

BRB Nos. 13-0313 BLA
and 13-0314 BLA

CAROLYN JUSTUS, o/b/o and)
Widow of GRELEY JUSTUS)
)
Claimant-Respondent)
)
v.)
)
RIFE & HALL COAL COMPANY)
)
and)
)
LIBERTY MUTUAL INSURANCE) DATE ISSUED: 04/09/2014
COMPANY)
)
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 Subsequent Claim of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, 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 Granting Subsequent Claim (2010-BLA-5434 and 2011-BLA-6326) of Administrative Law Judge Stephen R.

Henley rendered on a miner's claim¹ and a survivor's claim² filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).³ The administrative law judge credited the parties' stipulation that the miner worked in underground coal mine employment for at least twenty years, and adjudicated these claims pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that new evidence submitted in support of the miner's subsequent claim was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed pursuant to 20 C.F.R. §725.309 since the denial of the miner's prior claim. The administrative law judge further found that claimant, the miner's surviving spouse, was entitled to invocation of the rebuttable presumption of total

¹ Greley Justus, the miner, filed his first application for benefits on September 24, 1986, which was denied on December 31, 1986 by the district director. Director's Exhibit 1. The miner filed a second claim on August 15, 1989, which was denied by Administrative Law Judge Samuel J. Smith on July 20, 1993. Director's Exhibit 2. The miner filed a third application for benefits on August 2, 1999, which was denied by the district director on December 15, 1999. Director's Exhibit 3. The miner filed a fourth application for benefits on July 18, 2007, which the district director denied on February 19, 2008, because the evidence did not establish total respiratory disability or disability causation. Director's Exhibit 4. On April 29, 2009, the miner filed a fifth application for benefits, which is currently pending on appeal. The miner died on June 17, 2011, and claimant, his surviving widow, is pursuing the miner's claim on behalf of his estate.

² Claimant, Carolyn Justus, filed her survivor's claim on July 31, 2011. Survivor-Director's Exhibit 1. This claim is pending on appeal and was consolidated with the miner's claim.

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, 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), and revived Section 422(l) of the Act, 30 U.S.C. §932(l). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis, or to have died due to pneumoconiosis, if the evidence 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 20 C.F.R. §718.305. Under Section 422(l), the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

disability and/or death due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim. Because the administrative law judge found that the miner was entitled to benefits at the time of his death, he found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l), without having to establish that the miner's death was due to pneumoconiosis.

On appeal, employer challenges the administrative law judge's finding that claimant established total respiratory disability at Section 718.204(b), a change in an applicable condition of entitlement at Section 725.309, and invocation of the amended Section 411(c)(4) presumption. Employer also challenges the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption with proof that the miner did not suffer from legal pneumoconiosis and that his disabling respiratory impairment did not arise out of, or in connection with, employment in a coal mine. Claimant has not filed a response brief to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he is not participating in this appeal.

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

Employer initially asserts that the newly submitted evidence of record is insufficient to establish either total respiratory disability at Section 718.204(b) or a change in an applicable condition of entitlement pursuant to Section 725.309. Specifically, employer contends that, after finding that the weight of the newly submitted pulmonary function studies and blood gas studies of record was insufficient to establish total disability at Section 718.204(b)(2)(i), (ii), the administrative law judge erred in his consideration of the conflicting medical opinions at Section 718.204(b)(2)(iv). Employer maintains that Dr. Forehand's opinion is unreasoned, as the physician failed to explain how the miner's non-qualifying tests supported his finding of total respiratory disability, and failed to distinguish the relative contributions of the miner's respiratory and cardiac conditions to his disability. Employer additionally contends that the administrative law judge erred in finding that the opinions of Drs. Krishnan and Caffrey support Dr.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

Forehand's opinion, arguing that Dr. Krishnan's treatment notes are brief and conclusory, and that the administrative law judge misstated Dr. Caffrey's opinion regarding the severity of the miner's chronic obstructive pulmonary disease (COPD). Employer also maintains that the administrative law judge subjected the contrary opinion of Dr. Hippensteel to a higher level of scrutiny, and failed to provide a valid reason for discounting the opinion. Employer's Brief at 5-14.

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the evidence sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv), the administrative law judge determined that Dr. Forehand diagnosed pneumoconiosis, based on the miner's work history, symptomatology, x-ray and blood gas study results; cigarette smokers' lung disease, based on the miner's smoking history and pulmonary function study results; and congestive heart failure due to coronary artery disease, based on the miner's x-ray and electrocardiogram. Dr. Forehand opined that a significant respiratory impairment was present, and explained that, while the reduction in the miner's FEV₁ to 74% on his pulmonary function study was "not disabling," his blood gas study results revealed totally disabling exercise-induced arterial hypoxemia. Dr. Forehand concluded that the miner's coal mine employment was the principal cause of the abnormal blood gas study, and that "insufficient residual oxygen-transfer capacity remains" to allow the miner to return to his "extremely laborious" coal mining job. Director's Exhibit 14; Decision and Order at 14. Contrary to employer's arguments, the administrative law judge acted within his discretion in crediting Dr. Forehand's opinion as well-reasoned. Decision and Order at 16; see *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLA 2-23 (4th Cir. 1997); see also *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000). The administrative law judge then reviewed Dr. Krishnan's reports, and rationally found that, even though he did not explicitly state that the miner was totally disabled, Dr. Krishnan's diagnoses of chronic obstructive pulmonary disease, coal workers' pneumoconiosis, and chronic respiratory failure "requiring [the miner's use of] supplemental oxygen seven days a week 24 hours a day" bolstered Dr. Forehand's conclusion that the miner suffered a totally disabling respiratory impairment. Decision and Order at 16; Claimant's Exhibit 6. Similarly, the administrative law judge determined that Dr. Caffrey did not indicate whether the miner suffered from a totally disabling respiratory impairment, but opined that the miner's "medical problems are major and caused him significant pulmonary disability." Decision and Order at 16; Employer's Exhibit 8. While the administrative law judge incorrectly stated that Dr. Caffrey described the miner's COPD as a "significant medical problem" when, in fact, the physician opined that it was *not* a significant medical problem, the misstatement constitutes harmless error. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The administrative law judge reasonably inferred that Dr. Caffrey's opinion, that

the miner suffered a “significant pulmonary disability,” supported Dr. Forehand’s conclusion that the miner was precluded from performing his usual coal mine employment from a respiratory standpoint.

In evaluating the contrary opinion of Dr. Hippensteel, that the miner was not disabled from a pulmonary standpoint, the administrative law judge noted that Dr. Hippensteel indicated that the miner suffered from end-stage congestive heart failure, chronic kidney disease, hypertension, atrial fibrillation, interstitial lung disease, COPD, simple pneumoconiosis (CWP), and hyperlipidemia at the time of his death. Decision and Order at 15; Employer’s Exhibits 3, 5, 6. While Dr. Hippensteel opined that the miner’s cardiac disease and its complications were the major causes of his gas exchange impairment, the administrative law judge noted that the physician did not explain why the miner’s respiratory conditions, including COPD, CWP and interstitial lung disease, did not prevent the miner from returning to his usual coal mine employment involving heavy manual labor. *Id.* As Dr. Hippensteel failed to adequately explain how the miner could perform his work from a respiratory standpoint in light of his obstructive impairment, his need for supplemental oxygen, and his symptoms which included shortness of breath after walking a short distance, the administrative law judge permissibly discounted Dr. Hippensteel’s opinion as insufficiently reasoned. Decision and Order at 16; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). As substantial evidence supports the administrative law judge’s credibility determinations, we affirm his finding that the weight of the newly submitted evidence established total respiratory disability at Section 718.204(b), based on his conclusion that the medical opinion evidence was the most probative. Consequently, we affirm the administrative law judge’s finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309.

We reject employer’s assertion that the administrative law judge erred in failing to review the entire record *de novo* before finding that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge properly based his finding of a change in an applicable condition of entitlement pursuant to Section 725.309 on the newly submitted evidence relevant to total respiratory disability, but then considered the entire record to determine whether claimant was entitled to benefits. Decision and Order at 16; *see White v. New White Coal Co.*, 23 BLR 1-1 (2004). The administrative law judge determined that the evidence from the miner’s prior claims dated from 1986 and was less probative of the miner’s condition at the time of his death due to its age. Thus, the administrative law judge properly concluded that the newly submitted evidence was entitled to greater weight and established total respiratory disability pursuant to Section 718.204(b). Decision and Order at 14, 16; *see Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). As employer has not challenged the administrative law judge’s

determination that the miner worked in underground coal mine employment for more than fifteen years, we affirm the administrative law judge's finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6-7.

Lastly, while employer concedes that the miner suffered from simple clinical pneumoconiosis, employer contends that the administrative law judge erred in finding that employer failed to prove that the miner did not have legal pneumoconiosis and that his disabling impairment did not arise out of, or in connection with, coal mine employment. Specifically, employer argues that the administrative law judge provided invalid reasons for discrediting the opinions of Drs. Caffrey and Hippensteel. Employer's Brief at 16-19. We disagree.

In finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge determined that Dr. Caffrey offered no explanation for attributing the miner's COPD to smoking and heart failure but not coal dust exposure, when the Department of Labor has recognized that "coal dust exposure is additive with smoking in causing clinically significant airways obstruction and chronic bronchitis." Decision and Order at 22, citing 65 Fed. Reg. 79,940 (Dec. 20, 2000); see *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013); *Clark*, 12 BLR at 1-155. Dr. Caffrey also opined that the miner's interstitial lung disease was unrelated to coal dust exposure, but could be related to his use of Amiodarone, as there is a rate of toxicity in 5-10% of patients. Employer's Exhibit 8. As Dr. Caffrey failed to explain why he concluded that the miner was one of the 5-10% of patients who would develop interstitial lung disease from Amiodarone, the administrative law judge acted within his discretion in finding that the opinion was insufficient to rebut the presumption of legal pneumoconiosis, and that its probative value was diminished on the issue of the cause of the miner's disabling respiratory impairment. Decision and Order at 21-23; see *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 2-306 (4th Cir. 1994). Similarly, the administrative law judge determined that Dr. Hippensteel found interstitial lung disease, COPD, a gas exchange impairment, and a variable obstructive ventilatory impairment, but failed to adequately explain why the miner's significant coal dust exposure was not a contributing or aggravating cause of these conditions. Additionally, since Dr. Hippensteel did not believe that the miner suffered a totally disabling respiratory impairment, contrary to the administrative law judge's findings, the administrative law judge permissibly discounted his opinion. *Id.*; see also *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4), and affirm

his award of benefits in the miner's claim. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d at 478, 25 BLR 2-1 (6th Cir. 2010); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Because the administrative law judge properly found that the miner was entitled to benefits at the time of his death, we also affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(l).

Accordingly, the Decision and Order Granting Subsequent Claim of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge