BRB No. 13-0359 BLA

JIMMY WALKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROYALTY SMOKELESS COAL COMPANY	)	DATE ISSUED: 02/28/2014
	)	
and	)	
	)	
AT MASSEY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Subsequent Claim (2011-BLA-05253) of Administrative Law Judge Christine L. Kirby, rendered on a claim filed on April 7, 2010,[1] pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). Based on employer's concessions, and her review of the record, the administrative law judge found that claimant established 16.75 years of underground coal mine employment and that he is totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found, therefore, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[2] 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 applying amended Section 411(c)(4) in this case, as the limitations on rebuttable apply only to the Secretary of Labor, and the Department of Labor (DOL) has yet to promulgate regulations implementing the amended presumption. Employer also contends that the administrative law judge erred in discrediting Dr. Hippensteel's opinion and applied an incorrect standard when considering whether employer rebutted the presumption of

[1] Claimant filed his initial claim on November 3, 1982, which was denied by Administrative Law Judge Nicholas Laezza on June 17, 1988. Director's Exhibit 1. Judge Laezza found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, but did not prove that he had a totally disabling respiratory or pulmonary impairment arising out of coal mine employment. *Id*. On February 20, 2003, claimant filed his second claim, which was denied by the district director on October 30, 2003, on the grounds that claimant did not establish any of the elements of entitlement. Director's Exhibit 2. Claimant filed a request for modification on September 23, 2004, which was denied by the district director on March 14, 2005. *Id.* Claimant filed a second request for modification on March 13, 2006, which the district director denied on December 13, 2006. *Id*. Claimant took no further action until filing the present subsequent claim. Director's Exhibit 3.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 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).

disability causation. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response, asking the Board to reject employer's arguments regarding application of amended Section 411(c)(4), and what constitutes the correct rebuttal standard on the issue of disability causation. In a reply brief, employer reiterates its previous contentions.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Application of Amended Section 411(c)(4)

Employer initially contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. We reject this argument for the reasons set forth in our decision in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). *See also Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). We also reject employer's assertion that the administrative law judge's application of amended Section 411(c)(4) to this case was premature, because the DOL has yet to promulgate implementing regulations. 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 DOL recently promulgated regulations implementing amended Section 411(c)(4), and these regulations are consistent with the provisions applied by the administrative law judge. *See* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. 20 C.F.R. §718.305). We hold, therefore, that the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the amended Section 411(c)(4) presumption, and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[4] The record indicates that claimant was employed in the coal mining industry in West Virginia and Virginia. Director's Exhibit 5. 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).

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

A. The Existence of Pneumoconiosis

In determining whether employer rebutted the presumed existence of clinical pneumoconiosis[5] by medical opinion evidence, the administrative law judge considered the opinion in which Dr. Hippensteel stated that claimant does not have the disease. Decision and Order at 12-14. The administrative law judge noted that Dr. Hippensteel is Board-certified in internal medicine, critical care medicine and pulmonary diseases, and that he issued reports dated December 13, 2010, and March 31, 2012 and was deposed on April 20, 2012.[6] *Id*. at 12. The administrative law judge discredited Dr. Hippensteel's opinion because he relied on his negative interpretations of the x-ray evidence, which were contrary to her finding that the x-ray evidence was insufficient to prove the absence of clinical pneumoconiosis.[7] *Id*. at 14.

Employer asserts that, contrary to the administrative law judge's finding, Dr. Hippensteel did not rely solely on x-ray evidence to rule out the presence of clinical pneumoconiosis, but also considered claimant's symptoms and complaints, objective studies and medical records, including the results of claimant's physical examinations. Employer maintains that, "[b]y confining her analysis of Dr. Hippensteel's assessment . . . to only the chest x-ray interpretations, [the administrative law judge] failed to consider Dr. Hippensteel's analysis in its entirety[,] which colored her analysis of his opinion

[5] "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).

[6] The administrative law judge accorded the current reports greater weight than the reports submitted in claimant's prior claim because "they are likely to contain a more accurate evaluation of [claimant's] current condition." Decision and Order at 11. The administrative law judge noted that claimant's prior claim included reports between 1983 and 2006 from Drs. Forehand, Hippensteel, Castle, Berry and Abernathy. *Id*.

[7] We affirm the administrative law judge's unchallenged determinations that the newly submitted x-ray evidence is more probative, and that employer did not establish rebuttal of the presumed existence of clinical pneumoconiosis by x-ray evidence, as two of the newly submitted x-rays were positive for clinical pneumoconiosis and the third x-ray was in equipoise. *See Skrack*, 6 BLR at 1-711; Decision and Order at 9-10.

concerning the other issues." Employer's Brief in Support of Petition for Review at 14. We reject employer's arguments.

In Dr. Hippensteel's December 13, 2010 report, he concluded that he did not observe a "sufficient increase in lung markings to make a diagnosis of clinical pneumoconiosis." Employer's Exhibit 3. Dr. Hippensteel reiterated this opinion in his March 31, 2012 supplemental report. Employer's Exhibit 6. At his April 20, 2012 deposition, Dr. Hippensteel testified that coal workers' pneumoconiosis is an interstitial pulmonary process; that there were no findings consistent with an interstitial pulmonary process; and that the x-ray performed in conjunction with claimant's examination had "minimal abnormalities of q and t sized opacities with 0/1 profusion along with calcified granulomas . . . ." Employer's Exhibit 9 at 23-24. Dr. Hippensteel also compared his x-ray findings to those of Drs. Forehand, Miller and Ahmed, who read claimant's x-rays as positive for clinical pneumoconiosis, and noted that they did not diagnose calcified granulomas. *Id.* at 25-26. He further testified that "the evidence is against a diagnosis [of clinical pneumoconiosis] based on my own x-ray . . . which really reflected changes that are more consistent with granulomatous disease rather than any marginal simple coal workers' pneumoconiosis." Employer's Exhibit 9 at 42. Dr. Hippensteel concluded, "I think that I can exclude [coal workers' pneumoconiosis] based upon the fact that he does not have evidence of clinical pneumoconiosis radiographically when looking at all the test results of radiographs . . . ." *Id.*

In light of these statements, the administrative law judge acted within her discretion in finding that Dr. Hippensteel relied primarily on his negative interpretation of the x-ray evidence to rule out the presence of clinical pneumoconiosis.[8] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Thus, the administrative law judge rationally found that Dr. Hippensteel's opinion, that claimant does not have clinical pneumoconiosis, was entitled to little weight, as it was based on a premise contrary to her finding that the preponderance of the newly submitted x-ray evidence was positive for clinical pneumoconiosis. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

[8] Although Dr. Hippensteel also referred to a CT scan dated August 11, 2011, the administrative law judge permissibly found that that it neither confirmed, nor rebutted, the existence of pneumoconiosis because there was no evidence as to the medical acceptability and relevance of the CT scan, as required by 20 C.F.R. §718.107. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 135-136 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); Decision and Order at 10.

Because employer raises no other challenge to the administrative law judge's determination that the medical opinion evidence is insufficient to rebut the presumed existence of clinical pneumoconiosis, and the administrative law judge's basis for discrediting the opinion of Dr. Hippensteel is rational and supported by substantial evidence, it is affirmed. We further affirm, as unchallenged on appeal, the administrative law judge's determination that the evidence of record, considered as a whole, is insufficient to establish that claimant does not have clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 16.

B. Disability Causation

Employer contends that the administrative law judge erred in finding that Dr. Hippensteel's opinion did not rebut the presumed fact that claimant is totally disabled due to pneumoconiosis. This argument is without merit, as the administrative law judge permissibly determined that "the probative value of [Dr. Hippensteel's] opinion regarding disability causation is compromised," on the ground that he did not diagnose clinical pneumoconiosis, "contrary to this tribunal's findings." Decision and Order at 16; *see Toler*, 43 F.3d at 116, 19 BLR at 2-83; *Trujillo*, 8 BLR at 1-473. We therefore affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's disability did not arise out of, or in connection with, coal mine employment, and further affirm the award of benefits.[9] *See 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.

[9] Because employer bears the burden of proof on rebuttal, and we have held that the administrative law judge provided a valid rationale for discrediting the opinion of its expert, Dr. Hippensteel, we need not address employer's arguments concerning her finding that employer did not establish the absence of legal pneumoconiosis, her crediting of the opinion of Dr. Forehand that claimant has clinical and legal pneumoconiosis and is totally disabled by it, and the rebuttal standard that she allegedly applied on the issue of disability causation. *See Defore v. Alabama By-Products*, 12 BLR 1-27 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Subsequent Claim 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