BRB No. 11-0261 BLA

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| HERMAN H. WILLIAMS | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CONSOLIDATION COAL COMPANY | ) | DATE ISSUED: 12/29/2011 |
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| 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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

George E. Roeder III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5764) of Administrative Law Judge Adele Higgins Odegard rendered on a subsequent claim[1] 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). The administrative law judge credited claimant with more than thirty years of qualifying coal mine employment, as stipulated by the parties and supported by the record, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge found that invocation of the rebuttable presumption of total disability due to pneumoconiosis was established, and that employer failed to establish rebuttal.[2] Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the applicability of Section 1556 of the Patient Protection and Affordable Care Act (PPACA) to the case. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)). Employer further argues that, in finding that employer failed to rebut the amended Section 411(c)(4) presumption, the administrative law judge incorrectly assessed claimant's smoking history, which in turn tainted her credibility determinations with regard to the cause of claimant's disabling respiratory impairment. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's

[1] Claimant filed his present claim on September 4, 2007. Director's Exhibit 3. Claimant's previous claim, filed April 16, 1996, was denied by the district director on August 9, 1996, for failure to establish total disability due to pneumoconiosis, and was administratively closed, as abandoned, on October 29, 1996. Director's Exhibit 1 at 1, 3; Decision and Order at 20.

[2] Congress recently enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, 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, 124 Stat. 119 (2010)(to be codified at 30 U.SC. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

constitutional and procedural arguments regarding the applicability of Section 1556, and employer's request to hold the case in abeyance.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address employer's challenges to the administrative law judge's application of Section 1556 of the PPACA to this case. Employer contends that retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. We reject employer's contention for the same reason the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *see also Keene v. Consolidation Coal Co*., 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Employer further contends that the provisions of amended Section 411(c)(4) do not apply in cases where an employer is liable for benefits, as the plain language of 30 U.S.C. §921(c)(4) provides limitations on rebuttal evidence which apply only to claims brought against "the Secretary." The Board rejected the identical argument in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011). We, therefore, reject it here for the same reasons set forth in *Owens*. Lastly, consistent with our reasoning in *Mathews*, we reject employer's argument that this case should be held in abeyance pending resolution of the constitutional challenges to the PPACA in federal court. *See Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-211 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6062116 (4th Cir. Dec. 7, 2011); *Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011). Consequently, we affirm

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The administrative law judge found that claimant's coal mine employment was in West Virginia. Decision and Order at 13; Director's Exhibit 1 at 54. 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*).

the administrative law judge's application of Section 1556 to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We further affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on the administrative law judge's unchallenged findings that claimant established more than fifteen years of qualifying coal mine employment and total respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We now turn to employer's challenge to the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's disabling respiratory impairment did not arise out of employment in a coal mine. Employer argues that that the medical opinions of Drs. Spagnolo and Ghio,[5] relevant to rebuttal, were improperly discredited as inconsistent with the administrative law judge's finding as to the length and extent of claimant's smoking history. Employer maintains that claimant's testimony and the notations in his 2001 and 2007 hospitalization records contradict the administrative law judge's finding of a twenty-six pack-year smoking history, ending in 1981. Employer also argues that the administrative law judge selectively analyzed the various smoking histories recorded by Dr. Hasan, claimant's treating physician. Employer's arguments have merit.

Reviewing the conflicting evidence, the administrative law judge found that claimant reported various smoking histories, as shown in medical reports, medical treatment records, and claimant's hearing testimony. Initially, the administrative law judge found that Dr. Hasan's treatment records, covering the period from 1996-2008, "do not reflect that the Claimant was currently smoking."[6] Decision and Order at 12.

[5] Of the three medical opinions of record relevant to disability causation, Dr. Porterfield reported a non-smoking history, and diagnosed coal workers' pneumoconiosis caused by coal dust exposure. Dr. Ghio considered a twenty to twenty-five pack-year history, and stated that claimant "may have stopped smoking by 1982." Dr. Spagnolo relied on "a long history of smoking," comprised of at least twenty-six pack-years, based on Dr. Rasmussen's 1996 report. Dr. Spagnolo also presumed that claimant was still smoking, based on claimant's 2001 and 2007 hospitalization records, and the results of claimant's 2007 spirometry testing. Drs. Ghio and Spagnolo opined that claimant's totally disabling respiratory impairment is due to smoking and not to coal dust exposure. Decision and Order at 11-12, 18-19; Director's Exhibits 1 at 15, 11 at 14; Employer's Exhibits 4 at 17-18, 5 at 3, 6 at 5, 7 at 1.

[6] Treatment notes dated June 7, 1985, August 29, 1988, and June 28, 1993 reported that claimant is an ex-smoker. *See* Employer's Exhibit 3 at 8, 9, 14. Dr. Hasan's treatment notes dated May 20, 1996, October 18, 2007 and January 28, 2008 indicate that claimant is a non-smoker. *See* Employer's Exhibit 3 at 24, 27, 151.

Additionally, she found that the treatment records, "which date back to the late 1980's, are relatively consistent with the report the Claimant made to Dr. Rasmussen in 1996 [*i.e.*, that he stopped smoking in 1981]." *Id.* at 12-13. She next reviewed hospital admission records of December 12, 2001, including Dr. Hasan's admission documentation, and Dr. Dy's consultation report, which reflected, respectively: "He is a smoker" and "He smokes." Employer's Exhibits 2 at 13, 16; 3 at 162. The administrative law judge concluded: "I have no explanation for these notations, which are inconsistent with the claimant's other medical treatment records." Decision and Order at 13. Next, the administrative law judge reviewed claimant's March 22, 2007 hospitalization records, including admitting physician Dr. Hasan's March 22, 2007 notation "The patient is a widower. He is a smoker," and Dr. Vaught's March 23, 2007 consulting report, noting that claimant "lives with his wife." Decision and Order at 12; Employer's Exhibits 2, 3 at 154, 157. The administrative law judge "excluded" the 2007 hospitalization records as not credible because they conflicted as to claimant's marital status. However, she credited the smoking history of twenty-six years pack-years, ending in 1981, recorded by Dr. Ramussen in his 1996 pulmonary evaluation, as "likely accurate," although she found that claimant's 2009 hearing testimony on the issue of his smoking history was not credible.[7] Decision and Order at 13; Director's Exhibit 1.

We agree with employer that the administrative law judge's findings concerning claimant's smoking history cannot be affirmed. First, the administrative law judge has failed to explain her determination to credit Dr. Hasan's treatment records over the hospitalization records recorded by Dr. Hasan, although they both appear to be comprehensive and contemporaneous. Nor has she provided an adequate rationale for her discounting of Dr. Hasan's later records in favor of his earlier records dating from 1996, in view of his documentation of claimant's current smoking in the 2001 and 2007 hospitalization records. *See* Decision and Order at 12. The administrative law judge additionally failed to explain why Dr. Hasan's treatment records were credited over Dr. Dy's notation in claimant's 2001 hospitalization records that "[Claimant] smokes," given that Dr. Hasan also recorded that claimant "is a smoker" in both the 1981 and the 1987 hospitalization records. Employer's Exhibit 3 at 157. Next, the administrative law judge's discrediting of Dr. Hasan's 2007 hospitalization records, on the basis of a conflicting statement in Dr. Vaught's report regarding claimant's marital status, is not warranted, since the accuracy of Dr. Vaught's information does not reflect on that of Dr. Hasan. Moreover, the administrative law judge's crediting of medical records from 1987 and 1988, indicating that claimant was bothered by cigarette smoke and dust, lends no particular support to her finding that claimant last smoked in 1981, in view of evidence

[7] Claimant testified, variously, that he began smoking "back when I was young," never had a habit of smoking, and smoked some cigarettes but never inhaled. He affirmed that he was no longer smoking, had not smoked "in at least four years," and could not remember when he stopped smoking. Hearing Transcript at 21-23.

suggesting that he was a smoker at later dates, including claimant's 2009 hearing testimony that he had not smoked "for at least four years." Hearing Transcript at 23; Decision and Order at 12. Lastly, while the administrative law judge relied on the smoking history provided in 1996 by claimant to Dr. Rasmussen, which supports a finding that the miner initially stopped smoking in 1981, the administrative law judge failed to adequately address subsequent evidence indicating that the miner may have resumed smoking during some periods of time since the 1996 report. As the administrative law judge did not provide valid reasons for her credibility determinations, we vacate her finding that claimant smoked for twenty-six pack-years, and last smoked in 1981. Further, because the administrative law judge discredited the opinions of Drs. Spagnolo and Ghio in whole or in part on the ground that they relied on an inaccurate smoking history, we vacate the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis by establishing that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. On remand, the administrative law judge is instructed to reassess the evidence of record relevant to the issues of the length and extent of claimant's smoking history and rebuttal of the amended Section 411(c)(4) presumption, and to fully explain the basis for her findings of fact and conclusions of law, as required by the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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