BRB No. 12-0163 BLA

JOHNNY M. FORTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 12/12/2012
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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.[1]

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2010-BLA-5181) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

[1] By letter dated June 25, 2012, Paul E. Frampton of Bowles, Rice, McDavid, Graff & Love, in Charleston, West Virginia, notified the Board that he is employer's new counsel.

§§901-944 (Supp. 2011) (the Act). Claimant filed this claim on February 27, 2008.[2] Director's Exhibit 3.

In his Decision and Order issued December 6, 2011, the administrative law judge noted the recent amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act. Under Section 411(c)(4), if a miner establishes at least fifteen years of underground or substantially similar coal mine employment, and establishes that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). If the presumption is invoked, the burden shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id*.

After crediting claimant with twenty-eight years of underground coal mine employment,[3] the administrative law judge found that the new evidence established that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge thus found that claimant established a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d), and considered his claim on its merits. Based on claimant's years of underground coal mine employment and the finding of total disability,[4] the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

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[2] Claimant's prior claim, filed on December 15, 1995, was ultimately denied by Administrative Law Judge Thomas M. Burke on April 19, 2002. Director's Exhibit 1. Judge Burke found that claimant established the existence of pneumoconiosis, but did not establish that he was totally disabled by a respiratory or pulmonary impairment. *Id*.

[3] Claimant testified that his last coal mine employment was in Kentucky. Hearing Tr. at 35-36. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] On the merits, the administrative law judge considered the entire record, but accorded greater weight to the more recent evidence associated with claimant's subsequent claim, finding that it was more probative of claimant's current respiratory condition. Decision and Order at 35-36.

On appeal, employer challenges the application of amended Section 411(c)(4) to this case. In addition, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant invoked the Section 411(c)(4) presumption and that employer did not rebut it.[5] Claimant responds, urging affirmance of the award of benefits. 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. 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).

To establish entitlement to benefits under the Act, a claimant must establish by a preponderance of the evidence that he or she is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of a totally disabling respiratory impairment. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3). The administrative law judge found that the new evidence established total disability, demonstrating a change in the applicable condition and establishing a necessary fact for invocation of the Section 411(c)(4) presumption.

As an initial matter, employer contends that the retroactive application of amended Section 411(c)(4) constitutes an unconstitutional taking of private property, and that its rebuttal provisions do not apply to claims brought against a responsible operator. Employer's Brief at 5-6, n.2. Employer's contentions are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the

[5] Employer does not challenge the administrative law judge's findings of twenty-eight years of underground coal mine employment, and that the blood gas study evidence establishes total disability under 20 C.F.R. §718.204(b)(2)(ii). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

reasons set forth in that decision. Further, we reject employer's argument that the application of amended Section 411(c)(4) to this case is premature for lack of implementing regulations. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing.[6] *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. *Id*.

In determining whether claimant is totally disabled, the administrative law judge considered new arterial blood gas studies and pulmonary function studies, as well as medical opinion evidence. *See* 20 C.F.R. §718.204(b)(2). The administrative law judge concluded that both of the new blood gas studies were valid and qualifying,[7] and that the preponderance of the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 16-17. Next, the administrative law judge determined that the newly submitted pulmonary function study evidence under 20 C.F.R. §718.204(b)(2)(i), which consisted of two qualifying results and two non-qualifying results, was inconclusive. *Id*. at 17.

Finally, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Agarwal, McSharry, and Hippensteel, all of whom are Board-certified in Internal Medicine and Pulmonary Disease. Dr. Agarwal opined that claimant has a severe pulmonary limitation that prevents him from working as a coal miner. Director's Exhibit 15. Similarly, Dr. McSharry opined that claimant suffers from a severe respiratory impairment, as a result of which he is unable to perform his usual coal mine employment. Employer's Exhibit 8. Dr. Hippensteel opined that claimant has a "mild restrictive impairment," hypoxemia related to obesity, and chronic bronchitis unrelated to coal mine dust exposure. Employer's Exhibit 11 at 12-13; Employer's Exhibit 12 at 19. Dr. Hippensteel concluded that claimant is disabled as a

[6] Additionally, to the extent employer requests that this case be held in abeyance pending the resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, its request is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); Employer's Brief at 5-6 n.2.

[7] A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

whole man due to extrinsic factors, but is not disabled by an "intrinsic" lung disease.[8] Employer's Exhibit 12 at 19.

Finding that claimant's usual coal mine employment as a section foreman occasionally required him to perform heavy manual labor, the administrative law judge indicated that we would assess the medical opinions with that exertional requirement in mind. Decision and Order at 18. Evaluating the documentation and reasoning of the physicians' opinions, the administrative law judge found that Dr. Agarwal provided a documented and reasoned opinion that claimant's inability to adequately oxygenate his blood is an "impairment [that is] respiratory in nature." Decision and Order at 24. The administrative law judge further found that Dr. McSharry, having both examined claimant and reviewed the medical evidence, set forth "an exceptionally well documented opinion," and "reached a reasoned conclusion that [claimant] ha[s] a severe respiratory impairment. . . ." *Id*. Finally, he found that Dr. Hippensteel, having conducted a "thorough review" of the medical record, provided a well-documented and reasoned opinion that claimant is "not totally disabled due to an intrinsic lung condition." Decision and Order at 25. Noting that all three physicians are similarly qualified, the administrative law judge found that "the consensus of Dr. Agarwal and Dr. McSharry that [claimant] has a totally disabling respiratory impairment outweighs Dr. Hippensteel's conclusion that [claimant] is not totally disabled due to an intrinsic lung condition." Decision and Order at 25. Therefore, the administrative law judge found that the preponderance of the medical opinion evidence "supports, rather than contradicts, a finding of total disability based on the arterial blood gas studies." *Id*. Weighing all of the new evidence, the administrative law judge found that, based on the arterial blood gas study and medical opinion evidence, claimant established that he has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). *Id*.

Employer argues that the administrative law judge failed to explain sufficiently his decision to discredit Dr. Hippensteel's opinion after finding it reasoned and documented. Employer's Brief at 6-7. Employer contends that if the administrative law judge discredited Dr. Hippensteel's opinion simply because Drs. Agarwal and McSharry offered two contrary opinions, then the administrative law judge impermissibly "counted heads" to resolve the issue. We disagree. The administrative law judge did not merely

[8] Dr. Hippensteel noted that claimant has a respiratory impairment, but added that claimant's restrictive impairment and hypoxemia are "not indicative of intrinsic lung disease . . . ." Employer's Exhibit 12 at 19. Dr. Hippensteel opined that claimant's obesity and diastolic heart dysfunction are "extrinsic problems" that prevent claimant from exercising, but that "[f]rom the standpoint of intrinsic pulmonary function," claimant has the respiratory capacity to perform his usual coal mine employment. *Id*. at 30-31.

count heads, but considered the documentation and reasoning of the physicians' opinions, the physicians' qualifications, and the exertional requirements of claimant's job as a section foreman. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Having considered both the quantity and quality of the medical opinion evidence, the administrative law judge acted within his discretion in determining that "the consensus" of Drs. Agarwal and McSharry, that claimant has a totally disabling respiratory impairment, outweighed Dr. Hippensteel's opinion that he is not totally disabled by an "intrinsic lung condition."[9] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Substantial evidence supports the administrative law judge's permissible credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Therefore, we affirm the administrative law judge's finding that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Because claimant established that he has twenty-eight years of underground coal mine employment and that he is totally disabled, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4); Decision and Order at 34-36.

After finding that claimant invoked the Section 411(c)(4) presumption, the administrative law judge noted that the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011) (holding that rebuttal requires employer to affirmatively prove the absence of pneumoconiosis or show that the disease is unrelated to coal mine work). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 37-40.

[9] Employer stresses Dr. Hippensteel's opinion that claimant is totally disabled by obesity rather than intrinsic lung disease. The administrative law judge, however, noted that two other Board-certified pulmonologists examined claimant and considered his weight, yet diagnosed him as totally disabled by a respiratory impairment. Decision and Order at 19-24. As noted above, the Board is not authorized to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As to the first means of rebuttal, the administrative law judge found that employer established that claimant does not have clinical pneumoconiosis, but failed to establish that claimant does not have legal pneumoconiosis.[10] Decision and Order at 37-39. The administrative law judge found Dr. McSharry's opinion on the existence of pneumoconiosis to be inconclusive and equivocal. Decision and Order at 38-39. Dr. Hippensteel opined that claimant does not have legal pneumoconiosis, but the administrative law judge discredited his reasoning as inconsistent with the definition of pneumoconiosis. *Id*. Employer argues that the administrative law judge erred in discrediting the opinions of Drs. McSharry and Hippensteel. Employer's Brief at 7-12. We disagree.

Dr. McSharry concluded that, because the record contains conflicting x-ray interpretations regarding the existence of pneumoconiosis, "there is insufficient objective evidence to justify" a diagnosis of pneumoconiosis. Employer's Exhibit 8 at 1. Dr. McSharry, however, noted further that pulmonary function tests show that claimant has progressive restrictive and obstructive lung disease without reversibility, traits the doctor stated are "compatible with a diagnosis of pneumoconiosis." *Id*. at 2. He added that he could not offer an opinion regarding the x-ray evidence, but that if it did show signs of pneumoconiosis, he "would be comfortable in supporting a diagnosis of coal worker's pneumoconiosis overall based on the remainder of [claimant's] physiologic data and history." *Id*. Finally, Dr. McSharry opined that if claimant does have pneumoconiosis, it arose "solely as a result of his coal mine employment." *Id*. Because the rebuttal standard requires employer to affirmatively prove that claimant does not have legal pneumoconiosis, and Dr. McSharry stated only that the available x-ray evidence did not justify a diagnosis of pneumoconiosis, but that claimant has pulmonary function study findings compatible with pneumoconiosis, the administrative law judge reasonably found Dr. McSharry's opinion insufficient to rebut the Section 411(c)(4) presumption. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber v. Director, OWCP*, 43 F.3d 899, 900-

[10] To rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, employer must affirmatively prove the absence of both clinical and legal pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *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). Clinical pneumoconiosis is defined as "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." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Dr. Hippensteel opined that claimant does not have legal pneumoconiosis; contrary to employer's contention, the administrative law judge permissibly discounted his opinion. As noted by the administrative law judge, Dr. Hippensteel concluded that claimant's total disability as a whole person is due in part to chronic bronchitis that was ongoing after claimant left his coal mine employment. Employer's Exhibit 11 at 12-13. In Dr. Hippensteel's view, claimant's bronchitis is unrelated to his coal mine dust exposure because "industrial chronic bronchitis . . . should subside within a period of several months after leaving work in the mines." *Id*. at 13. The administrative law judge rationally discounted Dr. Hippensteel's reasoning, that an impairment related to coal dust exposure should have subsided once claimant left the mines, as contrary to the regulations. *See* 20 C.F.R. §718.201(c)(recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"). The administrative law judge thus permissibly discounted Dr. Hippensteel's opinion that claimant does not have legal pneumoconiosis.[11] Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis.

Finally, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of his coal mine employment. Employer contends that the administrative law judge erroneously discounted Dr. Hippensteel's opinion that claimant's respiratory impairment is not due to his coal mine employment. Employer's Brief at 10-11. Employer's argument lacks merit. The administrative law judge permissibly concluded that the same reasons for which he discounted Dr. Hippensteel's opinion on the issue of the existence of legal pneumoconiosis also undercut his opinion that claimant's impairment is unrelated to his coal mine employment. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consol. Coal Co*., 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 39. Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4)

[11] Because the administrative law judge properly discounted Dr. Hippensteel's opinion due to his reasoning regarding the cause of claimant's chronic bronchitis, we need not address employer's additional argument that the administrative law judge erred in discounting Dr. Hippensteel's reasoning for his conclusion that claimant's restrictive impairment is due to obesity. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

presumption by proving that claimant's impairment did not arise out of his coal mine employment.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits 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