BRB No. 13-0315 BLA

JERRY TOWNSEND	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 03/25/2014
	)	
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), 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.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5600) of Administrative Law Judge Linda S. Chapman with respect to a subsequent claim filed on April 26, 2010, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant established sixteen years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, invoked the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] The administrative law judge also concluded that, because employer did not rebut the presumption, claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(c), and is entitled to benefits.[3]

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited brief, urging the Board to reject employer's arguments that the administrative law judge erred in requiring employer to disprove the existence of legal pneumoconiosis and that the administrative law judge made the presumption irrebuttable.[4]

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[1] Claimant filed his initial claim for benefits on May 23, 2007, which was denied by the district director on February 25, 2008, because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or a totally disabling respiratory impairment that was due to pneumoconiosis. Director's Exhibit 1. The record does not show that claimant took any other action on his 2007 claim prior to filing the current subsequent claim.

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

[3] The Department of Labor (DOL) has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established sixteen years of underground coal mine employment, total disability at 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[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).

Upon determining that claimant invoked the amended Section 411(c)(4) presumption, the administrative law judge indicated that the burden shifted to employer "to demonstrate, by a preponderance of the evidence, either that [claimant] does not suffer from pneumoconiosis or that [claimant's] totally disabling respiratory impairment did not arise out of his coal mine employment." Decision and Order at 19. Regarding the first method of rebuttal, the administrative law judge summarized the definitions of clinical and legal pneumoconiosis[6] and indicated that employer must establish the absence of pneumoconiosis as broadly defined by the Department of Labor (DOL). *Id*.

The administrative law judge initially found "that the preponderance of the x-ray evidence establishes the absence of clinical pneumoconiosis." Decision and Order at 19. The administrative law judge then considered the newly submitted medical opinions in which employer's experts – Drs. Hippensteel and Rosenberg – ruled out coal dust exposure as a causative factor in claimant's totally disabling obstructive lung disease. *Id*. at 20-24; Employer's Exhibits 2, 5. The administrative law judge gave less weight to Dr. Hippensteel's opinion, because he did not adequately explain his conclusion, and because

[5] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibits 4, 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 (1989)(en banc).

[6] Pursuant to 20 C.F.R. §718.201(a), "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." Clinical pneumoconiosis is defined at 20 C.F.R. §718.201(a)(1) 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." Under 20 C.F.R. §718.201(a)(2), the definition of legal pneumoconiosis "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." The phrase "arising out of coal mine employment" is defined by 20 C.F.R. §718.201(b) as including "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

Dr. Hippensteel's assumption, that bronchitis due to coal dust inhalation would resolve after leaving the mines, conflicted with the recognition by the DOL that pneumoconiosis can be a latent and progressive disease. Decision and Order at 21. The administrative law judge also discredited Dr. Rosenberg's opinion, as she found that his belief, that a marked decrease in claimant's FEV1/FVC ratio excluded coal dust exposure as a cause of his impairment, was contrary to the science credited by the DOL in the preamble to the amended regulations. *Id*. at 22. The administrative law judge further determined that Dr. Rosenberg's statement, that claimant appears to have diffuse emphysema, which is not associated with coal dust inhalation, is unsupported by the evidence and inconsistent with the DOL's comments in the preamble. *Id*. at 23. Additionally, the administrative law judge determined that neither Dr. Hippensteel, nor Dr. Rosenberg, adequately explained why the reversibility of claimant's pulmonary impairment demonstrated that coal dust exposure did not contribute to his impairment. *Id*. at 23.

The administrative law judge found that, "based on the newly submitted evidence, [claimant] has established . . . his entitlement to the presumption under [20 C.F.R. §]718.305, which the Employer has not rebutted. On that basis, [claimant] has established that he is totally disabled due to pneumoconiosis." Decision and Order at 23. The administrative law judge then reviewed the evidence from claimant's previous claim, which consisted of qualifying objective studies, diagnoses of a totally disabling ventilatory impairment by Drs. Forehand and Renn, and an opinion in which Dr. Hippensteel did not explicitly address the issue of total disability. *Id*. at 24. The administrative law judge stated:

> Weighing all of the medical evidence together, I find that [claimant] has established by a preponderance of that evidence that he has a totally disabling respiratory impairment. I also find that the opinions of Dr. Forehand, Dr. Hippensteel, and Dr. Renn do not meet the employer's burden on rebuttal, as they do not rule out pneumoconiosis or coal mine dust exposure as a factor in [claimant's] disability.

Id. The administrative law judge concluded that employer "has not met its burden to rebut [the] presumption, either by establishing that [claimant] does not have pneumoconiosis or by demonstrating that [claimant's] totally disabling respiratory impairment did not arise from his coal mine employment. . . ." *Id*. at 25.

Employer argues that the administrative law judge applied inappropriate standards on rebuttal by erroneously presuming that claimant has legal pneumoconiosis and making the amended Section 411(c)(4) presumption "irrefutable" by failing to consider alternative explanations for the cause of claimant's disabling obstructive impairment. Employer's Brief at 19. Employer also maintains that the administrative law judge erred in applying a "rule out" standard on the issue of disability causation. Employer further

contends that the administrative law judge erred in discrediting the opinions of Drs. Hippensteel and Rosenberg. Finally, employer argues that the administrative law judge's findings as to disability causation were erroneous, as they were based on her flawed determination concerning rebuttal of the presumed existence of legal pneumoconiosis.

Employer's contentions are without merit. The administrative law judge properly concluded that the presumption of total disability due to pneumoconiosis effectuated by amended Section 411(c)(4) includes a presumption of both clinical and legal pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65 (4th Cir. 1995). Thus, the administrative law judge also determined correctly that, to rebut the presumed existence of pneumoconiosis, employer was required to prove that the miner did not have either form of pneumoconiosis. *See* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). We acknowledge that employer is technically correct that the administrative law judge's statement, that "[e]mployer must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment, including chronic pulmonary disease resulting from respiratory or pulmonary impairment significantly related to[,] or *significantly* aggravated by[,] dust exposure in coal mine employment," deviates from the regulatory definition of pneumoconiosis, which uses the phrase "*substantially* aggravated." Decision and Order at 19; 20 C.F.R. §718.201(a), (b). However, the administrative law judge's earlier summary of the definition of pneumoconiosis was accurate and employer has put forth no persuasive argument that the use of the word "significantly" constitutes error requiring remand. Decision and Order at 19; *see Larioni v. Director*, OWCP, 6 BLR 1-1276 (1984).

We further reject employer's argument that the administrative law judge created "an impossible burden for employers" through her application of the "rule out" standard on rebuttal by presumptively rejecting, as inconsistent with the preamble, the opinions of the physicians who ruled out a contribution from coal dust exposure. Employer's Brief at 19. As discussed *infra*, the administrative law judge provided valid rationales for discrediting the opinions in which Drs. Hippensteel and Rosenberg ruled out coal dust inhalation as a causative factor in claimant's totally disabling obstructive impairment. Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that, to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. In addition, the "rule out" standard applied by the administrative law judge is consistent with the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013 and provides that the party opposing entitlement must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as

defined in [20 C.F.R. §]718.201."[7] 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(ii)).

We also hold that there is no merit in employer's contention that the administrative law judge erred in finding that the opinions of Drs. Hippensteel and Rosenberg, that claimant's totally disabling respiratory impairment is due solely to cigarette smoking, were insufficient to rebut the Section 411(c)(4) presumption. The administrative law judge acted within her discretion as fact-finder in according little weight to Dr. Hippensteel's opinion on the grounds that his conclusions were based on generalities, that he did not adequately explain why coal dust exposure could not be a contributing cause of claimant's disabling obstructive impairment, and that he assumed, contrary to the position of the DOL, expressed in 20 C.F.R. §718.201(c), that pneumoconiosis may be both latent and progressive in nature. 20 C.F.R. §718.201(c); *see Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *see also* 65 Fed. Reg. at 79,937-79,945, 79,968-79,977; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Decision and Order on Reconsideration en banc).

In addition, contrary to employer's allegation, the administrative law judge rationally determined that Dr. Rosenberg's opinion, that claimant's reduced FEV1/FVC ratio indicated that claimant's impairment was not due to coal dust exposure, is in conflict with the preamble to the regulations, which recognizes that "decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present" and states that "studies have shown that coal miners have an increased risk of developing [chronic obstructive pulmonary disease] . . . . [that] may be detected from decrements in certain measure of lung function, especially FEV1 and the ratio of FEV1/FVC." Decision and Order at 22, quoting 65 Fed. Reg. 79,943 (Dec. 20, 2000) (internal citations omitted); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). The administrative law judge also permissibly found that neither Dr. Hippensteel nor Dr. Rosenberg adequately explained why claimant's improved, but still qualifying pulmonary functions studies after the administration of bronchodilators, necessarily excluded a finding of legal pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 Fed. App'x 227 (4th Cir. 2004)(unpub.); Decision and Order at 23. Because the administrative law judge provided valid rationales for determining that the opinions of Drs. Hippensteel and Rosenberg were insufficient to establish that claimant's disabling

[7] The DOL has explained that the "no part" standard recognizes that the courts have interpreted Section 411(c)(4) "as requiring the party opposing entitlement to 'rule out' coal mine employment as a cause of the miner's disabling respiratory or pulmonary impairment." 78 Fed. Reg. 59,105 (Sept. 25, 2013).

obstructive impairment was not related to coal dust exposure, we affirm her finding that employer did not rebut the presumed existence of legal pneumoconiosis.[8] *See Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Finally, employer contends that the administrative law judge's findings as to disability causation were erroneous because they "essentially mimicked her findings concerning the existence of legal pneumoconiosis." Employer's Brief at 18. However, employer does not argue why this constitutes harmful error. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."). Because employer has not challenged the administrative law judge's finding that claimant has a totally disabling obstructive impairment, the only issue remaining in this case is the etiology of claimant's totally disabling chronic obstructive pulmonary disease and emphysema. We have affirmed the administrative law judge's finding that the opinions of Drs. Hippensteel and Rosenberg were insufficient to establish that claimant does not have legal pneumoconiosis, i.e., a chronic obstructive lung disease or impairment arising out of coal mine employment. Under the facts of this case, therefore, this finding was a determination that the opinions of employer's experts were also insufficient to establish that claimant's totally disabling obstructive impairment did not arise out of, or in connection with, his coal mine employment, pursuant to amended Section 411(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(ii)); *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013). Thus, the similarities between the administrative law judge's findings concerning legal pneumoconiosis and disability causation are not erroneous. Consequently, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption, and further affirm the award of benefits. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67.

[8] Because the administrative law judge relied on valid rationales to accord little weight to the opinions of Drs. Hippensteel and Rosenberg, we decline to address employer's remaining arguments regarding her consideration of these opinions. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We also reject employer's argument that the administrative law judge did not consider all relevant evidence, as required by *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000), as she addressed the totality of the relevant medical evidence of record when making her determination as to whether employer rebutted the presumed existence of legal pneumoconiosis. *See* Decision and Order at 20-24.

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