

BRB No. 13-0150 BLA

FRANKLIN McALPINE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ESSENTIAL FUELS)	DATE ISSUED: 01/27/2014
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
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 Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (The Law Office of Roger D. Forman, L.C.), Buckeye, West Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Ann Marie Scarpino (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: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2011-BLA-05396) of Administrative Law Judge Thomas M. Burke with respect to a claim filed on March 18, 2010, 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 noted that claimant testified that all of his work as a miner was underground and determined that claimant established 26.79 years of coal mine employment. The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718 and found that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-(ii), (iv), and, therefore invoked the presumption at amended Section 411(c)(4) of the Act, 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).¹ The administrative law judge also determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of the presumption at amended Section 411(c)(4) to this case. Employer further asserts that, even assuming the presumption was properly applied, the administrative law judge erred in determining that employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that the Board should reject employer's contentions that the amended presumption does not apply to responsible operators, and does not have any effect, absent implementing regulations. In addition, the Director urges the Board to reject employer's assertion that the "rule out" standard set forth in *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980), cannot be applied to rebut the presumption and asserts that in weighing the evidence, an administrative law judge may rely on the preamble to the regulations.²

¹ Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). 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), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

² We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established 26.79 years of underground coal mine employment, a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i)-

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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).

I. Application of the Section 411(c)(4) Presumption

Employer initially contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. This argument is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, F.3d , No. 11-2418, 2013 WL 3929081 (4th Cir. July 31, 2013) (Niemeyer, J., concurring).⁴ We, therefore, reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

We also reject employer's assertion that the application of amended Section 411(c)(4) to this case was premature, because the Department of Labor (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). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).⁵

(ii), (iv), and invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The record reflects that claimant's coal mine employment was in West 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).

⁴ As the Fourth Circuit has issued its decision in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, F.3d , No. 11-2418, 2013 WL 3929081 (4th Cir. July 31, 2013) (Niemeyer, J., concurring), employer's request to hold this case in abeyance pending the court's decision is moot.

⁵ Moreover, the Department of Labor (DOL) has issued a regulation implementing amended Section 411(c)(4), 30 U.S.C. §921(c)(4), which became effective on October 25, 2013. 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

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

A. Legal Pneumoconiosis

Employer argues, *inter alia*, that in considering whether employer rebutted the presumed existence of legal pneumoconiosis,⁶ the administrative law judge erred in finding that Drs. Rosenberg and Hippensteel based their opinions ruling out the presence of the disease on premises that conflict with the preamble to the regulations. This argument is without merit.

Because the preamble sets forth the resolution by the DOL of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (4th 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). In this case, the administrative law judge rationally determined that Dr. Rosenberg's opinion, that claimant's reduced FEV1/FVC ratio indicated that claimant's impairment was not due to coal dust exposure, is in conflict with the preamble to the regulations, "which recognizes that 'coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio.'" Decision and Order at 20, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Looney*, 678 F.3d at 311-12, 25 BLR at 2-125. Further, the administrative law judge reasonably found that Dr. Hippensteel's opinion, that the lack of radiographic evidence suggested that claimant's impairment was not due to coal dust exposure, is contrary to "the Act and regulations[, which] adopt legal pneumoconiosis as an acknowledgement that coal workers can experience coal dust-induced respiratory impairment without radiographic findings." Decision and Order at 21; *see Looney*, 678 F.3d at 311-12, 25 BLR at 2-125.

Employer also maintains that the administrative law judge's "piecemeal analysis of the individual reasons proffered" by Drs. Rosenberg and Hippensteel "is not consistent with law" and that the administrative law judge "failed to consider or discuss whether the evidence as a whole" satisfied employer's burden of affirmatively establishing that claimant does not have legal pneumoconiosis. Employer's Brief at 31. We reject employer's arguments, as discrediting a medical opinion because a key part of the physician's rationale is flawed represents a reasonable exercise of the broad discretion

⁶ "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).

granted to the administrative law judge as fact-finder. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). In addition, employer does not explain how the additional explanations and/or evidence supporting the opinions of its experts negate the permissible rationales that the administrative law judge provided for discrediting their opinions. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Because the administrative law judge set forth valid bases for according little weight to the opinions of Drs. Rosenberg and Hippensteel, he rationally determined that employer did not rebut the presumption that the miner has legal pneumoconiosis. 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). We decline to address, therefore, employer's remaining arguments regarding the weight he accorded to these opinions and further affirm the administrative law judge's finding. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

B. Total Disability Causation

Employer argues that the administrative law judge erred in failing to consider separately whether employer rebutted the presumption of total disability causation. Employer also contends, in an Appendix to its Brief in Support of Petition for Review, that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Appendix at 8-12. Employer further alleges, in the Appendix, that rebuttal of the presumed fact that claimant is totally disabled due to pneumoconiosis should be governed by the "contributing cause" standard that a claimant who does not have the benefit of the presumption must satisfy under 20 C.F.R. §718.204(c). We reject employer's allegations of error. *Id.* at 12-23.

The administrative law judge accurately explained that, because claimant invoked the presumption that his total disability was due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by establishing that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 17; *see* 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); *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. The regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that, with respect to the latter method of rebuttal, the party opposing entitlement must establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as

defined in [20 C.F.R. §]718.201.” 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(ii)).

The DOL has explained that the “no part” standard recognizes that the courts have interpreted Section 411(c)(4) “as requiring the party opposing entitlement to ‘rule out’ coal mine employment as a cause of the miner’s disabling respiratory or pulmonary impairment.” 78 Fed. Reg. 59,105 (Sept. 25, 2013). The DOL specifically rejected the view that a “rule out,” or “no part,” standard violates either the Administrative Procedure Act, 5 U.S.C. §500 et seq., or the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), that the proponent of a rule or order bear the burden of persuasion by a preponderance of the evidence. 78 Fed. Reg. 59,107. The DOL also explicitly chose not to use the “contributing cause” standard set forth in 20 C.F.R. §718.204(c) and stated that the application of a different standard on rebuttal “is warranted by the statutory section’s underlying intent and purpose,” which “effectively singled out” totally disabled miners who had fifteen years of qualifying coal mine employment “for special treatment.” 78 Fed. Reg. 59,106-07.

In the present case, the administrative law judge’s determination that employer did not rebut the presumed fact that claimant’s totally disabling impairment is due to pneumoconiosis satisfies amended Section 411(c)(4) and the implementing regulation. Because employer has not challenged the administrative law judge’s finding that claimant has a totally disabling obstructive impairment caused by emphysema, the only issue remaining in this case is the etiology of claimant’s totally disabling emphysema. We have affirmed the administrative law judge’s finding that the opinions of Drs. Rosenberg and Hippenstein were insufficient to establish that claimant does not have legal pneumoconiosis, i.e., a chronic obstructive lung disease or impairment arising out of coal mine employment. Under the facts of this case, this finding subsumed a determination that the opinions of employer’s experts were also insufficient to establish that claimant’s totally disabling obstructive impairment did not arise out of, or in connection with, his coal mine employment pursuant to amended Section 411(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(ii)); see *Island Creek Kentucky Mining v. Ramage*, F.3d , 2013 WL 1846597 (6th Cir. Dec. 17, 2013); *Big Branch Resources, Inc. v. Ogle*, F.3d , 2013 WL 6608019 (6th Cir. Dec. 17, 2013). Thus, we affirm the administrative law judge’s determination that employer did not rebut the amended Section 411(c)(4) presumption, and further affirm the award of benefits. See *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Owens*, 25 BLR at 1-4.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge