BRB No. 13-0464 BLA

JIMMY D. DYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RED BARON, INCORPORATED	)	DATE ISSUED: 05/29/2014
	)	
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 on Request for Modification of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Emily Goldberg-Kraft (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Request for Modification (2012-BLA-05018) of Administrative Law Judge Christine L. Kirby, rendered on a claim filed on December 19, 2005, pursuant to the provisions of the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time. The relevant procedural history is as follows. In a Decision and Order dated August 28, 2007, Administrative Law Judge Daniel F. Solomon denied benefits, based on his finding that claimant did not establish the existence of pneumoconiosis. On consideration of claimant's appeal, the Board held that Judge Solomon erred in weighing the evidence pursuant to 20 C.F.R. §718.202(a), and vacated the denial of benefits. *See J.D.* [*Dye*] v. *Red Baron Inc*., BRB No. 07-0997 BLA (Aug. 28, 2008) (unpub.). In his Decision and Order on Remand issued on May 19, 2009, Judge Solomon again determined that claimant failed to establish the existence of pneumoconiosis. Claimant filed a timely petition for modification, which was granted by the district director. Employer requested a hearing and the case was reassigned to Judge Kirby (the administrative law judge). On June 10, 2013, the administrative law judge issued her Decision and Order Awarding Benefits on Request for Modification, which is the subject of this appeal.

Relevant to whether claimant demonstrated a basis for modification under 20 C.F.R. §725.310, the administrative law judge initially found that claimant did not establish a mistake in a determination of fact with regard to the prior denial. However, based on the filing date of the claim and employer's stipulations that claimant worked twenty-eight years in underground coal mine employment and also suffers from a totally disabling respiratory impairment, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further found that employer failed to rebut that presumption. The administrative law judge concluded that claimant was entitled to modification, based on a change in conditions pursuant to 20 C.F.R. §725.310, and also determined that granting modification would render justice under the Act. Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in determining that claimant established a change in conditions under 20 C.F.R. §725.310. Employer also argues that the administrative law judge erred in finding that employer 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 (the Director), responds, asserting that the administrative law judge properly assessed whether

[1] Under amended Section 411(c)(4), claimant is entitled to a presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of 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).

claimant established a change in conditions pursuant to 20 C.F.R. §725.310. Employer has filed a reply brief, reiterating its contentions on 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 rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits, based on a change in conditions or a mistake in a determination of fact. Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely upon further reflection on the evidence of record. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In considering whether a change in conditions has been established, an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992).

Employer asserts that the administrative law judge "erred by failing to consider whether claimant had established a change in condition based solely on the newly submitted evidence before considering evidence from prior denials." Employer's Brief in Support of Petition for Review at 5. Employer maintains that claimant may show a basis for modification only if the newly submitted evidence is determined to be sufficient to establish the existence of pneumoconiosis, the element of entitlement that previously defeated the claim. Contrary to employer's assertion, the administrative law judge properly found that, because claimant was able to invoke the amended Section 411(c)(4) presumption, which encompasses all of the requisite elements of entitlement, claimant

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

demonstrated a change in conditions.[3] *See Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, BLR (7th Cir. 2013) (the amended Section 411(c)(4) presumption may be used to show a change in condition). The administrative law judge also properly considered the evidence newly submitted by employer, and the previously submitted evidence, relevant to whether employer rebutted the presumption. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994). Thus, we reject employer's argument that the administrative law judge did not perform the proper analysis under 20 C.F.R. §725.310.

In order to rebut the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, employer bears the burden to prove that claimant does not suffer from either clinical[4] or legal pneumoconiosis,[5] or to establish that claimant's disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *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, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). In this case, the administrative law judge determined that employer disproved the existence of clinical pneumoconiosis because she found that a preponderance of the analog and digital x-ray evidence was negative for the disease.[6] Decision and Order Awarding Benefits on Request for Modification (Decision and Order on Modification) at 8, 17. With regard to

[3] We affirm, as unchallenged by employer, the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] Legal pneumoconiosis is defined as "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).

[6] Although employer successfully rebutted the presumption of clinical pneumoconiosis, based on the x-ray evidence, we decline to address employer's argument that the administrative law judge did not properly weigh the medical opinions, relevant to whether claimant has clinical pneumoconiosis, as any error committed by the administrative law judge is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order on Modification at 8, 17.

the issue of legal pneumoconiosis, the administrative law judge considered the opinions of employer's experts, Drs. Fino, Dahhan and Hippensteel, and found that they did not adequately explain why claimant does not have a coal dust-related lung disease. *Id*. at 14-16. The administrative law judge also determined the opinions of Drs. Fino, Dahhan and Hippensteel were insufficient to establish that claimant's disability was unrelated to his coal mine employment. *Id*. at 17.

Employer contends that the administrative law judge erred in rejecting Dr. Fino's opinion, that claimant does not have legal pneumoconiosis, based on his discussion of the shape and location of claimant's radiographic abnormalities,[7] which the doctor attributes to idiopathic pulmonary fibrosis. We disagree. As noted by the administrative law judge, although a preponderance of the x-ray evidence is negative for clinical pneumoconiosis, the regulations do not require that opacities consistent with coal dust exposure be in a specific lung zone or in a particular shape. *See* 20 C.F.R. §718.102(b); Decision and Order on Modification at 14. The administrative law judge also observed correctly that the Department of Labor (DOL) "finds that coal dust exposure can produce a disabling chronic obstructive lung disease, even in the absence of findings of clinical pneumoconiosis, *i.e.* x-ray correlation of the disease." Decision and Order on Modification at 15; *see* 20 C.F.R. §718.201; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

We also reject employer's argument that the administrative law judge mischaracterized Dr. Fino's opinion. The administrative law judge properly found that Dr. Fino opined that claimant does not have legal pneumoconiosis, "based on the [pulmonary function test] he conducted which produced non-qualifying values for disability, variability in spirometry tests, and the [arterial blood gas] test which provided qualifying values at rest *but not with exercise*." Decision and Order on Modification at 14 (emphasis added); *see* Director's Exhibit 97. However, as noted by the administrative law judge, "additional subsequent" arterial blood gas studies were qualifying for total disability at rest and with exercise. Decision and Order on Modification at 14. The

[7] To the extent that Dr. Fino states that claimant may have "idiopathic pulmonary fibrosis" or a non-specific interstitial fibrosis, his opinion does not aid employer in establishing rebuttal. Under the implementing regulations, "where a physician attributes the pulmonary impairment to unknown causes, such does not constitute a sufficiently reasoned opinion so as to rebut the presumption." 77 Fed. Reg. 19,475 (Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305(d)(3)).

administrative law judge determined that Dr. Fino did not provide a persuasive explanation for his opinion that claimant's blood gas impairment was unrelated to coal dust exposure. *Id*. at 14-15; Employer's Exhibit 13. Because the administrative law judge rationally explained her credibility determination, we affirm her finding that Dr. Fino's opinion is insufficient to establish that claimant does not have legal pneumoconiosis. *See Hicks*, 138 F.3d at, 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 438, 21 BLR at 2-269.

In addition, we reject employer's contention that the administrative law judge erred in giving no weight to Dr. Dahhan's opinion. The administrative law judge properly found that while Dr. Dahhan attributed claimant's disabling respiratory condition to claimant's lengthy smoking history and not to his coal dust exposure, Dr. Dahhan specifically "excludes legal [coal workers'] pneumoconiosis because [c]laimant has an obstructive lung disease rather than a restrictive lung disease." Decision and Order on Modification at 15. The administrative law judge properly found that Dr. Dahhan's opinion is contrary to the regulatory definition of legal pneumoconiosis, which includes restrictive or obstructive respiratory diseases, or a combination of both, that arise out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); Decision and Order on Modification at 15.

With regard to Dr. Hippensteel's opinion, the administrative law judge noted that Dr. Hippensteel diagnosed a disabling pulmonary impairment and opined that claimant's "abnormalities are related to interstitial fibrosis of the general public[,] and not to coal workers' pneumoconiosis." Employer's Exhibit 15. Contrary to employer's argument, the administrative law judge rationally concluded that Dr. Hippensteel's opinion is insufficient to rebut the presumption of legal pneumoconiosis because he "did not explain why [c]laimant could not have interstitial fibrosis in conjunction with [coal workers' pneumoconiosis] or why coal dust exposure could not have contributed to [c]laimant's disabling pulmonary condition." Decision and Order on Modification at 16; *see Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 438, 21 BLR at 2-269.

We affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.[8] *See Barber*, 43 F.3d at 901, 19 BLR

[8] Employer argues that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Gallai, that claimant has legal pneumoconiosis. Decision and Order on Modification at 13-14. However, because employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's finding that employer's evidence fails to affirmatively establish that claimant does not have pneumoconiosis, it is not necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-

at 2-67; *Rose,* 614 F.2d at 939, 2 BLR at 2-43-44. Furthermore, contrary to employer's contention, the administrative law judge properly assigned little weight to the opinions of Drs. Fino, Dahhan and Hippensteel, relevant to the etiology of claimant's respiratory disability, because they did not diagnose legal pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also 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); Decision and Order on Modification at 17-18. Thus, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's respiratory disability did not arise out of, or in connection with, coal mine employment. Consequently, we affirm the administrative law judge's finding that claimant established a change in conditions under 20 C.F.R. §725.310, and the award of benefits.[9]

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67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

[9] Because it is unchallenged by employer, we affirm the administrative law judge's finding that granting modification would render justice under the Act. *See Skrack,* 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Request for Modification 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