BRB No. 13-0339 BLA

CLAUDE VANDYKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VANDYKE BROTHERS COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	DATE ISSUED: 04/21/2014
	)	
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 Benefits of Linda S. Chapman, 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/Tennessee, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-5678) of Administrative Law Judge Linda S. Chapman on a subsequent

claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited claimant with twenty-seven years of underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d),[2] based on her determination that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3]

[1] Claimant's first application for benefits, filed on August 23, 1971, was finally denied on February 29, 1980. Director's Exhibit 1. Claimant filed a second claim for benefits on September 13, 1983, which was denied by the district director on August 3, 1984. Claimant filed a third application for benefits on January 22, 1986, which was denied by the district director on May 22, 1986. Claimant's fourth application for benefits, filed on August 6, 1987, was ultimately denied by Administrative Law Judge Clement J. Kichuk on April 8, 1998 for failure to establish any element of entitlement. Claimant's petition for modification, filed on September 14, 1998, was ultimately denied by Administrative Law Judge Joseph E. Kane on December 27, 2001 on the ground that, even though he established total respiratory disability and a material change in conditions, claimant failed to establish the existence of pneumoconiosis. By letter dated December 27, 2002, claimant filed a second request for modification with supporting medical evidence. In a Decision and Order dated March 18, 2005, Administrative Law Judge Alice M. Craft denied modification because claimant did not establish the existence of pneumoconiosis. On January 23, 2008, claimant filed a fifth application for benefits, which is currently pending on appeal. Director's Exhibit 3.

[2] The applicable language set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer maintains that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption under amended Section 411(c)(4), and erred in her weighing of the medical opinion evidence relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.[4]

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.[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).

Employer first contends that the administrative law judge applied an incorrect standard in finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Employer concedes that the administrative law judge articulated the proper standard at the start of her rebuttal analysis, *i.e.*, that upon invocation, the burden shifts to employer to demonstrate, by a preponderance of the evidence, either that claimant does not suffer from pneumoconiosis or that his totally disabling respiratory or pulmonary impairment did not arise out of his coal mine employment. Employer's Brief at 5, *citing* Decision and Order at 28. Employer maintains, however, that the administrative law judge subsequently applied a stricter standard by precluding employer from establishing rebuttal by a "preponderance of the evidence." Employer's Brief at 4-8, 10. Specifically, employer asserts that, by stating that "it is not sufficient that the evidence 'preponderate' against the existence of clinical pneumoconiosis or total disability related to coal dust exposure," Decision and Order at 30, n.23, the administrative law judge employed a "heightened burden of proof

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total respiratory disability at 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 27-28.

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

[that] unjustifiably prejudiced the employer by essentially transforming the [Section] 718.305 rebuttable presumption into an irrebuttable presumption." Employer's Brief at 7.

Employer has taken the administrative law judge's statement out of context. After finding that the preponderance of the evidence established neither the presence nor absence of clinical pneumoconiosis, the administrative law judge, in two footnotes, referred to arguments in employer's closing brief regarding whether the evidence established the existence of pneumoconiosis or disability causation. The administrative law judge first stated:

> The Employer's Brief suggests a misapprehension of the Employer's burden under the presumption, as it states that "the evidence preponderates against a finding of pneumoconiosis or total disability due to the disease." Employer's Brief at 9. It is not sufficient that the evidence "preponderate" against the existence of clinical pneumoconiosis or total disability related to coal dust exposure. The Employer must affirmatively rule out the existence of clinical or legal pneumoconiosis.

Decision and Order at 30, n.23. In continuing her analysis of the evidence relevant to rebuttal of the presumption of legal pneumoconiosis, the administrative law judge noted:

> Again, it is not sufficient that, as argued by the Employer, the "evidence as a whole fails to establish coal workers' pneumoconiosis," legal or clinical. Employer's Brief at 15. It is not [claimant's] burden to establish that he has pneumoconiosis; it is the Employer's burden to establish that he does not.

Decision and Order at 31, n.24. The administrative law judge concluded her rebuttal analysis by stating that "[c]onsidering all of the medical evidence, I find that the Employer has not met its burden to establish *by a preponderance of the medical evidence* that [claimant] does not have pneumoconiosis, or that his totally disabling respiratory impairment is not caused by pneumoconiosis." Decision and Order at 34-35 [emphasis added]; 30 U.S.C. §921(c)(4); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011). Because the administrative law judge applied the correct standard in determining whether employer affirmatively established rebuttal of the amended Section 411(c)(4) presumption, we reject employer's arguments to the contrary.

Employer also avers that the administrative law judge's Decision and Order does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), because the administrative law judge summarized the disparate smoking histories recorded by the various physicians, but failed to render a determination regarding the length and extent of

claimant's smoking history. Employer's Brief at 10-13. While reliance on an incorrect smoking history may affect the credibility of a medical opinion, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), employer has not shown how the administrative law judge's failure to determine the length and extent of claimant's smoking history was prejudicial to employer in the present case. The administrative law judge did not credit any of the opinions that would support a finding of entitlement over any of those that would support a finding of rebuttal. Rather, she identified the opinions relevant to rebuttal and discounted all of them on various grounds, but not on the ground of reliance on an inaccurate smoking history. We, therefore, reject employer's argument.

Lastly, employer maintains that the opinions of Drs. Castle and Hippensteel are sufficient to affirmatively rebut the amended Section 411(c)(4) presumption, and that the administrative law judge erred in discrediting these opinions. Specifically, employer argues that the administrative law judge improperly discounted the opinions of Drs. Castle and Hippensteel on the ground that these physicians relied on the results of a biopsy conducted in 1999, which demonstrated an absence of significant anthracotic pigmentation in claimant's lungs. As claimant was not exposed to coal dust after his retirement in 1985, employer asserts that the administrative law judge impermissibly dismissed evidence that is "highly relevant to the issue of whether claimant has pneumoconiosis." Employer's Brief at 9.

A review of the Decision and Order reveals that the administrative law judge provided a comprehensive analysis of the opinions of Drs. Hippensteel and Castle, who found that there is insufficient evidence of coal workers' pneumoconiosis and that claimant's disabling pulmonary impairment is attributable to smoking with an asthmatic component, and not to coal dust exposure. Decision and Order at 9-13, 31-34; Director's Exhibits 21, 93, 99; Employer's Exhibit 3. After reviewing the underlying bases for their conclusions, the administrative law judge acted within her discretion in finding that the opinions of Drs. Hippensteel and Castle were entitled to little weight, as neither physician had rendered an adequately explained and supported opinion. Decision and Order at 31-34; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). In light of the progressive nature of pneumoconiosis, the administrative law judge permissibly found that the probative value of the opinions was diminished because the physicians relied, in part, on biopsy evidence that was obtained approximately ten years prior to the time they rendered their opinions that coal workers' pneumoconiosis was absent. Decision and Order at 32-33. Additionally, while Dr. Hippensteel considered the opinions of Drs. Tomashefski and Crouch, pathologists who reviewed claimant's October 15, 1999 lung biopsy slides, "he did not address the findings of Dr. Hudgens, the pathologist who initially examined these tissue slides, and concluded that they showed features consistent with simple coal

workers' pneumoconiosis, a moderate degree of deposition of black pigment, and focal emphysematous change." Decision and Order at 32. The administrative law judge rationally concluded that "in any event … an absence of findings of pneumoconiosis on tissue obtained in 1999 is not sufficient to rule out a connection between [claimant's] history of coal dust exposure and his totally disabling respiratory impairment [at the time of the hearing in 2012]. *Id.*; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

The administrative law judge also determined that Dr. Hippensteel diagnosed panacinar or bullous emphysema that was unrelated to coal dust exposure, while ignoring the multiple CT scan findings of centrilobular emphysema *in addition* to bullous changes contained in claimant's treatment records. As Dr. Hippensteel reviewed these records but did not "discuss the relationship between the numerous findings of centrilobular emphysema, which he stated was 'associated with' simple coal workers' pneumoconiosis, and [claimant's] history of exposure to coal mine dust," the administrative law judge permissibly discounted his opinion. Decision and Order at 32; 65 Fed. Reg. 79,941-42 (Dec. 20, 2000); *see Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 1-61 (4th Cir. 1995). Further, although Dr. Hippensteel indicated that the "specifics of the abnormalities" in claimant's case showed that his pulmonary impairment did not result from coal dust exposure but were due to smoking, probable asthma, and allergies, the administrative law judge observed that he did not describe the "specifics of the abnormalities," or the objective evidence that he relied upon for his conclusion. Decision and Order at 31-33; *see Clark*, 12 BLR at 1-155. Noting that the Department of Labor (DOL) has recognized that coal dust exposure can result in a purely obstructive respiratory impairment, the administrative law judge was also not persuaded by Dr. Hippensteel's statement that simple pneumoconiosis usually causes a mixed and irreversible obstructive and restrictive impairment, particularly since he failed to explain why claimant's purely obstructive impairment could not be one of the "unusual" cases. Decision and Order at 32; 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

Similarly, the administrative law judge determined that Dr. Castle attributed claimant's disabling respiratory impairment with a significant degree of bronchoreversibility to smoking-induced airway obstruction with an asthmatic component, stating that when coal workers' pneumoconiosis causes impairment, it "generally" does so by causing a mixed irreversible obstructive and restrictive ventilatory defect. Decision and Order at 33. As Dr. Castle did not explain why claimant's purely obstructive impairment could not be due to coal dust exposure, or why coal dust exposure played no role in causing claimant's residual disabling impairment after bronchodilation, the administrative law judge permissibly discounted his opinion. *Id.*; *Clark*, 12 BLR at 1-155; *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). The administrative law judge additionally rejected, as contrary to legislative fact,

Dr. Castle's position that claimant's pattern of a slight reduction in forced vital capacity, with severe reduction in the FEV_1 and FEV_1/FVC ratio, was typical of obstruction related to smoking and not pneumoconiosis. Decision and Order at 34; 65 Fed. Reg. 79,943 (Dec. 20, 2000). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4); *see Rose*, 614 F.2d at 936, 2 BLR at 2-38.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge 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