BRB No. 12-0511 BLA

BASIL E. THOMAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BILL BRANCH COAL COMPANY	)	DATE ISSUED: 04/25/2013
	)	
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 on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), 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 on Remand Awarding Benefits (2009-BLA-5613) of Administrative Law Judge Linda S. Chapman, with respect to a claim filed on August 21, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for a second time. In its previous decision, the Board vacated the administrative law judge's denial of benefits and her crediting of claimant with 14.24 years of underground coal

mine employment. *Thomas v. Bill Branch Coal Co.*, BRB No. 10-0630 BLA, slip op. at 4 (June 22, 2011)(unpub.). The Board remanded the case to the administrative law judge for reconsideration and also directed the administrative law judge to consider the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[1] *Id*.

On remand, the administrative law judge determined that claimant established 18.25 years of underground coal mine employment and that he is totally disabled at 20 C.F.R. §718.204(b)(2). The administrative law judge further found, therefore, that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). The administrative law judge determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in determining that claimant invoked the amended Section 411(c)(4) presumption, as she erred in finding that claimant established 18.25 years of underground coal mine employment. In addition, employer asserts that, in evaluating the evidence as to whether employer rebutted the presumption, the administrative law judge improperly discredited the opinions of Drs. Fino and Hippensteel. Claimant has not filed a response brief. The Director, Office of Workers' Compensation (the Director), filed a limited brief, stating that, regardless of the method the administrative law judge used to calculate claimant's coal mine employment, the record supports a finding of more than fifteen years of underground employment.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

---

[1] 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), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 3. 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).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Amended Section 411(c)(4) Presumption – Length of Coal Mine Employment

In considering whether claimant established at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, the administrative law judge reviewed claimant's Social Security Administration (SSA) Statement of Earnings, description of coal mine work form CM-913, and employment history form CM-911a. Decision and Order on Remand at 2; *see* Director's Exhibits 3-5. The administrative law judge determined that, although claimant did not specifically state whether his coal mine employment was underground, "even a cursory review of his Description of Coal Mine Work, History of Employment and hearing testimony clearly indicates that [claimant] worked in underground coal mines."[4] Decision and Order on Remand at 5. The administrative law judge also found that claimant's testimony, that he worked for various coal companies over a twenty-five year period, was credible, but she was unable to determine the precise length of his coal mine employment because claimant did not indicate how long he worked for each employer or how much he earned. *Id*. at 3. Relying primarily on claimant's Social Security records, and crediting claimant with a quarter of coal mine employment for each quarter in which he earned at least fifty dollars, the administrative law judge concluded that claimant had "a total of 73 quarters, or 18 and ¼ years of underground coal mine employment." *Id*.

Employer contends that the administrative law judge "applie[d] dated earnings requirements to find an inflated coal mine employment history." Employer's Brief at 7. Employer maintains that the fifty dollars per quarter method may have been reasonable at one time, but more accurate methods of computation are now available, such as comparing the Table of Coal Mine Industry Average Earnings to the earnings reflected in claimant's SSA Statement of Earnings, which results in 14.2 years of coal mine employment. Employer also asserts that the administrative law judge's award of a quarter of a year of coal mine employment for each quarter in which claimant earned fifty dollars is contrary to the regulations and case law providing that claimant must prove one calendar year of employment, which is defined as at least 125 working days. Employer further contends that the earnings in some of the years in claimant's SSA Statement of Earnings are not broken down by quarter. The Director responds, asserting that, regardless of whether the fifty dollar per quarter standard is reasonable in all

[4] We affirm this finding, as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

circumstances, the administrative law judge permissibly found at least fifteen years of underground coal mine employment.

Setting aside for a moment the reasonableness of the so-called "fifty dollars per quarter" method, claimant's SSA Statement of Earnings shows that he earned in excess of that amount while engaged in coal mine employment from the second quarter of 1962 through the first quarter of 1972, and from the third quarter of 1972 through the second quarter of 1977, for a total of sixty quarters. Director's Exhibit 5. Claimant then worked full years for employer in 1980, 1982 and 1983, for an additional twelve quarters, bringing the total to seventy-two quarters, or eighteen years. *Id*. We are not persuaded that employer is correct in maintaining that in this case, in which the bulk of claimant's coal mine employment occurred in the 1960s and 1970s, the "fifty dollars per quarter" standard is outdated.[5] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Moreover, as the administrative law judge noted, claimant's SSA Statement of Earnings reflects earnings "well above" fifty dollars in all but one quarter of his coal mine employment.[6] Decision and Order on Remand at 4; Director Exhibit 5. Even if the administrative law judge had not counted this quarter, claimant would still have seventy-one quarters, or 17.75 years, of qualifying coal mine employment.

In addition, we reject employer's related argument that the administrative law judge should have calculated the length of claimant's coal mine employment by reference to the Table of Coal Mine Industry Average Earnings. There is no regulatory requirement that an administrative law judge apply the formula at 20 C.F.R. §725.101(a)(32)(iii) in determining the length of a miner's coal mine employment. Rather, the use of the formula is discretionary. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Employer's contention that, for each calendar year of coal mine employment established, claimant was required to prove that he worked at least 125 days, is also without merit. Under the

[5] Employer is correct in asserting that the administrative law judge's finding of four quarters of coal mine employment in 1972 appears to conflict with claimant's Social Security Administration earnings report. Decision and Order on Remand at 3; Director's Exhibit 5. Error, if any, is harmless, however, as subtracting this quarter would not alter the administrative law judge's ultimate finding of at least fifteen years of coal mine employment. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984);

[6] A review of claimant's Social Security Statement of Earnings indicates that in the third quarter of 1964, claimant earned fifty-nine dollars while engaged in coal mine employment. Director's Exhibit 5.

terms of 20 C.F.R. §725.101(a)(32), if a miner worked a calendar year, he is presumed to have worked at least 125 days during that period. Other than alleging that claimant's earnings suggest that he was not employed during every work day in a calendar year, employer has not identified any evidence that claimant worked for less than 125 days in any year from 1963 through 1983. Therefore, the administrative law judge rationally concluded that claimant established at least fifteen years of coal mine employment. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003). Accordingly, we affirm the administrative law judge's determination that claimant invoked the presumption at amended Section 411(c)(4). *Id.*

II. Rebuttal of the Amended Section 411(c)(4) Presumption

The administrative law judge initially determined that employer did not rebut the presumed fact that claimant has clinical pneumoconiosis based on the x-ray evidence.[7] Decision and Order on Remand at 8. The administrative law judge then considered simultaneously whether, based on the medical opinion evidence, employer established that claimant does not have legal pneumoconiosis, or that legal pneumoconiosis is not a contributing cause of claimant's totally disabling respiratory impairment.[8] *Id*. at 9-12. Based upon her decision to discredit the opinions of Drs. Fino and Hippensteel, who opined that claimant's respiratory impairment is not due to coal dust exposure, the administrative law judge determined that employer did not rebut the amended Section 411(c)(4) presumption. *Id*. The administrative law judge stated, "finding that [e]mployer failed to establish that [claimant's] totally disabling respiratory impairment was not due

---

[7] Pursuant to 20 C.F.R. §718.201(a)(1):

> "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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[8] "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition also includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*.

to his exposure to coal mine dust necessarily includes a finding that the [e]mployer failed to establish that [claimant] does not suffer from legal pneumoconiosis." Decision and Order on Remand at 12 n.8.

In light of the administrative law judge's analysis, employer has combined its arguments on the issues of the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis. Employer asserts that the administrative law judge did not provide valid reasons for discrediting the opinions of Drs. Fino and Hippensteel regarding the cause of claimant's totally disabling respiratory impairment. In addition, employer maintains that the administrative law judge's reliance on the preamble to evaluate their opinions "distorts the purpose behind the regulation and cannot be approved on review as a proper or reasonable interpretation of the regulation." Employer's Brief at 21.

As an initial matter, we reject employer's assertion that the administrative law judge erred in relying on the preamble to the amended regulations. The preamble sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32.

Regarding the administrative law judge's consideration of Dr. Fino's opinion, the administrative law judge correctly noted that Dr. Fino relied on the reduction in claimant's FEV1/FVC ratio to exclude coal dust exposure as a cause of claimant's obstructive impairment. Decision and Order on Remand at 10; *see* Employer's Exhibit 10. The administrative law judge rationally found that this reasoning was inconsistent with the preamble to the regulations, in which the DOL recognized that coal dust can cause clinically significant obstructive lung disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio. *See* 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-130; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); Decision and Order on Remand at 10-11. Further, the administrative law judge permissibly gave less weight to Dr. Fino's opinion because he did not adequately explain why he ruled out coal dust exposure as a contributing cause of claimant's impairment, especially given the disabling impairment that remained after the administration of bronchodilators. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227 (4th Cir. 2004); *Grizzle v. Pickands*

Mather & Co., 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); Decision and Order on Remand at 11.

The administrative law judge also rationally found that Dr. Hippensteel did not adequately explain why his diagnosis of asthma excluded coal dust exposure as a contributing cause of claimant's respiratory impairment, as asthma and asthmatic bronchitis may fall under the regulatory definition of legal pneumoconiosis, if they are related to coal dust exposure.[9] *See Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666 (1983); *Robinson v. Director, OWCP*, 3 BLR 1-798.5 (1981); Decision and Order on Remand at 11. In addition, the administrative law judge acted within her discretion in giving less weight to Dr. Hippensteel's opinion, that chronic bronchitis related to coal dust exposure typically disappears within a few years of leaving the mines, because this view is contrary to the scientific view endorsed 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; 65 Fed. Reg. 79,971 (Dec. 20, 2000); *see Looney*, 678 F.3d at 314-16, 25 BLR at 2-130; Decision and Order on Remand at 12.

Contrary to employer's contention, the administrative law judge did not substitute her opinion for that of Dr. Hippensteel, who opined that claimant's pattern of gas exchange would not be "typical" for coal workers' pneumoconiosis and diagnosed that hypercarbia is "rare" in coal workers' pneumoconiosis. Decision and Order on Remand at 12; Employer's Exhibits 5, 7, 11. Rather, the administrative law judge permissibly accorded Dr. Hippensteel's opinion less weight for failing to adequately explain why coal dust could not have also contributed to claimant's impairment, especially given the irreversible portion that remained after the administration of bronchodilators. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order on Remand at 12.

Because the administrative law judge gave permissible reasons for discrediting the opinions of Drs. Fino and Hippensteel, we affirm her finding that employer failed to rebut the presumption that claimant has legal pneumoconiosis and is totally disabled by it.[10] *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480,

[9] Dr. Hippensteel stated that "[t]here is no specific association between asthma and coal mining" and that claimant "has evidence of partially reversible asthma which is a disease that has no occupational relationship to coal dust exposure." Employer's Exhibits 7 (at 20), 11.

[10] We need not address employer's arguments concerning the administrative law judge's finding that employer did not establish the absence of clinical pneumoconiosis, as employer must affirmatively disprove the existence of clinical *and* legal pneumoconiosis to rebut the amended Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4);

25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). Consequently, we further affirm the administrative law judge's award of benefits.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

Morrison v. Tenn. Consol. Coal Co., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995).