BRB No. 11-0864 BLA

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<tr><td>ANDREW BARBER

Claimant-Respondent

v.

U.S. STEEL MINING COMPANY, LLC

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DATE ISSUED: 09/12/2012

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05545) of Administrative Law Judge Robert B. Rae on a claim filed on August 25, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge accepted the parties' stipulation that claimant had over thirty-three years of underground coal mine employment. In light of the length of claimant's underground coal mine employment and the fact that he established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge found claimant entitled to invocation of

the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to rebut the presumption.[1] Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.[2] In response, claimant contends that the administrative law judge's Decision and Order is supported by substantial evidence and should be affirmed. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[3] 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).

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[1] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. *See* 30 U.S.C. §921(c)(4), as amended by Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556(a) (2010). In order to rebut the Section 411(c)(4) presumption, it must be shown that the miner did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

[2] Employer contends that the evidence does not establish total respiratory disability due to pneumoconiosis. Employer's specific arguments, however, pertain to whether employer disproved the existence of pneumoconiosis or that claimant's disabling respiratory impairment arose out of, or in connection with, coal mine employment. We will, therefore, address employer's arguments as Section 411(c)(4) rebuttal arguments, and we affirm the administrative law judge's finding that claimant was entitled to invocation of the Section 411(c)(4) presumption, as that finding is not challenged. *See* *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] It appears from the record that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Employer first contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption by failing to establish that claimant did not have pneumoconiosis. Specifically, employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of pneumoconiosis, arguing that it was, at best, in equipoise. Employer also asserts that the administrative law judge erred in not according additional weight to the x-ray readings of Drs. Hippensteel and Zaldivar because they are pulmonary specialists.

Contrary to employer's argument, the administrative law judge properly found that employer failed to disprove the existence of clinical pneumoconiosis because at least three of the four x-rays of record were read as positive for pneumoconiosis by the better qualified physicians, *i.e.*, physicians who are both B readers and Board-certified radiologists,[4] and the readings of the fourth x-ray were in equipoise because the x-ray was read as both positive and negative by equally qualified physicians.[5] *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1993); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Further, contrary to employer's argument, the administrative law judge was not required to accord additional weight to the negative x-ray readings of Drs. Hippensteel and Zaldivar, B readers, because they are also "Board-certified *pulmonary specialists*." Employer's Brief at 6 (emphasis in original); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en

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[4] The x-ray evidence in this case consists of the following: The x-ray taken on September 10, 2008, was read as positive for pneumoconiosis by Dr. Forehand, a B reader; as negative by Dr. Zaldivar, a B reader; and as positive by Dr. Alexander, a B reader and Board-certified radiologist. Director's Exhibit 10; Claimant's Exhibit 3; Employer's Exhibit 3. The March 11, 2009 x-ray was read as negative for pneumoconiosis by Dr. Hippensteel, a B reader, and as positive by Dr. Alexander. Employer's Exhibit 1; Claimant's Exhibit 4. The April 1, 2009 x-ray was read as negative for pneumoconiosis by Dr. Zaldivar, and as positive by Dr. Alexander. Employer's Exhibit 2; Claimant's Exhibit 5. Finally, the August 10, 2010 x-ray was read as positive for pneumoconiosis by Dr. DePonte, a B reader and Board-certified radiologist and as negative by Dr. Willis, a B reader and Board-certified radiologist. Claimant's Exhibit 1; Employer's Exhibit 4.

[5] Even if employer were correct in asserting that the x-ray evidence in this case is in equipoise, such a finding would not benefit employer, as it is employer's affirmative burden to rebut the Section 411(c)(4) presumption by showing that claimant does not have pneumoconiosis. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

banc); *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Considering the medical opinion evidence, the administrative law judge properly accorded little weight to the opinions of Drs. Hippensteel and Zaldivar,[6] that claimant does not have clinical pneumoconiosis, because they were based, in part, on the doctors' negative readings of x-rays that were subsequently read as positive by better qualified physicians. *See Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). We, therefore, affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of clinical pneumoconiosis.

Turning to whether employer rebutted the presumption by disproving the existence of legal pneumoconiosis, the administrative law judge properly accorded little weight to the opinions of Drs. Hippensteel and Zaldivar, that claimant's respiratory impairment did not arise out of coal mine employment, as the doctors' analysis of the objective test results they obtained conflicted with the analysis of the results of the majority of the physicians who reviewed the objective testing. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Consequently, the administrative law judge properly found that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. *See* 30 U.S.C. §921(c); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

Employer next contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant's totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. Specifically, employer asserts that claimant's disabling respiratory impairment is the result of "asbestos-related pleural disease that has developed from claimant's intensive asbestos exposure during his service as a machinist mate in the U.S. Navy in the 1950's[,]" and did not arise out of, or in connection with, his coal mine employment. Employer's Brief at 14.

Dr. Hippensteel opined that claimant's disabling respiratory impairment was related to his work as a machinist mate during service in the U.S. Navy from 1953-1957, and not to his work as a mechanic in the coal mines. Dr. Hippensteel, who was a Navy doctor from 1972-1979, stated that many machinist mates, like claimant, were exposed to asbestos in the service. Employer's Exhibit 1.

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[6] The medical opinion evidence also includes the opinions of Drs. Forehand and Khal, who diagnosed both clinical and legal pneumoconiosis. Director's Exhibit 10; Claimant's Exhibit 1.

In considering Dr. Hippensteel's opinion, however, the administrative law judge concluded that the doctor's position, that a purely restrictive impairment, such as that caused by asbestos, could not be caused by coal dust exposure, is contrary to the regulations, which define pneumoconiosis as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *See* 20 C.F.R. §718.201(a)(2). Additionally, the administrative law judge found Dr. Hippensteel's opinion to be less credible, as the doctor failed to mention in his report that the pulmonary function study he considered, which showed "moderate" impairment, was qualifying under the regulations, as were all of claimant's pulmonary function study results. Further, the administrative law judge noted that Dr. Hippensteel failed to mention that claimant's exercise blood gas study results were qualifying. Additionally, the administrative law judge concluded that Dr. Hippensteel's reference to his service as a Navy doctor from 1972-1979, as a basis for his expertise, "falls far short" of establishing him as an expert on asbestos exposure. Further, the administrative law judge also found that a review of Dr. Hippensteel's curriculum vitae does not provide such a basis. Decision and Order at 10. The administrative law judge also stated that Dr. Hippensteel "[did] not have sufficient expertise to proclaim himself as an expert in the lack of asbestos exposure for mechanics in the coal mines during the [c]laimant's 35 year coal mine employment." *Id.* For the above reasons, therefore, the administrative law judge properly concluded that Dr. Hippensteel's opinion was entitled to little weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark*, 12 BLR at 1-155; Decision and Order at 11. Consequently, the administrative law judge properly found that Dr. Hippensteel's opinion was insufficient to establish that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment.

Next, Dr. Zaldivar opined that claimant's asbestosis was mild to moderate, and that claimant's disabling respiratory impairment was a purely restrictive impairment due to asbestosis, and not, therefore, related to his coal mine employment. The administrative law judge, however, accorded less weight to Dr. Zaldivar's opinion because he found that Dr. Zaldivar provided no explanation for this finding. The administrative law judge also accorded less weight to Dr. Zaldivar's opinion because the doctor did not diagnose the existence of pneumoconiosis. Additionally, the administrative law judge found that the position taken by Dr. Zaldivar, like that of Dr. Hippensteel, that a purely restrictive impairment could not be caused by coal dust exposure, is contrary to the regulations. *See* 20 C.F.R. §718.201(a)(2). Thus, the administrative law judge properly found that Dr. Zaldivar's opinion was insufficient to establish that claimant's totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Clark*, 12 BLR at 1-155. Accordingly, we affirm the administrative law judge's finding that the evidence failed to show that claimant's totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment.

In light of our affirmance of the administrative law judge's findings, that employer failed to disprove that claimant had pneumoconiosis or that his disabling respiratory impairment arose out of, or in connection with, coal mine employment, we affirm the administrative law judge's award of benefits pursuant to Section 411(c)(4).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge