BRB No. 12-0142 BLA

BARBARA R. ARTRIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 12/21/2012
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (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 (2010-BLA-5726) of Administrative Law Judge Linda S. Chapman awarding benefits on a subsequent claim[1] filed pursuant to

[1] Claimant filed her first claim on November 8, 2004. Director's Exhibit 1. On August 30, 2007, Administrative Law Judge William S. Colwell issued a Decision and Order denying benefits, based on claimant's failure to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis. *Id*. The Board affirmed Judge

the provisions of Title IV 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 at least 21 years of qualifying coal mine employment and noted that employer conceded total respiratory disability. The administrative law judge therefore found that claimant invoked the rebuttable presumption that her total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that claimant invoked the rebuttable presumption that her total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of total disability due to pneumoconiosis. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge failed to apply the proper standard for rebuttal of the amended Section 411(c)(4) presumption.

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.[2] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that she is totally disabled due to

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Colwell's denial of benefits. *B.R.A.* [*Artrip*] *v. Clinchfield Coal Co.*, BRB No. 07-1001 BLA (Aug. 21, 2008)(unpub.). Because claimant did not pursue this claim any further, the denial became final. Claimant filed this claim on August 31, 2009. Director's Exhibit 3.

[2] The record indicates that claimant was employed in the coal mining industry in Virginia. Director's Exhibits 1, 4. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The amendments, in pertinent part, 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, that her death was due to pneumoconiosis, or that at the time of her death she was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we affirm the administrative law judge's application of Section 1556 of the PPACA to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We also affirm the administrative law judge's unchallenged finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on her determination that claimant established at least 21 years of qualifying coal mine employment and employer's concession to total respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Additionally, we affirm the administrative law judge's unchallenged finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack*, 6 BLR at 1-711.

Furthermore, with regard to rebuttal of the amended Section 411(c)(4) presumption, we affirm the administrative law judge's unchallenged finding that employer did not establish the absence of pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

Next, we address employer's contention that the administrative law judge erred in finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of total disability due to pneumoconiosis. The administrative law judge considered the reports of Drs. Forehand, Fino, and Castle, as well as the treatment records.[3] Dr. Forehand's opinion, that claimant's coal dust exposure

[3] The administrative law judge found that the treatment records are insufficient to assist employer in establishing that claimant's totally disabling respiratory impairment is not due to coal mine dust exposure. Decision and Order at 18. No party challenges the administrative law judge's consideration of the treatment records.

contributed to her respiratory impairment,[4] would not support rebuttal of the presumption. By contrast, the opinions of Drs. Fino and Castle, that neither coal workers' pneumoconiosis nor a disease induced by coal mine dust contributed to claimant's disabling respiratory impairment, would support rebuttal of the presumption.[5] The administrative law judge found that the opinions of Drs. Fino and Castle were insufficient to meet employer's burden of establishing the absence of disability causation. Hence, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption.

Employer asserts that the administrative law judge erred in discrediting Dr. Fino's opinion because it was equivocal. We disagree. After stating that Dr. Fino concluded that claimant's July 14, 2006 and August 16, 2007 CT scans showed diffuse bullous emphysema,[6] but no changes consistent with irregular opacities as suggested on the chest x-ray, the administrative law judge noted Dr. Fino's finding that the CT scans ruled out coal workers' pneumoconiosis radiographically and any interstitial abnormalities due to any type of interstitial pulmonary fibrosis. The administrative law judge then stated:

> Dr. Fino also concluded that [claimant's] obstructive abnormality "could be explained" by bullous emphysema seen on CT scan, and that her reduction in diffusing capacity and impairment in oxygen transfer were "consistent with" emphysema. He concluded that [claimant] has a "fairly classic" picture for bullous emphysema, with irreversible obstruction and a

[4] Dr. Forehand opined that claimant's coal workers' pneumoconiosis related to coal dust exposure contributed to her totally disabling respiratory impairment. Director's Exhibit 11.

[5] Dr. Fino opined that claimant's disabling respiratory impairment is due to a type of emphysema that is related to cigarette smoking. Director's Exhibit 14; Employer's Exhibit 3. Further, Dr. Fino opined that the inhalation of coal dust by claimant played no role in her disability. Director's Exhibit 14. Dr. Castle opined that claimant is totally disabled as a result of bullous pulmonary emphysema induced by tobacco smoke, and not by coal mine dust. Employer's Exhibit 1.

[6] In summarizing Dr. Fino's report, the administrative law judge noted: "Dr. Fino stated that bullous emphysema can be hereditary or congenital, or related to smoking, but it is not caused by coal mine dust. Bullous emphysema has not been associated with coal mine dust or legal pneumoconiosis. Coal dust does not produce huge bullae, except with progressive massive fibrosis. In bullous emphysema due to smoking or heredity, it is a diffuse process that generally affects the upper and middle portions of the lung, but primarily the upper portions with destruction diffusely throughout the chest." Decision and Order at 8.

> significant impairment in oxygen transfer, and clear evidence of bullous emphysema on CT scan. But he stated that bullous emphysema is not a type associated with coal dust inhalation, citing to a 1994 study by Dr. Leigh.

Decision and Order at 16. The administrative law judge further stated:

> Although Dr. Fino acknowledged that coal dust exposure can cause some types of emphysema, generally in the centrilobular area, he concluded that the "prime abnormality" shown on her CT scan was diffuse bullous emphysema, and that her pulmonary function study results were "most compatible with" bullous emphysema. Dr. Fino also stated that [claimant's] hypoxemia was "quite consistent" with bullous emphysema.

Id. The administrative law judge also found that, "although Dr. Fino paid lip service to the concept that coal mine dust can result in emphysema, he clearly relied on his belief that there must be x-ray evidence to support a finding of emphysema or obstructive disease caused by coal dust exposure." *Id*. at 18. Thus, the administrative law judge permissibly discredited Dr. Fino's opinion because it is in conflict with the spirit of the Act.[7] *Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350 (1985); *Hoffman v. B& G. Construction Co.*, 8 BLR 1-65 (1985). Consequently, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Fino's opinion because it was equivocal.

Employer also asserts that the administrative law judge erred in discrediting Dr. Castle's opinion because, employer alleges, she focused on the absence of a minute detail that is not a key component of the doctor's opinion. Employer maintains that "it remains Dr. Castle's well-reasoned conclusion that claimant's objective testing did not show a coal dust-related impairment" despite the doctor's failure to explain what changes would be expected if her impairment were caused by coal dust exposure. Employer's Brief at 10.

In considering Dr. Castle's opinion with regard to rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge stated:

[7] After finding that Dr. Fino relied on his belief that there must be x-ray evidence to support a finding of emphysema or an obstructive disease related to coal dust exposure, the administrative law judge stated, "[b]ut the Act recognizes that a miner can establish that his or her obstructive disease is the result of coal dust exposure in the absence of x-ray evidence of 'dust deposition.'" Decision and Order at 18.

> According to Dr. Castle, [claimant's] pulmonary findings were indicative of significant airway obstruction, and her appearance was that of a person with pulmonary emphysema as opposed to chronic bronchitis; the digital x-ray reviewed by Dr. Meyer also showed emphysema. Dr. Castle thought that these pulmonary function study results were "consistent with" bullous emphysema, and that her findings were "clearly" those of pulmonary emphysema due to cigarette smoking. Although he stated that they were the opposite of what would be expected in a coal mine dust induced lung disease, Dr. Castle did not further elaborate on just what *would* be expected with a coal mine dust induced lung disease.

Decision and Order at 16-17. The administrative law judge further stated:

> Dr. Castle also thought that [claimant's] arterial blood gas tests were "consistent with" a disabling gas exchange impairment and bullous emphysema due to smoking. He acknowledged that the severe reduction in diffusing capacity *could be* consistent with a coal dust related lung impairment, but that the etiology could not be determined on that finding alone. Rather, it had to be considered in context with other testing, which did not show the changes expected with a coal mine dust induced lung disease. Dr. Castle stated that the only "logical conclusion" was that the arterial blood gas results were due to underlying emphysema. But again, Dr. Castle did not indicate just what changes would be expected if [claimant] had a coal mine dust induced lung disease. Nor did Dr. Castle discuss the relationship between [claimant's] history of asthmatic bronchitis and her significant history of exposure to coal mine dust.

Id. at 17.

Thus, the administrative law judge permissibly found that Dr. Castle's opinion was insufficient to meet employer's burden of establishing rebuttal of the presumption because it was not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Consequently, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Castle's opinion on this ground. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer further asserts that the administrative law judge failed to apply the proper rebuttal standard at amended Section 411(c)(4). After noting that claimant had successfully invoked the amended Section 411(c)(4) presumption, the administrative law judge properly found that "[t]he burden now shifts to the [e]mployer to demonstrate, by a

preponderance of the evidence,…that [claimant's] totally disabling respiratory or pulmonary impairment did not arise out of her coal mine employment." Decision and Order at 14. Moreover, the administrative law judge applied the rule out standard, as she found that Dr. Fino's opinion was insufficient to meet employer's burden to rule out coal dust as a contributing factor in claimant's disabling respiratory impairment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Thus, we reject employer's assertion that the administrative law judge failed to apply the proper rebuttal standard at amended Section 411(c)(4).

Employer additionally asserts that the administrative law judge erred in applying a greater level of scrutiny to the opinions of Drs. Fino and Castle than to Dr. Forehand's contrary opinion. In considering rebuttal of the presumption, the administrative law judge noted:

> In this case, Dr. Forehand concluded that [claimant] has a mechanical respiratory impairment, resulting in a reduced FEV1, due to damage from cigarette smoking, and a gas exchange impairment, due to coal dust exposure. Both of these factors have substantially damaged her lungs, and if she had not been employed in coal mining, the impairment would not be as great.

Decision and Order at 16. The administrative law judge also noted that Drs. Fino and Castle concluded that claimant's respiratory impairment is caused by bullous emphysema that is not related to coal dust exposure. The administrative law judge then found that the opinions of Drs. Fino and Castle were insufficient to meet employer's burden of establishing that coal dust exposure did not contribute to claimant's totally disabling respiratory impairment. Thus, while the administrative law judge noted Dr. Forehand's conclusions, she did not weigh the opinions of Drs. Fino and Castle against Dr. Forehand's contrary opinion. Consequently, we reject employer's assertion that the administrative law judge erred in applying a greater level of scrutiny to the opinions of Drs. Fino and Castle than to Dr. Forehand's contrary opinion. We, therefore, affirm the administrative law judge's findings that employer failed to establish the absence of total disability due to pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[8]

[8] Employer asserts that Dr. Forehand's opinion is not reasoned because it "offers no explanation as to how coal dust caused claimant's disability." Employer's Brief at 12. In view of our holdings that the administrative law judge permissibly discredited Dr. Fino's opinion because it is in conflict with the spirit of the Act, *Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350 (1985); *Hoffman v. B&G. Construction Co.*, 8 BLR 1-65 (1985), and that she permissibly discredited Dr. Castle's opinion because it is not reasoned, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc), we need not

Furthermore, because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing either that claimant does not have pneumoconiosis, or that claimant's total disability is not due to pneumoconiosis, we affirm the administrative law judge's award of benefits.

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

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

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address employer's assertion that Dr. Forehand's opinion is not reasoned. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).