BRB No. 11-0485 BLA

WILLIAM H. HOPES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/25/2012
	)	
EMERALD COAL RESOURCES	)	
	)	
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 on Remand-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (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 appeals the Decision and Order on Remand-Awarding Benefits (08-BLA-5530) of Administrative Law Judge Daniel L. Leland on a claim filed on September 4, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at

30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the Board for the second time. Initially, the administrative law judge credited claimant with twenty-five years and one month of coal mine employment,[1] and found that claimant established the existence of both clinical and legal pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a)(1),(4), and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2),(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in his analysis of the x-ray evidence in finding clinical pneumoconiosis established under 20 C.F.R. §718.202(a)(1), and erred in his analysis of certain medical opinions when he found that legal pneumoconiosis was established under 20 C.F.R. §718.202(a)(4). Therefore, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), (4), and remanded the case for him to reconsider those issues.[3] *Hopes v. Emerald Coal Res.*, BRB No. 09-0812 BLA (Aug. 26, 2010)(unpub.). Further, the Board instructed the administrative law judge, on remand, to consider this claim in light of a recent amendment to the Act contained in Section 1556 of Public Law No. 111-148. *Hopes*, slip op. at 12.

[1] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] 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 is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[3] The Board affirmed, however, the administrative law judge's decision to discount Dr. Basheda's opinion, that claimant's chronic obstructive pulmonary disease is due to smoking, because employer did not challenge the administrative law judge's finding that Dr. Basheda's reasoning for excluding coal mine dust exposure as a cause was contrary to the principle that pneumoconiosis may be latent and progressive. *Hopes v. Emerald Coal Res.*, BRB No. 09-0812 BLA (Aug. 26, 2010)(unpub.), slip op. at 10 n.10.

On remand, the administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556(a) 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 Section 411(c)(4), if a miner 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 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). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's respiratory or pulmonary impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his respiratory or pulmonary impairment "did not arise out of, or in connection with," coal mine employment and, thus, failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer further contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that employer did not rebut the Section 411(c)(4) presumption.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's arguments that amended Section 411(c)(4) may not be applied to this case. Additionally, claimant's counsel has filed a fee petition for work performed before the Board in the prior appeal. Employer responds that it has no objection to the fee request.

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

[4] Employer does not challenge the administrative law judge's finding that eighteen years and one month of claimant's coal mine employment took place in an underground mine, or his finding that claimant established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

Invocation of the Section 411(c)(4) Presumption

Employer contends that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 14-23. These contentions lack merit, and are therefore rejected. *See B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 254-63 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Employer argues further that the administrative law judge erred in applying amended Section 411(c)(4), because its rebuttal provisions do not apply to claims brought against a responsible operator. Employer's Brief at 24-25. The Board rejected the identical argument in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), slip op. at 4, *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the reasons set forth in that decision. 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. In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[5] 30 U.S.C. §921(c)(4).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis, the administrative law judge noted that the burden of proof shifted to employer to rebut the presumption, either by disproving the existence of pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Decision and

[5] We deny employer's request to hold this case in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); Employer's Brief at 7-13.

Order at 2. The administrative law judge found that employer failed to establish either method of rebuttal.[6] *Id.* at 2-6.

In considering whether employer disproved the existence of legal pneumoconiosis, or established that claimant's impairment is unrelated to coal mine employment, the administrative law judge considered the medical opinions of Drs. Celko, Jaworski, Rasmussen, and Fino. Drs. Celko, Jaworski, and Rasmussen opined that claimant has disabling chronic obstructive pulmonary disease (COPD), due to both coal mine dust exposure and smoking. Director's Exhibits 12, 14; Claimant's Exhibits 1, 3, 5; Employer's Exhibit 8. In contrast, Dr. Fino opined that claimant's COPD is "more consistent with" an impairment due to smoking or asthma than one significantly related to coal mine dust exposure. Employer's Exhibit 10 at 26. Specifically, Dr. Fino opined that, in addition to the impairment from asthma, claimant has lost another 600 cc of his FEV1 capacity due to both smoking and coal mine dust exposure. Employer's Exhibit 1 at 12. Dr. Fino, however, detected no evidence in the pattern of claimant's impairment to suggest that claimant experienced an "above average" loss of FEV1 due to coal mine dust exposure, because his impairment is partially reversible with bronchodilators, and his diffusion capacity and exercise blood gas study are normal.[7] Employer's Exhibit 10 at 26-32, 42, 44-45. Dr. Fino therefore determined that the portion of claimant's COPD caused by his coal mine dust exposure is "clinically insignificant," and opined that claimant would be as disabled had he never engaged in coal mine employment. Employer's Exhibit 1 at 12.

The administrative law judge found that Dr. Fino's opinion was not well-reasoned. Specifically, the administrative law judge found that Dr. Fino did not cite medical literature in support of his assertion that partial reversibility, normal diffusion capacity, and normal exercise blood gas values are factors that rule out coal mine dust exposure as a significant contributing cause of COPD, nor adequately explain his rationale for why

[6] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of legal pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 2-6. Employer does not challenge this aspect of the administrative law judge's decision.

[7] Dr. Fino stated that, because only six to eight percent of miners will have "above average" loss of FEV 1 due to coal mine dust, he would need to see evidence that claimant falls within that six to eight percent, in order to conclude that claimant's obstructive impairment is significantly related to coal mine dust exposure. Employer's Exhibit 1 at 11; Employer's Exhibit 10 at 44-45.

those factors eliminated a coal mine dust-related impairment in claimant's case. Decision and Order on Remand at 5. Therefore, the administrative law judge found that Dr. Fino's opinion did not satisfy employer's burden to rebut the Section 411(c)(4) presumption.

Employer argues that the administrative law judge erred in finding that Dr. Fino's opinion did not provide an adequate rationale for ruling out coal mine dust exposure as a cause of claimant's COPD. Employer's Brief at 32-33. We disagree. Contrary to employer's contention, the administrative law judge found, as was within his discretion, that Dr. Fino did not adequately explain why partial reversibility, and the lack of a blood gas or diffusion impairment, eliminated coal mine dust exposure as a significant factor in claimant's COPD. *See* 20 C.F.R. §718.201(a)(2); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Substantial evidence supports the administrative law judge's 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 reject employer's argument that the administrative law judge erred in discounting Dr. Fino's opinion.

Because Dr. Fino's opinion is the only opinion supportive of a finding that claimant does not suffer from legal pneumoconiosis[8] or that his pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal.[9] Therefore, we affirm the administrative law judge's award of benefits. *See* 30 U.S.C. §921(c)(4).

Claimant's counsel has filed a complete, itemized statement, requesting a total fee of $7,211.25, representing 32.05 hours of attorney services at an hourly rate of $225.00, for work performed in the prior appeal, BRB No. 09-0812 BLA. Employer states that it

[8] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *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). Therefore, we need not address employer's contention that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that employer did not disprove the existence of clinical pneumoconiosis. Employer's Brief at 26-30.

[9] Thus, we need not address employer's arguments that the administrative law judge should have discounted the opinions of Drs. Celko, Jaworski, and Rasmussen. Employer's Brief at 32-35.

has no objection to the fee petition. Upon review of the fee petition, the Board finds the requested fee to be reasonable in light of the services performed and approves a fee of $7,211.25, to be paid directly to claimant's counsel by employer. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits is affirmed, and claimant's counsel is awarded a fee of $7,211.25.

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