

BRB No. 11-0760 BLA

WILLIAM THOMAS HOWELL)
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 Claimant-Respondent)
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 v.)
)
 RED HAWK MINING, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND) DATE ISSUED: 08/29/2012
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (09-BLA-5315) of Administrative Law Judge Pamela J. Lakes rendered 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 involves a claim filed on January 16, 2008. Director's Exhibit 2.

The administrative law judge credited claimant with at least twenty-six years of underground coal mine employment,¹ based on claimant's credible testimony and his Social Security earnings records, and properly noted that Congress recently 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 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. 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 the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying 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 rebut the Section 411(c)(4) presumption. Specifically, the administrative law judge found that, although employer disproved the existence of clinical pneumoconiosis,² employer failed to disprove the existence of legal

¹ The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibits 3, 6. Accordingly, the Board will apply the law 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).

² Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic

pneumoconiosis,³ or that his pulmonary or respiratory impairment “did not arise out of, or in connection with,” coal mine employment. Therefore, the administrative law judge found that employer failed to rebut the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge’s application of Section 411(c)(4) to this case. Employer further asserts that the administrative law judge erred in her analysis of the medical opinion evidence when she found that employer did not rebut the presumption.⁴ Claimant responds, urging affirmance 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 arguments regarding the application of Section 411(c)(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 supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially 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 10-22. 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 7, 24. Employer’s contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo*

reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1).

³ Legal pneumoconiosis “includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

⁴ Employer does not challenge the administrative law judge’s findings of more than twenty-six years of underground coal mine employment and that claimant is entitled to invocation of the presumption at amended Section 411(c)(4). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Logan Coal Co., BLR , BRB No. 11-0154 BLA, slip op. at 4 (Oct. 28, 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 8-10. 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, 2010.⁵ Accordingly, we turn to employer's contentions regarding rebuttal of the Section 411(c)(4) presumption.

In determining whether employer rebutted the amended Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Zaldivar, Castle, and Rasmussen. Dr. Zaldivar opined that claimant does not have clinical or legal pneumoconiosis, but suffers from obstructive lung disease due entirely to asthma and cigarette smoke-induced emphysema,⁶ unrelated to coal mine dust exposure. Director's Exhibit 12; Employer's Exhibit 12. Dr. Castle opined that claimant has obstructive airways disease and chronic bronchitis, due entirely to cigarette smoking. Employer's Exhibits 3, 11, 13. In contrast, Dr. Rasmussen diagnosed claimant with legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and emphysema, related to both coal mine dust exposure and smoking. Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibit 5.

⁵ Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending the resolution of the constitutional challenges to the Patient Protection and Affordable Health Care Act, Public Law No. 111-148 (2010), is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); Employer's Brief at 17.

⁶ The administrative law judge credited claimant's testimony that, at the time of the hearing, he was smoking about a half a pack per day, and that he had been smoking since age eighteen, although he had quit for several years at a time. Decision and Order at 4.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge found all three medical opinions deficient for selectively analyzing the medical evidence. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Castle. Employer's Brief at 26-32. We disagree. Dr. Zaldivar noted that "on one occasion, on [May 24, 2004]," pulmonary function testing indicated reversible airway obstruction after administration of bronchodilators, while his own pulmonary function study, performed on June 25, 2008, and Dr. Rasmussen's study, performed on February 14, 2008, as well as a study performed on November 6, 2006, indicated irreversible airway obstruction, with no response to bronchodilators. Director's Exhibit 12.

The administrative law judge reasonably discounted Dr. Zaldivar's opinion, in part, because Dr. Zaldivar did not adequately explain his reliance on the May 24, 2004 pulmonary function study to rule out coal mine dust exposure as a contributing cause of claimant's impairment, in light of the physician's acknowledgment that several other pulmonary function studies indicated irreversible airways obstruction. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *see also Consolidation Coal Co. v. Swiger*, 98 Fed. App'x 227 (4th Cir. May 11, 2004) (unpub.) (the fact that some of the pulmonary function studies showed reversibility does not necessarily preclude the presence of legal pneumoconiosis); Decision and Order at 10-11; Director's Exhibit 12. In addition, the administrative law judge correctly noted that while Dr. Zaldivar explained that "different patterns of pulmonary function testing allow[] a differential diagnosis," and diagnosed asthma, Dr. Zaldivar did not explain what pattern was apparent on claimant's pulmonary function testing that would support a diagnosis of asthma. *See Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-149; Decision and Order at 10; Director's Exhibit 12. Moreover, the administrative law judge reasonably found that Dr. Zaldivar did not explain his conclusion that claimant's breathing problems "will be ameliorated and perhaps even fully resolved with cessation of smoking, as well as intensive treatment with bronchodilators," Director's Exhibit 12, in light of the fact that Dr. Zaldivar's own pulmonary function testing revealed an irreversible impairment, which was not responsive to bronchodilators. *See Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-149; Decision and Order at 10. Thus, the administrative law judge concluded, as was within her discretion, that Dr. Zaldivar had not "provided a basis for ruling out the scenario that claimant's impairment is due to a combination of factors, including legal pneumoconiosis, with an asthmatic component and a cigarette-smoke induced component." *See Hicks*, 138 F.3d at 524, 21 BLR at 2-

323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-149; Decision and Order at 13.

Turning to Dr. Castle's opinion, the administrative law judge noted that Dr. Castle, in attempting to rule out coal mine dust exposure as a cause of claimant's obstructive impairment, noted that a December 23, 2009 pulmonary function study, as well as the May 24, 2004, pulmonary function study, demonstrated a significant degree of reversibility following bronchodilators; this degree of reversibility he stated was "inconsistent with a finding due to coal workers' pneumoconiosis." Employer's Exhibit 13. Contrary to employer's assertions, the administrative law judge permissibly discounted Dr. Castle's opinion because, like Dr. Zaldivar, Dr. Castle failed to adequately explain the significance of the intervening pulmonary function tests that showed little to no bronchoreversibility, or why claimant's impairment could not be due to a combination of factors, including claimant's twenty-six years of coal mine dust exposure. *Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-149; *see also Swiger*, 98 F. App'x at 237; Decision and Order at 11-12, 13.

The determination of whether a medical opinion is sufficiently documented and reasoned is a credibility matter within the purview of the administrative law judge. *Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Clark*, 12 BLR at 1-155. Here, having properly addressed the comparative credentials of the respective physicians,⁷ the documentation underlying their medical judgments, and the explanations for their conclusions, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Castle for failing to provide a sufficient "explanation for a pattern of pulmonary function testing that appeared both reversible and irreversible on different occasions." Decision and Order at 12. As the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Castle, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to rule out legal

⁷ Employer contends that the administrative law judge erred in failing to accord controlling weight to the opinions of Drs. Zaldivar and Castle, based on their superior qualifications. Employer's Brief at 35. Employer notes that Drs. Zaldivar and Castle are both Board-certified in Internal Medicine and Pulmonary Diseases, while Dr. Rasmussen is not Board-certified in Pulmonary Diseases. Employer's Brief at 35; Director's Exhibit 12; Employer's Exhibits 4, 5. This contention lacks merit. An administrative law judge is not required to defer to the physicians with superior qualifications. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). Further, a physician's qualifications do not render irrelevant that requirement that the opinion be reasoned and documented. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002).

pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See 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); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, BLR (6th Cir. 2011).

Finally, employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption by showing that claimant's respiratory impairment did not arise out of, or in connection with, coal mine employment. Employer's Brief at 12. We disagree. In determining that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment, the administrative law judge discounted the opinions of Drs. Zaldivar and Castle for the same reasons she gave in her analysis of the legal pneumoconiosis issue. Decision and Order at 13. On appeal, employer makes the same arguments it made regarding the administrative law judge's finding that employer did not establish the absence of legal pneumoconiosis. Employer's Brief at 28-32. As we have already rejected those arguments, we affirm the administrative law judge's finding that employer did not establish that claimant's impairment did not arise out of, or in connection with, coal mine employment. *Barber*, 43 F.3d at 899, 901, 19 BLR at 2-61, 2-67; *Rose*, 614 F.2d at 936, 939, 2 BLR at 2-38, 2-43.

Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the presumption at amended Section 411(c)(4) by establishing that claimant does not have pneumoconiosis, or that his impairment did not arise out of his coal mine employment. 30 U.S.C. §921(c)(4). Thus, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge