BRB No. 14-0145 BLA

LEROY ADKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAGLAND COAL COMPANY, INCORPORATED	)	DATE ISSUED: 01/23/2015
	)	
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

William S. Mattingly and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Helen H. Cox (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5262) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on July 8, 2009,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the filing date of the subsequent claim, and his determinations that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling pulmonary impairment, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also determined that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut the amended Section 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer contends that the rebuttal provisions of amended Section 411(c)(4) are not applicable to responsible operators, and that the administrative law judge erred in applying the "rule out" standard in considering whether employer's

---

[1] Claimant filed an initial claim for benefits on June 22, 1993, which was denied by the district director for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on December 11, 1995, which was dismissed by Administrative Law Judge Richard A. Morgan on February 12, 1998, after claimant failed to appear for the hearing and also failed to respond to an Order to Show Cause why the claim should not be dismissed. Director's Exhibit 2. Claimant filed a third claim on July 25, 2001, which was denied by the district director because claimant did not establish any element of entitlement. Director's Exhibit 3. Claimant requested modification, which was denied by the district director on May 2, 2003. *Id*. Claimant filed a fourth claim on June 3, 2004. Director's Exhibit 4. Judge Morgan denied benefits on May 9, 2007, finding that while claimant proved total disability, he failed to establish that he has pneumoconiosis and is totally disabled by it. *Id*. The Board affirmed the denial in *L.A.* [*Adkins*] *v. Ragland Coal Co.*, BRB No. 07-0744 BLA (May 28, 2008) (unpub.). *Id*. Claimant took no further action until filing the current subsequent claim on July 8, 2009. Director's Exhibit 6.

[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. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

evidence was sufficient to rebut the presumption. Employer also contends that the administrative law judge erred in rejecting the opinions of Drs. Hippensteel and Oesterling, that claimant's respiratory disability was not due to pneumoconiosis.[3] Claimant filed a motion to dismiss employer's appeal on the ground that employer did not timely file its petition for review and supporting brief. Claimant also filed a response brief, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response to employer's appeal, asserting that the administrative law judge applied the proper rebuttal standard. In reply, employer opposed claimant's motion to dismiss employer's appeal, stating it is unfounded.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. CLAIMANT'S MOTION TO DISMISS EMPLOYER'S APPEAL

Claimant asserts that employer's appeal should be dismissed because its petition for review and supporting brief were not timely filed. The record reflects that employer's appeal was acknowledged by the Board on March 13, 2014, and employer was instructed to file a petition for review and brief within thirty days of receipt of the acknowledgement. On April 11, 2014, employer filed a motion for enlargement of time to submit its pleadings. The Board granted employer's request on May 12, 2014, and directed employer to file a petition for review and brief within ten days from receipt of the order. *Adkins v. Ragland Coal Co.*, BRB No. 14-0145 BLA (May 12, 2014) (unpub. Order). Employer's petition for review and supporting brief were received by the Board on June 3, 2014.

In its Opposition to the Motion to Dismiss, employer asserts that it received the Board's May 12, 2014 Order on May 15, 2014 and, as evidence of the date of receipt, attached a copy of the order with a date stamp of May 15, 2014. Employer maintains that

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 32.

[4] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 67. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200 (1989) (en banc).

its petition for review and supporting brief were timely filed pursuant to 20 C.F.R. §802.221, which states, in relevant part:

> (a) In computing any period of time prescribed or allowed by these rules, by direction of the Board, or by any applicable statute which does not provide otherwise, the day from the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.
>
> (b) Whenever a paper is served on the Board or on any party by mail, paragraph (a) of this section will be deemed complied with if the envelope containing the paper is postmarked by the U.S. Postal Service within the time period allowed, computed as in paragraph (a) of this section. If there is no such postmark, or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.

20 C.F.R. §802.221(a), (b).

Because the date-stamp shows that employer received the Board's Order on May 15, 2014, the ten day deadline for filing the petition and brief and supporting brief was May 25, 2014. However, as May 25, 2014 was a Sunday, and the following day, May 26, 2014, was Memorial Day, a legal holiday, employer's petition for review and supporting were due on May 27, 2014. *See* 20 C.F.R. §802.221(a). In addition, pursuant to 20 C.F.R. §802.221(b), the date of mailing is determinative as the filing date. Because the postmark and the certificate of service establish that employer's petition for review and supporting brief were mailed on May 27, 2014, we conclude that they were timely filed. Thus, we deny claimant's motion to dismiss. *See* 20 C.F.R. §802.219.

II. REBUTTAL OF THE AMENDED SECTION 411(c)(4) PRESUMPTION

A. Applicability of the Rebuttal Provisions

Employer contends that the "rebuttal limitation" provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief in Support of Petition for Review at 20-37. 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*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). 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 v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Moreover, the Department of Labor (DOL) has promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. *See* 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d).

B. Rebuttal Standard

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer either to disprove that claimant suffers from both clinical and legal pneumoconiosis,[5] or establish that claimant's disability did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305; *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The administrative law judge found that employer did not rebut the presumption because it failed to disprove the existence of clinical pneumoconiosis[6] and did not rule out coal dust exposure as a causative factor for claimant's disability.

Employer contends that the administrative law judge erred in applying "the rule-out standard" in considering whether it rebutted the presumed fact of disability causation. Employer's Brief in Support of Petition for Review at 27. Employer maintains that "the standard of proof required [for rebuttal] can be no greater than that required for the claimant to prove his case where the 15-year presumption does not apply." *Id*. at 29.

[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). 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).

[6] We affirm the administrative law judge's finding that employer did not disprove clinical pneumoconiosis, as it is not challenged by employer on appeal. *See Skrack*, 6 BLR at 1-711. Because employer does not contest that claimant has clinical pneumoconiosis, we decline to address its assertion that the administrative law judge erred in discussing the digital x-ray evidence. Employer's Brief in Support of Petition for Review at 11 n.5.

Employer therefore asserts that it is required to show only that pneumoconiosis was not a "contributing cause" of claimant's respiratory disease and/or disability. *Id*. at 33.

Contrary to employer's assertion, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has stated that, to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the regulation implementing amended Section 411(c)(4), which became effective on October 25, 2013, provides that 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." 20 C.F.R. §718.305(d)(1)(ii). The DOL has explained that the "no part" standard recognizes that the courts have interpreted amended 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); *see Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. 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 (Sept. 25, 2013). Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

In considering the medical opinion evidence relevant to the cause of claimant's respiratory disability, the administrative law judge noted that employer relied on the opinions of Drs. Hippensteel and Oesterling.[7] Decision and Order at 33. Dr. Hippensteel attributed claimant's impairment to cigarette smoking, and lung cancer surgery that resulted in the removal of the left upper lobe of claimant's lung. Employer's Exhibit 8. He excluded coal dust exposure as a causative factor, noting that the biopsy findings of coal workers' pneumoconiosis were "small enough not to have contributed in any significant way to [claimant's] impairment," and further stated that claimant:

> [D]eveloped significant impairment after he left work in the mines, deteriorating specifically between 2001 and 2004 . . . and then having further problems . . . that made his lung function deteriorate that were tied in with his cigarette smoking. . . .

Employer's Exhibit 8 at 30; *see also* Director's Exhibit 65 at 14, 215.

---

[7] Dr. Swedarsky did not address the etiology of claimant's respiratory impairment and disability. Employer's Exhibit 3.

Dr. Oesterling prepared a July 25, 2012 biopsy report and was deposed on June 25, 2013. Employer's Exhibits 1, 7. Dr. Oesterling diagnosed simple pneumoconiosis, lung cancer, and respiratory bronchiolitis with associated interstitial lung disease. Employer's Exhibit 1. He opined that the primary cause of claimant's impairment was the inhalation of tobacco smoke, and noted that cancer and pneumonia were contributory causes. *Id*. With respect to the role claimant's simple pneumoconiosis played, Dr. Oesterling opined:

> [*I*]*t may have a small role in contributing to any respiratory impairment he has experienced.* I cannot quantitate this in terms of the impact of the coal dust, but it would be a minor factor.

Id. (emphasis added).

Contrary to employer's assertion, the administrative law judge did not selectively analyze Dr. Hippensteel's opinion in giving it less weight. Employer's Brief in Support of Petition for Review at 13. The administrative law judge permissibly found that Dr. Hippensteel excluded coal dust exposure as a cause of claimant's respiratory disability, in part, because claimant's disability arose after claimant left coal mine employment. The administrative law judge permissibly rejected Dr. Hippensteel's opinion because he considered it to be inconsistent with the regulation at 20 C.F.R. §718.201(c), which states that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004); *Workman v. E. Assoc. Coal Corp.*, 23 BLR 1-22 (2004); Decision and Order at 33, *citing Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009).

There is also no merit to employer's argument that the administrative law judge erred in his consideration of Dr. Oesterling's opinion. The administrative law judge acted within his discretion in finding that Dr. Oesterling's opinion on the etiology of claimant's respiratory disability was not based on adequate documentation, as Dr. Oesterling reviewed biopsy slides, but did not have the opportunity to review claimant's other evidence, including pulmonary function tests and arterial blood gas studies, which established the existence of pneumoconiosis and total disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 33. As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The Board cannot reweigh

the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge permissibly exercised his discretion in determining the weight to accord the opinions of Drs. Hippensteel and Oesterling, we 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, his coal mine employment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Consequently, we affirm the administrative law judge's findings that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption and that claimant is entitled to benefits.[8]

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

[8] Because employer bears the burden of proof on rebuttal, and we have affirmed the administrative law judge's credibility determinations with respect to employer's evidence, it is not necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See generally Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

BOGGS, Administrative Appeals Judge, concurring:

I agree with my colleagues that the administrative law judge permissibly discredited Drs. Oesterling and Hippensteel, for purposes of meeting employer's burden of persuasion on rebuttal. As a result, employer could not establish rebuttal under any standard, and it is not necessary for the Board to address the standard to be applied for purposes of rebutting the presumption established by amended Section 411(c)(4). *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 556, 25 BLR 2-339, 2-349-350 (4th Cir. 2013)(Niemeyer, J., concurring). Consequently, I concur in the result.

JUDITH S. BOGGS
Administrative Appeals Judge