BRB No. 11-0707 BLA

WILBUR M. REED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SLAB FORK COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 08/30/2012
	)	
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 on Remand of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

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

Jonathan Rolfe (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (09-BLA-5091) of Administrative Law Judge Richard T. Stansell-Gamm awarding benefits on a claim filed 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, involving a subsequent claim filed on February 20, 2008,[1] is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with at least sixteen years of coal mine employment,[2] and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. In considering the merits of the claim, the administrative law judge found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). However, the administrative law judge found that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Claimant appealed, and while his appeal was pending before the Board, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's 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 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), amended by Pub. L. No.

[1] Claimant's previous claim, filed on February 6, 1984, was finally denied on August 1, 1984, because he failed to establish that he suffers from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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, 1-202 (1989) (en banc).

111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 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 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).

In light of the potential applicability of amended Section 411(c)(4), the Board vacated the administrative law judge's denial of benefits, and remanded the case for further consideration. *Reed v. Slab Fork Coal Co.*, BRB No. 10-0303 BLA/A (Feb. 18, 2011) (unpub.). The Board instructed the administrative law judge, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption.[3] *Id.*

On remand, the administrative law judge applied Section 411(c)(4),[4] and found that claimant established at least fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption. Moreover, the administrative law judge found 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 amended Section 411(c)(4) to this claim. Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that Section 411(c)(4)

[3] The Board affirmed the administrative law judge's findings that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Reed v. Slab Fork Coal Co.*, BRB No. 10-0303 BLA/A (Feb. 18, 2011) (unpub.). The Board further affirmed the administrative law judge's finding, on the merits, that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.*

[4] In light of the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge reopened the record on remand, and allowed the parties an opportunity to submit additional evidence. In response, claimant submitted three medical articles, and employer submitted Dr. Zaldivar's deposition, all of which the administrative law judge admitted into evidence. Decision and Order on Remand at 2; Employer's Exhibit 8.

may not be applied in this case. In a reply brief, employer reiterates its previous contentions.[5]

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

Application of Amended Section 411(c)(4)

Employer asserts that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 43-51. Further, employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's Brief at 31-32. Employer's contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision.

Employer next argues that the application of Section 411(c)(4) is premature, because the Department of Labor has not yet promulgated regulations implementing the amendments to the Act. Employer's Brief at 32-34. We reject this argument. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *See 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). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as the claim was filed after January 1, 2005, and was pending on March 23, 2010.[6]

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings of at least fifteen years of underground coal mine employment, and that employer did not meet its rebuttal burden to disprove the existence of pneumoconiosis under Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

In light of our affirmance of the administrative law judge's findings that claimant established fifteen years of underground 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 determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 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 at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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 Order on Remand at 5. The administrative law judge found that employer failed to establish either method of rebuttal. *Id.* at 6-18.

The administrative law judge properly found that, because the evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), employer cannot rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. Decision and Order on Remand at 14. Employer contends that the administrative law judge erred in finding that employer did not prove 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). Employer specifically argues that the administrative law judge erred in his consideration of the opinions of Drs. Zaldivar and Ghio.

Dr. Zaldivar opined that there was radiographic evidence of clinical pneumoconiosis, but he suggested that a high resolution CT scan would be useful in determining the "true etiology" of claimant's radiographic abnormalities. Director's Exhibit 14. Dr. Zaldivar stated that it was "very much conceivable that [claimant] may have a combination of simple coal workers' pneumoconiosis as a result of his years of work in the coal mines, plus interstitial fibrosis as of an as yet undetermined cause, but not related to coal mining." Director's Exhibit 11. Based upon examination findings of crackles in claimant's lungs, a decreased diffusing capacity with otherwise normal spirometry results, and a deterioration in claimant's blood gas values with exercise, Dr. Zaldivar opined that claimant's pulmonary impairment is attributable to a "pure form" of pulmonary fibrosis unrelated to his coal mine employment. Employer's Exhibit 8.

Dr. Ghio opined that there was x-ray evidence of clinical pneumoconiosis, but explained that "simple coal workers' pneumoconiosis most frequently does not affect the diffusing capacity or any other index of pulmonary function." Employer's Exhibit 1. Dr.

Ghio indicated that it is "unusual" for coal workers' pneumoconiosis to be associated with a reduced diffusing capacity. Employer's Exhibit 6 at 18. Dr. Ghio opined that it was unclear why claimant's diffusing capacity was decreased, noting that such a finding is non-specific and can be associated with numerous possible exposures and diseases. Employer's Exhibit 1.

The administrative law judge discounted Dr. Zaldivar's opinion that claimant's pulmonary impairment did not arise out of his coal mine employment, because he found that the opinion was not well-reasoned. Specifically, the administrative law judge found that Dr. Zaldivar initially relied upon the presence of crackles in claimant's lungs as a basis to exclude clinical pneumoconiosis as a cause of his totally disabling pulmonary impairment, yet later acknowledged that the presence of crackles does not exclude a diagnosis of clinical pneumoconiosis. Decision and Order on Remand at 17. The administrative law judge also found that Dr. Zaldivar's reasoning was not persuasive, because Dr. Zaldivar required qualifying[7] pulmonary function study results, in addition to qualifying arterial blood gas study results, before he would attribute claimant's pulmonary impairment to clinical pneumoconiosis.[8] Decision and Order on Remand at 17. The administrative law judge further found that Dr. Zaldivar's opinion was entitled

[7] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values

[8] The administrative law judge explained the deficiency he found in Dr. Zaldivar's reasoning:

> According to Dr. Zaldivar, since coal mine dust itself does not interfere with oxygenation capacity, coal workers' pneumoconiosis must develop into progressive massive fibrosis and produce both restrictive and obstructive impairments before oxygenation capacity is adversely affected. However . . . total disability that may later be determined to be caused by coal mine dust exposure may be established . . . through either a qualifying pulmonary function test or a qualifying arterial blood gas stud[y]. Under this regulatory structure, either test may be sufficient. Yet, under his analytical standard, in a case where a miner presents with an oxygenation deficiency, Dr. Zaldivar appears to require both a qualifying pulmonary function test and an arterial blood gas study, in addition to progressive massive fibrosis, in order to diagnose total disability due to coal workers' pneumoconiosis.

Decision and Order on Remand at 17.

to less weight as internally inconsistent. *Id.* Specifically, the administrative law judge noted that, during his 2009 deposition, Dr. Zaldivar stated that coal workers' pneumoconiosis is "not one of the fibrotic processes." Employer's Exhibit 7 at 12. However, the administrative law judge accurately noted that Dr. Zaldivar, during his 2011 deposition, characterized coal workers' pneumoconiosis as an "interstitial pulmonary fibrosis." Employer's Exhibit 8 at 35.

The administrative law judge also found that Dr. Ghio's reasoning was deficient, and that the doctor's opinion was, therefore, insufficient to establish rebuttal of the Section 411(c)(4) presumption:

> [R]elying on medical studies, Dr. Ghio stated simple clinical coal workers' pneumoconiosis "most frequently" did not cause decreased diffusion capacity and it would be "unusual" for the disease to cause that pulmonary deficiency. However, that reasoning does not definitively establish that in [claimant's] case, coal workers' pneumoconiosis did not cause a diffusion defect. In other words, Dr. Ghio did not discuss whether [claimant's] pulmonary impairment might fall into the "unusual" category.

Decision and Order on Remand at 16. The administrative law judge, therefore, found that employer failed to prove that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order on Remand at 18.

Employer contends that the administrative law judge erred in finding that Dr. Zaldivar's opinion did not establish rebuttal of the Section 411(c)(4) presumption. We disagree. The administrative law judge rationally questioned Dr. Zaldivar's opinion because the doctor initially relied upon the presence of crackles in claimant's lungs to exclude clinical pneumoconiosis as cause of claimant's impairment, but later acknowledged that this factor was not sufficient to exclude clinical pneumoconiosis. *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); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 17; Employer's Exhibit 8 at 8, 42.

The administrative law judge also found that Dr. Zaldivar required a qualifying pulmonary function study, in addition to a qualifying arterial blood gas study, before he would attribute claimant's total disability to clinical pneumoconiosis. The administrative law judge accurately noted that a totally disabling pulmonary impairment, that may be attributed to clinical pneumoconiosis, can be established by either qualifying pulmonary function studies or qualifying arterial blood gas studies. 20 C.F.R. §718.204(b)(2)(i), (ii). The administrative law judge permissibly questioned Dr. Zaldivar's opinion, because the

doctor did not adequately explain why a totally disabling pulmonary impairment evidenced by a qualifying arterial blood gas study must be accompanied by a qualifying pulmonary function study, before the impairment can be attributed to clinical pneumoconiosis. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order on Remand at 17. Finally, the administrative law judge permissibly found that the probative value of Dr. Zaldivar's opinion was called into question, in light of the inconsistencies in Dr. Zaldivar's deposition testimony. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order on Remand at 17.

We also reject employer's contention that the administrative law judge erred in finding that Dr. Ghio's opinion did not establish rebuttal. The administrative law judge permissibly accorded less weight to Dr. Ghio's opinion because the doctor did not definitively address whether coal workers' pneumoconiosis caused a diffusion defect in claimant's case, opining only that clinical pneumoconiosis "most frequently" does not cause a decrease in diffusion capacity.[9] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 312 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order on Remand at 16.

The administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence, *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993), and the Board is not empowered to reweigh the evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999). As the administrative law judge properly considered the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses, *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274, we affirm the administrative law judge's finding that employer failed to meet its burden to establish that claimant's respiratory impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4). We, therefore, affirm the award of benefits.

[9] Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Zaldivar and Ghio regarding the cause of claimant's respiratory impairment, we need not address employer's remaining arguments regarding the weight accorded to those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge