BRB No. 12-0412 BLA

| | | |
|---|---|---|
| RAYMOND E. HOSTUTLER | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: 04/19/2013 |
| | ) | |
| 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 in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Tiffany B. Davis and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits in an Initial Claim (2008-BLA-5416) of Administrative Law Judge Larry S. Merck. The claim was filed on May 2, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge accepted the parties' stipulation to at least fifteen years of underground coal mine employment. He further found that the evidence established a total respiratory disability pursuant to 20

C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, and that employer failed to rebut the presumption.[1] 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the Section 411(c)(4) presumption was not rebutted.[2] Specifically, employer contends that the administrative law judge did not properly evaluate the relevant evidence. Employer also contends that the 2010 amendments to the Act are unconstitutional, as retroactive application of the amendments denies employer due process of law and constitutes an unlawful taking of private property. Further, employer contends that the Section 411(c)(4) rebuttal provisions do not apply to responsible operators and that the administrative law judge's application of the Section 411(c)(4) presumption in this case is premature, as the Department of Labor has not yet devised regulations implementing the presumption. Claimant has not responded to employer's appeal. In response, the Director, Office of Workers' Compensation Programs, contends that the 2010 amendments are constitutional, that the Section 411(c)(4) rebuttal provisions apply to responsible operators, and that it is not premature to apply the Section 411(c)(4) presumption prior to the enactment of implementing regulations.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and

[1] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

[2] The administrative law judge's finding, that claimant is entitled to invocation of the Section 411(c)(4) presumption, is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

may not be disturbed.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Constitutionality of 2010 Amendments;**
**Applicability of Section 411(c)(4)**

At the outset, we reject employer's arguments concerning the constitutionality and applicability of the 2010 amendments. Contrary to employer's argument, the constitutionality of the 2010 amendments has been upheld. *See Nat'l Fed'n of Indep. Bus v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); *B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 247-63, 25 BLR 2-13, 2-35-63 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010); *see also Vision Processing, LLC v. Groves*, F.3d , No. 11-3702, 2013 WL 332082 (6th Cir. Jan. 30, 2013). Further, contrary to employer's argument, the Section 411(c)(4) rebuttal provisions apply to responsible operators. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *appeal docketed*, No. 11-2415 (4th Cir. Dec. 29, 2011). Additionally, contrary to employer's argument, the Board has held that since the statutory provisions at issue are self-executing, the absence of updated implementing regulations do not preclude immediate application of the amendments. *Mathews*, 24 BLR at 1-201; *see Cumberland v. Dep't of Agric. of U.S.*, 537 F.2d 959, 961 (7th Cir. 1976). Accordingly, we affirm the administrative law judge's application of the Section 411(c)(4) presumption.

**Section 411(c)(4) Rebuttal**

Employer challenges the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption by disproving the presence of clinical pneumoconiosis. Employer first contends that the administrative law judge failed to consider *all* of the credentials of the physicians who read x-rays, in evaluating the credibility of their readings.

In considering the x-ray evidence, the administrative law judge found that the May 31, 2007 x-ray was read as positive for pneumoconiosis by Dr. Muchnok and Dr. Ahmed, who are both B readers and Board-certified radiologists, and as negative by Dr. Wiot,

[3] Because claimant's last coal mine employment was in Ohio, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 5; Decision and Order at 6.

who is also a B reader and Board-certified radiologist. Director's Exhibits 14, 26; Claimant's Exhibit 1. The administrative law judge concluded that, "[a]s [these] dually-qualified physicians disagree on the presence of pneumoconiosis, I find that [the May 31, 2007] x-ray is inconclusive" on the presence of pneumoconiosis. Decision and Order at 26. The administrative law judge found that Dr. Fox, a B reader, interpreted the x-ray dated September 12, 2007 as negative for pneumoconiosis, Director's Exhibit 24, while Dr. Ahmed interpreted the x-ray as positive. Claimant's Exhibit 4. Because Dr. Ahmed, a dually-qualified radiologist, interpreted the x-ray as positive for pneumoconiosis, the administrative law judge deemed the September 12, 2007 x-ray to be positive for the disease. *Id.* The administrative law judge found that the September 27, 2007 x-ray was interpreted by Dr. Schaaf, a B reader, as positive for pneumoconiosis, and by Dr. Meyer, a B reader and Board-certified radiologist, as negative for pneumoconiosis. Relying on the reading of Dr. Meyer, the better qualified physician, the administrative law judge found the September 27, 2007 x-ray to be negative for pneumoconiosis. Director's Exhibit 25; Employer's Exhibit 2. Regarding the April 18, 2008 x-ray that was read as positive for pneumoconiosis by Dr. Ahmed and as negative for pneumoconiosis by Dr. Meyer, Claimant's Exhibit 3; Employer's Exhibit 9, the administrative law judge concluded that, as the dually-qualified radiologists disagreed on the presence or absence of pneumoconiosis, the April 18, 2008 x-ray is inconclusive on the issue.[4] Decision and Order at 26. The administrative law judge concluded that, as one of the x-rays is positive for pneumoconiosis, one is negative for pneumoconiosis, and two, including the most recent, are inconclusive on the issue, employer failed to rebut the Section 411(c)(4) presumption by disproving the presence of clinical pneumoconiosis.

Employer contends, however, that the administrative law judge erred in evaluating the x-ray evidence because he did not consider *all* of the physicians' credentials. Specifically, employer contends that the administrative law judge should have accorded greater weight to the negative readings of Drs. Wiot and Meyer, in light of their professorships in radiology, as well as their considerable experience and expertise in classifying x-rays, including Dr. Wiot's status as a C reader. Further, employer contends that Dr. Fox's negative interpretation should have been accorded greater weight because of his considerable experience and expertise in classifying x-rays, and Board-certification in nuclear medicine. Employer's Brief at 10-13.

Contrary to employer's contention, however, an administrative law judge is not required to assign greater weight to the readings of physicians with additional

[4] The administrative law judge noted the existence of x-ray interpretations in the treatment records, but gave them no probative weight because he could not discern whether they had been taken "for the purpose of determining the existence of clinical pneumoconiosis…." Decision and Order at 27.

qualifications. Although the administrative law judge *may* give greater weight to the interpretations of a physician based upon his academic qualifications as a professor of radiology and his additional experience and expertise in classifying x-rays, an administrative law judge is not required to do so.[5] *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc)(McGranery & Hall, JJ., concurring and dissenting), *citing Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Accordingly, we reject employer's argument in this regard and hold that the administrative law judge properly evaluated the x-ray evidence. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Employer next contends that the administrative law judge erred in failing to consider sufficiently claimant's treatment records, which included x-ray, biopsy, CT scan and medical opinion evidence, on the ground that the evidence contained therein was not administered for the purpose of diagnosing pneumoconiosis.[6] Employer's Brief at 14.

---

[5] We reject employer's contention that the reading of the April 18, 2008 x-ray by Dr. Babu, who is identified only as a "radiologist" supports Dr. Meyer's negative reading of the April 18, 2008 x-ray. Dr. Babu stated:

> Pleural parenchymal changes noted in the left lower chest most probably from previous cardiac surgery. Moderate cardiomegaly, [s]ternal sutures and mediastinal staples are seen from previous cardiac surgery.

Employer's Exhibit 7. The administrative law judge was not compelled to construe Dr. Babu's reading as negative for the existence of pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

[6] Claimant's treatment records include treatment and hospitalization records from Southeastern Ohio Regional Medical Center (May 1998-August 2006), Riverside Hospital (April 7, 1997-April 9, 1997), and Ohio State University Cardiology of Cambridge (January 2003-April 2007). Director's Exhibits 3, 11 and 12. These records include treatment for, and diagnosis of, pleural effusion, chronic obstructive pulmonary disease, emphysema, excessive tobacco use, coronary artery disease, coronary atherosclerosis, acute myocardial infarction, hypertension, diabetes, hypercholesterolemia, peptic ulcer disease, ischemic cardiomyopathy, and congestive heart failure. The hospital and treatment records also include documentation of coronary

Additionally, employer contends that the administrative law judge failed to evaluate properly the opinions of treating physicians pursuant to 20 C.F.R. §718.104(d)(1)-(5), in determining their credibility.

In considering claimant's treatment records, the administrative law judge found that the x-ray evidence contained therein does not address the issue of pneumoconiosis:

> None of these x-ray interpretations contains a positive reading for clinical pneumoconiosis. However, as I cannot tell from the x-ray reports if the chest x-rays were taken for the purpose of determining the existence of clinical pneumoconiosis, I give them little probative weight on the issue.

Decision and Order at 27. Regarding the biopsy evidence contained in the treatment records, the administrative law judge stated:

> I cannot determine from the biopsy report whether the biopsy was administered for the purpose of diagnosing pneumoconiosis. Accordingly, I give this biopsy report little probative weight on the issue regarding the existence of pneumoconiosis.[7]

Decision and Order at 27. Further, the administrative law judge found:

> "[t]he treatment records do not contain any medical opinions regarding [the presence or absence of] clinical or legal pneumoconiosis. Thus, the records are silent on the issue of pneumoconiosis and are not probative.

Decision and Order at 40. Regarding the CT scan evidence included in claimant's treatment records, the administrative law judge found:

> None of these interpretations contained a diagnosis of pneumoconiosis…. However, as I cannot determine whether these CT scans were administered for the purpose of diagnosing pneumoconiosis, I give these CT scan interpretations little probative weight.

Decision and Order at 47.

---

artery bypass, cardiac catherization, aortocoronary bypass, angioplasty and stent placement.

[7] The administrative law judge noted that "a small loculated pneumothorax, left lung base" was found on biopsy. Decision and Order at 27; Director's Exhibit 11 at 33.

Contrary to employer's contention, the administrative law judge acted within his discretion, as fact-finder, in according little weight to claimant's treatment records and the evidence contained therein, because he found no indication that the records were obtained for the purpose of diagnosing pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order at 27; Director's Exhibit 11. Employer's argument concerning the administrative law judge's evaluation of claimant's treatment records, and the evidence contained therein is, therefore, rejected.[8]

Employer also argues that the administrative law judge erred in discrediting Dr. Grodner's opinion that claimant does not have clinical pneumoconiosis. Employer contends that the administrative law judge erred in discrediting Dr. Grodner's opinion because it was based on Dr. Fox's negative reading of the September 12, 2007 x-ray, which was subsequently read as positive by Dr. Ahmed, a better qualified physician. The administrative law judge found that Dr. Grodner's opinion, that claimant does not suffer from clinical pneumoconiosis, was "based in large part on … Dr. Fox's interpretation[] of the September 12, 2007, chest x-ray as negative for pneumoconiosis."[9] Decision and Order at 31. The administrative law judge, however, found the September 12, 2007 x-ray to be positive, based on the interpretation of Dr. Ahmed. The administrative law judge stated, therefore, that as "Dr. Grodner's opinion regarding [the absence of] clinical pneumoconiosis is significantly based on a premise contrary to my findings, namely that the September 12, 2007 x-ray is [positive] for pneumoconiosis, I accord it little weight." Decision and Order at 31.

Employer's argument is rejected. The administrative law judge properly concluded that Dr. Grodner's opinion, finding the absence of pneumoconiosis, was

[8] As the administrative law judge permissibly accorded little weight to the medical opinions because they were not obtained for the purpose of diagnosing pneumoconiosis, we reject employer's argument that the administrative law judge should have considered the credibility of the opinions pursuant to the requirements set forth at 20 C.F.R. §718.104(d)(1)-(5).

[9] In addition, the administrative law judge noted that Dr. Grodner's opinion that claimant does not have clinical pneumoconiosis was also based on his own negative interpretation of the September 12, 2007 x-ray. The administrative law judge found, however, that the reading of Dr. Grodner was inadmissible pursuant to 20 C.F.R. §725.414. Nevertheless, the administrative law judge determined that he would consider Dr. Grodner's opinion because it was also based on Dr. Fox's interpretation of the September 12, 2007 x-ray, which was properly admitted pursuant to Section 725.414. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(en banc).

entitled to little weight as it was based on a negative interpretation of an x-ray that was subsequently read as positive for pneumoconiosis by a better qualified physician. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Accordingly, we affirm the administrative law judge's evaluation of the medical opinion evidence.[10] Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of clinical pneumoconiosis.[11] 30 U.S.C. §921(c)(4).

Finally, employer challenges the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption by showing that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. Drs. Grodner and Repsher found that claimant did not have either clinical or legal pneumoconiosis and that his disabling respiratory impairment did not, therefore, result from pneumoconiosis. The administrative law judge properly accorded little weight to their opinions, however, because their findings that claimant did not have pneumoconiosis were contrary to his own. *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(en banc); *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S.Ct. 2732 (1994), *rev'd on other grds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Employer's argument in this regard is, therefore, rejected. Because employer does not otherwise challenge the administrative law judge's finding, that employer has failed to rebut the presumption by showing that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment, that finding is affirmed. 30 U.S.C. §921(c)(4).

---

[10] Employer challenges the administrative law judge's decision to credit Dr. Schaaf's opinion, that claimant has clinical pneumoconiosis. However, as the administrative law judge found the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4), invoked, error, if any, by the administrative law judge in finding that Dr. Schaaf's opinion establishes the existence of clinical pneumoconiosis is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[11] Because we affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, we need not address employer's general argument challenging the administrative law judge's finding that employer did not also disprove the existence of legal pneumoconiosis. *Larioni*, 6 BLR at 1-1278; *see* 30 U.S.C. §921(c)(4).

In light of the foregoing, we affirm the administrative law judge's application of the Section 411(c)(4) presumption and his finding that the presumption was invoked and not rebutted.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits in an Initial Claim is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge