BRB No. 11-0756 BLA

NORWOOD E. BUCKNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HIGH POWER ENERGY	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	DATE ISSUED: 08/23/2012
	)	
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.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5136) of Administrative Law Judge Richard A. Morgan on a subsequent

claim filed pursuant to the provisions of 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 administrative law judge credited claimant with at least twenty-seven years of qualifying coal mine employment, and adjudicated this claim, filed on December 4, 2008, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that new evidence submitted in support of this subsequent claim established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[1] Considering the entire record, the administrative law judge found that the new evidence outweighed the earlier evidence, and that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §§921(c)(4), as amended by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556(a) (2010).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption.[3] Accordingly, benefits were awarded.

On appeal, employer challenges the constitutionality of the PPACA. Employer also argues that the application of amended Section 411(c)(4) to this case is premature for

[1] The administrative law judge determined that claimant's original claim, filed on December 18, 2001, was denied by the district director because the evidence, while sufficient to establish the existence of pneumoconiosis, was insufficient to establish total respiratory disability due to pneumoconiosis. Decision and Order at 2; Director's Exhibit 1.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), 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.

[3] The administrative law judge placed the burden of proof on claimant and found that the weight of the evidence established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 16-22. Upon invocation of the amended Section 411(c)(4) presumption, however, the burden shifts to employer to rebut the presumption with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

lack of implementing regulations, and constitutes a denial of due process and an unconstitutional taking of private property. Further, employer maintains that the limitations on rebuttal evidence under amended Section 411(c)(4) are inapplicable to coal mine operators. On the merits of entitlement, employer challenges the administrative law judge's weighing of the evidence in finding it sufficient to establish invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), with no rebuttal. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's challenges to the PPACA and the administrative law judge's application of amended Section 411(c)(4) to this case.[4]

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).

Subsequent to the filing of employer's brief, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,[5] has rejected employer's argument that retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012) (No. 11-1342); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Further, the Board has held that the rebuttal provisions of amended Section 411(c)(4) apply to claims brought against responsible operators, and we decline to revisit this issue. *See Owens v. Mingo Logan Coal Co.*, 25

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least twenty-seven years of qualifying coal mine employment, either working underground or in conditions that were substantially similar to those in an underground coal mine. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 26-27.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibits 1, 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011). Lastly, the absence of implementing regulations does not bar application of amended Section 411(c)(4), as the mandatory language therein is self-executing. *See Mathews v. Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Thus, the administrative law judge properly found that the provisions of amended Section 411(c)(4) are applicable to this claim.

Turning to the merits of entitlement, employer contends that the administrative law judge, in finding invocation of the amended Section 411(c)(4) presumption established, erred in weighing the evidence relevant to total respiratory disability pursuant to Section 718.204(b). Specifically, employer maintains that the administrative law judge: (1) failed to resolve the conflict in the blood gas study evidence; (2) failed to explicitly determine whether claimant was totally and permanently disabled by a chronic respiratory or pulmonary impairment, rather than disabled by any cause or by a combination of respiratory and non-respiratory impairments; and (3) failed to provide an adequate rationale for discounting the opinion of Dr. Zaldivar, that claimant had no respiratory or pulmonary impairment whatsoever, and for relying on the opinions of Drs. Rasmussen, Gaziano and Bellotte to support a finding of total disability. Employer's Brief at 10-15. Employer's arguments have merit.

In evaluating the evidence at Section 718.204(b), the administrative law judge acknowledged that the record contained no evidence of cor pulmonale with right-sided congestive heart failure; that none of the pulmonary function studies of record produced qualifying results; that the blood gas studies conducted by Dr. Bellotte in June 2009 and by Dr. Zaldivar in December 2009 produced non-qualifying results; and that only the exercise portion of the blood gas study conducted by Dr. Rasmussen in February 2009 produced a qualifying result. Decision and Order at 23. The administrative law judge did not weigh the blood gas study evidence at Section 718.204(b)(2)(ii), but proceeded to find that claimant's last coal mining positions required heavy manual labor and that the weight of the medical opinions at Section 718.204(b)(2)(iv) established that claimant is totally disabled. In so finding, the administrative law judge determined that Dr. Zaldivar was the only physician to opine that claimant is able to perform heavy labor in coal mine employment,[6] whereas Dr. Rasmussen opined that claimant is totally disabled by

[6] Employer points out that Dr. Zaldivar acknowledged claimant's non-pulmonary conditions, *i.e.*, heart disease and hypertension, and did not affirmatively state that claimant could, in fact, perform heavy labor, but merely opined that claimant could return to his previous coal mine employment "from the pulmonary standpoint." Employer's Brief at 13; Employer's Exhibit 1. Employer asserts that Dr. Zaldivar's opinion is not inconsistent with the opinion of Dr. Bellotte, who found that claimant is totally disabled by a combination of pulmonary and non-pulmonary conditions, and the opinion of Dr.

pneumoconiosis; Dr. Gaziano opined that claimant is totally disabled due to clinical pneumoconiosis and cardiovascular disease; and Dr. Bellotte opined that claimant is totally disabled from asthmatic bronchitis, hypertension and back pain. Noting that he "highly discredited Dr. Zaldivar's medical report because it lacked reasoning and sufficient conclusions" on the issue of the existence of pneumoconiosis, *see* Decision and Order at 20-22, the administrative law judge found that the opinions of Drs. Rasmussen, Gaziano and Bellotte outweighed Dr. Zaldivar's opinion and established total disability. Decision and Order at 24.

We agree with employer that the administrative law judge's weighing of the evidence under Section 718.204(b) cannot be affirmed. While entitlement is not precluded if the miner suffers from a combination of disabling conditions, claimant must still establish the presence of a respiratory or pulmonary impairment which, standing alone, prevents him from performing his usual coal mine employment or similar work. 20 C.F.R. §718.204(a), (b)(1). In determining whether total respiratory disability is established, the adjudicator must weigh the evidence in each category at Section 718.204(b)(2)(i)-(iv), and then weigh the evidence together, like and unlike. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Moreover, the issues of pneumoconiosis, total respiratory or pulmonary disability, and disability causation must be considered separately, and a finding that a physician's opinion is not well-reasoned on one issue does not necessarily indicate that the opinion cannot be credited on a separate issue. *See Luketich v. Director, OWCP*, 8 BLR 1-477 (1986). Rather, the administrative law judge is required to examine the validity of a physician's reasoning on each element of entitlement in light of the studies conducted and the underlying bases for the physician's conclusions. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). In the present case, Dr. Bellotte did not reference any specific tests to support his finding of total disability from both respiratory and non-respiratory causes. Director's Exhibit 15. However, Drs. Rasmussen and Gaziano based their findings of total disability largely on Dr. Rasmussen's exercise blood gas study results,[7] Director's Exhibit 11, Claimant's Exhibit

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Gaziano, who diagnosed clinical pneumoconiosis and reported that claimant "apparently has cardiovascular disease as well and based on the exercise testing and the cardiovascular assessment I do not believe he could perform his last coal mine work." Employer's Brief at 14; Claimant's Exhibit 1.

[7] In his narrative medical report, Dr. Rasmussen described claimant's performance on, and the results of, the incremental treadmill exercise blood gas test he conducted on February 4, 2009. Director's Exhibit 11. After reviewing claimant's medical records, Dr. Gaziano noted the discrepancy between the results of the exercise blood gas studies obtained by Drs. Rasmussen and Zaldivar, and indicated that a part of that discrepancy would be related to the higher altitude where Dr. Rasmussen's tests were done. Dr.

1, while Dr. Zaldivar reviewed Dr. Rasmussen's "terribly abnormal" testing and concluded that claimant had no permanent respiratory or pulmonary impairment because his own studies, administered later in time, produced normal results.[8] Employer's Exhibits 1, 5, 6. As the administrative law judge is charged with resolving conflicts in the evidence, and as the reliability of the objective evidence underlying a medical report is a factor that must be considered in assessing the weight of a physician's opinion, we vacate the administrative law judge's finding of total disability at Section 718.204(b), and remand the case for further consideration. Thus, we must also vacate the administrative law judge's findings that the new evidence established a change in an applicable condition of entitlement pursuant to Section 725.309(d); that claimant was entitled to invocation of the presumption at amended Section 411(c)(4); and that employer failed to establish rebuttal. On remand, the administrative law judge is directed to weigh the conflicting evidence regarding the validity and probative value of the objective tests; reevaluate and weigh the medical opinions of record in light of their reasoning and documentation; provide a detailed rationale for his crediting or discrediting of the evidence; and determine whether the weight of the evidence, like and unlike, is sufficient to establish total respiratory disability at Section 718.204(b). *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Fields*, 10 BLR at 1-21. If, on remand, the administrative law judge again determines that claimant has established total disability, a change in an applicable condition of entitlement, and invocation of the amended Section 411(c)(4) presumption, he must determine whether employer has met its burden of establishing rebuttal with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection

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Gaziano stated that he could not compare the workload of the two tests because Dr. Rasmussen's exercise test did not provide a printout, comparable pulse rate or oxygen consumption level reached, but he concluded that the blood gases achieved by Dr. Rasmussen "represent a disabling impairment of the cardiorespiratory system." Claimant's Exhibit 1.

[8] Dr. Zaldivar addressed the discrepancy between his exercise blood gas study results and those of Dr. Rasmussen, and testified at deposition that he assumed both tests were accurate. Employer's Exhibit 5 at 24. Dr. Zaldivar acknowledged that, on the stress test he administered, claimant stopped exercising prematurely, complaining of shortness of breath and dizziness. *Id.* at 21. Dr. Zaldivar questioned whether Dr. Rasmussen's "terribly abnormal" results on exercise were caused by bronchospasm or fluid retention in the lungs, *id.* at 23-24; noted that, because claimant's heart rate was higher on Dr. Rasmussen's test, claimant may have exercised more with Dr. Rasmussen, *id.* at 24, 27; and concluded that, because his own test was conducted at a later date and produced normal results, claimant's problem must have resolved, reflecting that the abnormality was not permanent. *Id.* at 24-25.

with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

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