BRB No. 11-0765 BLA

JAMES E. STOREY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B & G CONSTRUCTION COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 08/22/2012
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 – Awarding Benefits of Michael Lesniak, Administrative Law Judge, United States Department of Labor.

Preston T. Younkins, Kittanning, Pennsylvania, for claimant.

Edward K. Dixon and Ryan M. Krescanko (Zimmer Kunz, P.L.L.C.), Pittsburgh, Pennsylvania, for employer.

Ann Marie Scarpino (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 – Awarding Benefits (09-BLA-5496) of Administrative Law Judge Michael Lesniak 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 subsequent claim filed on April 9, 2008.[1] Director's Exhibit 4.

While the case was pending before the Office of Administrative Law Judges, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this 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). 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).

In a Decision and Order issued on July 19, 2011, the administrative law judge credited claimant with 29.39 years of coal mine employment, pursuant to the parties' stipulation.[2] The administrative law judge found that the medical evidence developed since the denial of claimant's last claim established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Further, the administrative law judge determined that claimant's coal mine employment at a surface mine took place in dusty conditions that were substantially similar to those in an underground mine. Because claimant established more than fifteen years of qualifying coal mine employment and that he is totally disabled, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption

[1] Claimant filed two previous claims, both of which were finally denied. His first claim, filed on May 7, 1979, was denied by the district director on July 11, 1980, because the evidence did not establish the existence of pneumoconiosis, that claimant was totally disabled, or that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant's second claim, filed on January 3, 1989, was denied by the district director on June 23, 1989, because claimant did not establish total disability. Director's Exhibit 2.

[2] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 8. 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 (1989) (en banc).

of total disability due to pneumoconiosis. The administrative law judge further found that employer did not establish that claimant does not have pneumoconiosis, or that his impairment did not arise out of, or in connection with, coal mine employment. Therefore, the administrative law judge determined that employer did not rebut the Section 411(c)(4) 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 asserts that the administrative law judge erred in finding that claimant's aboveground employment at a surface mine was substantially similar to underground coal mine employment. Additionally, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant is totally disabled. Finally, employer contends that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's challenge to the application of amended Section 411(c)(4), and to affirm the administrative law judge's finding that claimant's aboveground coal mine employment was substantially similar to underground mining. Employer restates its position in a reply brief.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's last claim was denied because he did not establish total disability. Director's Exhibit 2. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2),(3). The administrative law judge found that the new evidence established total disability,

demonstrating both a change in the applicable condition, and a necessary fact for invocation of the Section 411(c)(4) presumption.

Employer contends that the retroactive application of 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 19-26. Employer's contentions are substantially similar to the ones recently rejected by the United States Court of Appeals for the Third Circuit. *See B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 254-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-76-85 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. , (U.S. May 4, 2012) (No. 11-1342), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *Keene v. Consolidation Coal Co*., 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Campbell*, we reject employer's arguments. Consequently, we affirm the administrative law judge's application of Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

We next consider employer's challenge to the administrative law judge's finding that claimant's aboveground coal mine employment was substantially similar to underground coal mine employment. To establish that his or her work conditions were substantially similar to those in an underground mine, a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

In this case, the administrative law judge found that claimant's testimony and the documentary evidence established that claimant's work took place in dusty conditions comparable to those in an underground mine:

> I find that the miner's job was similar to those performed in an underground mine and exposed the Miner to comparable levels of dust, based on typical testimony by underground coal miners, who similarly complain about breathing dusty air and returning home covered with black dust. While the miner was often operating machinery, the record contains evidence that the cab of the machinery was open, exposing the miner to high levels of dust produced by moving coal. Based on this evidence, I find Claimant has met his burden establishing comparability between the surface mining operation and the operations of an underground coal mine.

> The miner's above ground work was substantially similar to underground coal mine employment . . . .

Decision and Order at 7.

Employer argues that substantial evidence does not support the administrative law judge's finding that claimant's aboveground coal mine employment was substantially similar to underground coal mine employment. Employer's Brief at 16-18. We disagree. The administrative law judge properly considered claimant's unrefuted testimony regarding the conditions in his aboveground coal mine employment, along with the physicians' comments regarding claimant's work conditions,[3] and compared that information with his knowledge of the conditions that prevail in underground coal mine employment. S*ee Leachman*, 855 F.2d at 512. Based on that comparison, the administrative law judge rationally determined that claimant's aboveground coal mine employment was substantially similar to underground coal mine employment. 30 U.S.C. §921(c)(4); *see Leachman*, 855 F.2d at 512. As substantial evidence supports the administrative law judge's finding of more than fifteen years of qualifying coal mine employment, the finding is affirmed.

We next turn to employer's challenges to the administrative law judge's evaluation of the new medical evidence regarding total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge found that the three new pulmonary

[3] Claimant described his coal mine employment as "very dirty and dusty." Director's Exhibit 6. At the hearing, claimant testified that he worked as a heavy equipment operator and he "always got the dirty jobs." Hearing Transcript at 10. He also stated that when he bathed after work, "it would be just as black as coal." *Id*. at 11. An employment history narrative attached to Dr. Celko's report described claimant's dust exposure in his coal mine employment. Director's Exhibit 11. According to the narrative, claimant's coal mine employment at the tipple for "Plumber Toy" in 1955 involved "moderate" coal dust exposure, and when claimant worked as a general laborer for "M & E," from 1955 to 1957, the "[c]oal dust exposure was extreme with the most exposure when working in the pit." *Id*. In addition, claimant's coal mine employment with employer, from 1957-1987, during which he operated a bulldozer, a grader, and a "high lift," involved "[e]xtreme dust exposure . . . from dirt and coal." Director's Exhibit 11. Dr. Kaplan reported that claimant worked in an open cab at a strip mine, that he was not given a protective dust mask, and that he was exposed to very dusty conditions at times. Employer's Exhibit 1.

function studies all yielded qualifying[4] values pre-bronchodilator, and that the most recent pulmonary function study, dated April 10, 2009, yielded qualifying values both pre- and post-bronchodilator, pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge further found that the two new blood gas studies were non-qualifying pursuant to 20 C.F.R. §718.204(b)(2)(ii), and that there was no new evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Turning to the two new medical opinions from Drs. Celko[5] and Kaplan[6] pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that "Dr. Kaplan based his finding of [total] disability on the miner's spirometry results, which showed severe airflow obstruction nonresponsive to bronchodilators." Decision and Order at 6. The administrative law judge found that Dr. Celko's opinion, that claimant is not totally disabled, was conclusory and not well-reasoned, because Dr. Celko did not "provide a basis for his opinion or explain his opinion in light of the objective test results." Decision and Order at 6. Based on the new pulmonary function study evidence and Dr. Kaplan's new opinion, the administrative law judge found that claimant established that he is totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2).

As the administrative law judge found, Dr. Celko did not explain the basis for his opinion that claimant is not totally disabled. Director's Exhibit 11. Because the determination of whether a medical opinion is adequately reasoned is committed to the

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[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

[5] Dr. Celko examined and tested claimant on July 3, 2008. Dr. Celko diagnosed claimant with a "mild obstructive vent[ilatory] pattern," based on a pulmonary function study, and opined that claimant was "[n]ot disabled from [his] last coal mining job or equivalent employment." Director's Exhibit 11.

[6] Dr. Kaplan examined and tested claimant on April 10, 2009. Dr. Kaplan stated that claimant's pulmonary function study "demonstrates severe airflow obstruction nonresponsive to bronchodilators. Lung volumes were normal. Diffusing capacity was normal." Employer's Exhibit 1. Dr. Kaplan opined that claimant is "quite impaired on account of his poor eyesight and difficulty with balance . . . . However, as an isolated abnormality, the degree of lung impairment he has would restrict him from working as a min[e]r." *Id.*

discretion of the administrative law judge, *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), we affirm the administrative law judge's permissible determination that Dr. Celko's opinion merited less weight as inadequately explained.[7]

Employer next asserts that the administrative law judge mischaracterized Dr. Kaplan's opinion as a diagnosis of total disability. Employer's Brief at 11-14. We disagree. Based on claimant's pulmonary function study results, Dr. Kaplan stated that "the degree of lung impairment [claimant] has would restrict him from working as a min[e]r." Employer's Exhibit 1. In view of Dr. Kaplan's diagnosis of a disabling lung impairment, we reject employer's assertion that the administrative law judge misconstrued Dr. Kaplan's opinion. We also reject employer's argument that it is unclear to what extent the blood gas studies were considered, because "the administrative law judge failed to discuss them at all." Employer's Brief at 15. Contrary to employer's contention, the administrative law judge considered the new blood gas studies, Decision and Order at 4, and noted that none of the tests yielded qualifying results. *Id.* at 6.

As employer raises no other challenge to the finding of total disability, we affirm the administrative law judge's finding that the new evidence established the existence of a totally disabling respiratory impairment 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). Therefore, we affirm the administrative law judge's finding that claimant established invocation of the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).

We next consider employer's challenges to the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. The administrative law judge first considered whether employer disproved the existence of pneumoconiosis. He found that the x-ray evidence is "slightly in favor of a finding of clinical pneumoconiosis,"[8] Decision and Order at 9, and that it did not support employer's burden

[7] Therefore, we need not address employer's arguments that the administrative law judge erred in labeling Dr. Celko's pulmonary function study as "qualifying," when only its pre-bronchodilator values were qualifying, and erred in noting that Dr. Celko did not appear to be familiar with claimant's job duties. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[8] "Clinical pneumoconiosis" consists of "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

of establishing that claimant does not have clinical pneumoconiosis. The administrative law judge was not persuaded by Dr. Kaplan's opinion, that claimant does not have pneumoconiosis,[9] because it was based solely on the x-ray that Dr. Kaplan interpreted as negative for pneumoconiosis. The administrative law judge found that Dr. Kaplan was not aware of "all of the other x-rays of record. . . [and] overall, the miner's x-ray evidence leans in favor of a finding of pneumoconiosis." *Id*. Therefore, the administrative law judge determined that employer did not disprove the existence of pneumoconiosis.

Employer argues that the administrative law judge erred in finding that the x-ray evidence "lean[ed] in favor of" a finding of the existence of pneumoconiosis. Employer's Brief at 19. Employer contends that, when properly considered,[10] the x-ray evidence is, at best, in equipoise as to the existence of pneumoconiosis. Employer concludes that a finding that the x-ray evidence was in equipoise invalidates the administrative law judge's rationale for discounting Dr. Kaplan's x-ray-based opinion that claimant does not have pneumoconiosis. We disagree.

If, as employer argues, the x-ray evidence is in equipoise, employer has not met its rebuttal burden of proving that claimant does not have clinical pneumoconiosis based on the x-ray evidence. *See* 30 U.S.C. §921(c)(4). Thus, the administrative law judge's

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

[9] Dr. Celko diagnosed the miner with coal workers' pneumoconiosis. Director's Exhibit 11.

[10] Employer argues that the three x-ray readings from the prior claims, which the administrative law judge included in his analysis because he found a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d), were "plausibly irrelevant," yet the administrative law judge included them in his "head count." Employer's Brief at 18. We note that, despite alleging a "head count" of the positive and negative x-ray readings, employer acknowledges that "[t]he qualifications of the physicians were also factored in." *Id*. Employer argues further that Dr. Singh's interpretation of a December 19, 2008 x-ray should have been "rejected," as it does not meet the quality standards for x-rays. Employer's Brief at 18; Claimant's Exhibit 3. Review of the administrative law judge's Decision and Order does not reveal that the administrative law judge relied on Dr. Singh's x-ray interpretation, which was not ILO-classified. Decision and Order at 9. Employer, however, asserts that if Dr. Singh's interpretation had been excluded, the x-ray evidence would be in equipoise. Employer's Brief at 18-19.

conclusion regarding the x-ray evidence would remain the same: "These x-rays do not support [e]mployer's argument that the miner does not have clinical pneumoconiosis." Decision and Order at 9. Consequently, error, if any, in the administrative law judge's evaluation of the x-ray evidence, would be harmless as it could not affect the disposition of this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413, 129 S.Ct. 1696, 1708 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Moreover, in view of this holding, we affirm the administrative law judge's finding that Dr. Kaplan's x-ray-based opinion, that claimant does not have pneumoconiosis, was insufficient to establish that claimant does not have clinical pneumoconiosis. The administrative law judge acted within his discretion in finding that Dr. Kaplan's opinion regarding the nonexistence of clinical pneumoconiosis was not well-documented. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, contrary to employer's contention, the administrative law judge was not bound to accept Dr. Kaplan's opinion that claimant does not have pneumoconiosis merely because the administrative law judge credited, at invocation, Dr. Kaplan's opinion that claimant is totally disabled by a respiratory impairment. *See Russell v. Bowen*, 856 F.2d 81, 83 (9th Cir. 1988)(holding that an administrative law judge who credits part of an expert's opinion need not agree with everything the expert witness says); Employer's Brief at 8-11. Therefore, we reject employer's argument that the administrative law judge selectively analyzed Dr. Kaplan's opinion by choosing to credit it only in part. Accordingly, we affirm the administrative law judge's finding that employer did not establish rebuttal by proving that claimant does not have pneumoconiosis.

The administrative law judge additionally found that employer did not establish that claimant's impairment did not arise out of his coal mine employment. Decision and Order at 9. In so finding, the administrative law judge discounted Dr. Kaplan's opinion, that claimant's respiratory disability is due solely to smoking, because Dr. Kaplan did not diagnose pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995). He further found that the opinion of Dr. Celko was not probative, because Dr. Celko did not address the cause of claimant's impairment. Additionally, he found that Dr. Paul's 1989 opinion, that claimant had a mild impairment that was due to smoking, was not probative of the cause of claimant's current, totally disabling impairment. Employer does not challenge these findings. They are therefore affirmed.[11] *Skrack v.*

[11] Therefore, we need not address employer's assertions that the administrative law judge erred by considering an allegedly incorrect smoking history, and by failing to evaluate the smoking histories relied on by the physicians. Employer's Brief at 13-14.

Island Creek Coal Co., 6 BLR 1-710 (1983). Consequently, we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge