BRB No. 13-0080 BLA

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| CLARENCE H. BOWMAN | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: 10/31/2013 |
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| Employer-Petitioner | ) | |
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| 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 Modification of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Richard A. Seid (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 Awarding Benefits on Modification (2011-BLA-5774) of Administrative Law Judge Linda S. Chapman with respect to a claim filed on September 3, 2009, pursuant to the provisions of the Black Lung Benefits

Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge determined that claimant established at least thirty-eight years of coal mine employment, the majority of them underground, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(ii), (iv) and, therefore, invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also determined that employer did not rebut the presumption that claimant had pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis, and, as a result, claimant further established a change in conditions as required by 20 C.F.R. §725.310.[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case, and also contends that the administrative law judge erred in finding that claimant invoked the presumption. Employer further asserts that the administrative law judge erred in determining that employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that the Board should reject employer's contentions that the presumption does not apply to responsible operators, and that the presumption cannot be applied without the promulgation of implementing regulations. Further, the Director urges the Board to

[1] The district director issued a proposed Decision and Order denying benefits on August 30, 2010, in which he determined that claimant did not establish any element of entitlement. Director's Exhibit 22. Claimant requested modification on December 8, 2010, which the district director denied on March 14, 2011, as the preponderance of the evidence established that claimant did not have pneumoconiosis and was not totally disabled by the disease. Director's Exhibits 24, 30. Claimant then requested a hearing.

[2] Relevant to this 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 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] Unless otherwise noted, the relevant version of the regulations cited in this Decision and Order can be found in 20 C.F.R. Parts 718 and 725 (2013).

decline to address employer's assertion that the "rule out" standard cannot be applied to rebut the presumption.[4]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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).

## I. Application of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge's application of amended Section 411(c)(4) to this case was premature, because the Department of Labor has yet to promulgate implementing regulations. We reject employer's assertion, as the mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Moreover, the Department of Labor has issued a regulation implementing amended Section 411(c)(4), 30 U.S.C. §921(c)(4), which became effective on October 25, 2013. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established at least thirty-eight years of coal mine employment, the majority of them underground, and that the blood gas study evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that claimant's coal mine employment was primarily in Virginia. Director's Exhibits 3, 5; Hearing Transcript at 16-17, 25-26. However, in claimant's role as the superintendent of contract coal, he traveled from his office in Virginia to mines in West Virginia, Kentucky, and Tennessee, which fall within the jurisdiction of both the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Sixth Circuit. Hearing Transcript at 16-17, 25-26. Because the visits to Kentucky and Tennessee, which fall within the Sixth Circuit's jurisdiction, occurred about once a month, and the record does not indicate when these visits ceased, we will apply the law of the Fourth Circuit in this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

## II. Invocation of the Section 411(c)(4) Presumption

The administrative law judge determined that claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), as the pulmonary function studies of record are non-qualifying.[6] Decision and Order at 17; Director's Exhibits 12, 29. The administrative law judge further found, however, that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv), based on the qualifying exercise blood gas studies and the medical opinions of Drs. Houser, Rasmussen and Forehand.[7] Decision and Order at 17-18; Director's Exhibits 12, 29; Claimant's Exhibits 3, 5. In so doing, the administrative law judge determined that the latter opinions outweighed Dr. Hippensteel's view, that the hypoxemia seen on claimant's exercise blood gas studies was a cardiac, rather than respiratory, condition. Decision and Order at 18; Director's Exhibit 29. The administrative law judge concluded that the preponderance of evidence, when considered as a whole under 20 C.F.R. §718.204(b)(2), is sufficient to establish that claimant is totally disabled. Decision and Order at 18. Accordingly, the administrative law judge found that claimant established invocation of the amended Section 411(c)(4) presumption.[8] *Id*.

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[6] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). The record contains blood gas studies performed by Dr. Forehand on September 16, 2009 and by Dr. Hippensteel on March 2, 2010. Director's Exhibits 12, 29. The two resting studies produced non-qualifying values, while the results of the two exercise studies were qualifying. *Id*.

[7] The record does not contain any evidence indicating that claimant can establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii), which requires proof that claimant has cor pulmonale with right-sided congestive heart failure.

[8] Although it is not applicable to claims filed after January 1, 1982, the administrative law judge cited the prior version of 20 C.F.R. §718.305 when applying the amended Section 411(c)(4) presumption. Decision and Order at 16, 19, 20. Because the administrative law judge's findings are consistent with the terms of amended Section 411(c)(4), and the revised version of 20 C.F.R. §718.305, *see* 78 Fed. Reg. 59,114 (Sept. 25, 2013), the administrative law judge's references to the prior version do not constitute error requiring remand.

Employer maintains that the administrative law judge erred in finding that the opinions of Drs. Houser, Rasmussen, Forehand outweighed the opinion of Dr. Hippensteel at 20 C.F.R. §718.204(b)(2)(iv). This allegation of error is without merit. The administrative law judge acted within her discretion in discrediting Dr. Hippensteel's opinion on the issue of total disability, as his attribution of claimant's hypoxemia to cardiac disease is relevant to the cause of claimant's impairment at 20 C.F.R. §718.204(c), and not to whether he has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Decision and Order at 18 n.10; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). We further reject employer's assertion that the claim must be remanded for the administrative law judge to consider Dr. Hippensteel's statement that claimant's normal pulmonary function study values establish that his hypoxemia is not attributable to a respiratory impairment caused by pneumoconiosis. Employer's Brief at 6. Non-qualifying pulmonary function studies do not constitute evidence contrary to qualifying blood gas studies, as these tests measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984).

The administrative law judge also permissibly gave greater weight to the opinions of Drs. Houser, Rasmussen, and Forehand, as she determined that they adequately explained how claimant's qualifying exercise blood gas studies supported their conclusions that he has a totally disabling respiratory impairment. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Compton*, 211 F.3d at 211, 22 BLR at 2-175; Decision and Order at 17-18; Director's Exhibit 12; Claimant's Exhibits 3, 5. Accordingly, we affirm the administrative law judge's determinations that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, further, invoked the presumption at amended Section 411(c)(4).

## III. Rebuttal of the Section 411(c)(4) Presumption

Employer initially contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 16-17, *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*, F.3d , No. 11-2418, 2013 WL 3929081 (4th Cir. July 31, 2013) (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision.[9] *See Owens*, 25 BLR at

[9] 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

1-4; *see also Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Employer also asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of the miner's disabling respiratory impairment. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption that the miner's total disability was due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted 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. *See* 30 U.S.C. §921(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)); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 18-19. Furthermore, the United States Court of Appeals for the Fourth Circuit has held that, to satisfy the latter method of rebuttal, an employer must "effectively . . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure.[10] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

In addition, employer argues that the administrative law judge's analysis of Dr. Hippensteel's disability causation opinion is "inadequate," as "[s]he merely refers to her prior analysis regarding Dr. Hippensteel's opinion as to the effects of cardiac disease, finding that the [e]mployer did not meet the burden to establish the absence of legal pneumoconiosis and total disability due to pneumoconiosis." Employer's Brief at 7. Employer contends that, as legal pneumoconiosis and disability causation are separate elements of entitlement, they must be considered separately. Contrary to employer's contention, the administrative law judge addressed these two elements independently. In finding that employer did not rebut the presumption of disability causation, the

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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*.

[10] The DOL has expressed its acceptance of the "rule out" standard and rejected the argument that the administrative law judges should apply a "substantially contributing cause" standard on rebuttal. 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013).

administrative law judge rationally found that "[e]ven setting aside the speculative nature of Dr. Hippensteel's claim, that [claimant's] arterial hypoxemia is due to diastolic heart dysfunction, he did not explain why he ruled out [claimant's] extensive history of coal mine dust exposure as a factor, even if not the sole factor, in his disabling hypoxemia." Decision and Order at 20; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Therefore, we affirm the administrative law judge's determination that employer did not rebut the presumption by establishing that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment at amended Section 411(c)(4).[11] We further affirm the administrative law judge's finding that claimant established a basis for modification at 20 C.F.R. §725.310.

[11] Employer does not appear to directly challenge the administrative law judge's finding that Dr. Hippensteel's opinion is insufficient to establish rebuttal of the presumed fact that claimant has legal pneumoconiosis, i.e., a chronic impairment arising out of coal mine employment. Decision and Order at 19; *see* 20 C.F.R. §718.201(a)(2). If employer's arguments on the issue of disability causation are read to include a challenge to this finding, we hold that the administrative law judge permissibly discredited Dr. Hippensteel's opinion, that claimant does not have legal pneumoconiosis, because he did not adequately explain why coal dust exposure was not a contributing cause of claimant's hypoxemia. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000). We further affirm, therefore, the administrative law judge's finding that employer has not rebutted the amended Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification is affirmed.

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