and Order – Awarding 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