BRB No. 12-0151 BLA

ORA ATWELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOL of KENTUCKY, INCORPORATED	)	DATE ISSUED: 12/21/2012
	)	
and	)	
	)	
NATIONAL FIRE INSURANCE COMPANY, c/o CHARTERIS	)	
	)	
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 Michael Lesniak, Administrative Law Judge, United States Department of Labor.

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

Richard A. Seid (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 (2009-BLA-05888) of Administrative Law Judge Michael Lesniak rendered on a subsequent claim filed on November 3, 2008[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] The administrative law judge credited claimant with twenty-six years of underground coal mine employment, and found that new evidence established total respiratory 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. 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). The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of the PPACA and the severability of its non-health care provisions, and requests that this case be held in abeyance pending resolution of the constitutional challenges to the PPACA. Employer also argues that the application of amended Section 411(c)(4) to this case is premature for lack of implementing regulations, and constitutes a denial of due process and an

[1] Claimant's original claim, filed on August 26, 1985, was denied by Administrative Law Judge John J. Forbes, Jr., on December 30, 1988, for failure to establish any element of entitlement. Director's Exhibit 1. Claimant's second claim, filed on June 26, 1990, was denied by the district director on December 18, 1990, for failure to establish any element of entitlement or a material change in conditions pursuant to 20 C.F.R. §725.309. Director's Exhibit 2. Claimant's third claim, filed on July 11, 2002, was denied by the district director on May 15, 2003, for failure to establish any element of entitlement. Director's Exhibit 3.

[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). *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). 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. If the presumption is successfully invoked, the burden of proof shifts to employer to rebut the presumption by affirmatively proving that the miner did not have pneumoconiosis, or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. *See Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

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 relevant to rebuttal under amended Section 411(c)(4). Claimant has not filed a response in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's constitutional arguments and deny its request to hold this 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 supported by substantial evidence, rational, 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 & 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. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); *Rose v. Trojan Mining & Processing*, BLR , BRB No. 12-0001 BLA (Oct. 24, 2012). Consequently, employer's request to hold this case in abeyance pending resolution of the legal challenges to the PPACA is moot. *Id*. We also reject 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, for the reasons set forth 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 Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, for the reasons set forth in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings of twenty-six years of underground coal mine employment, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Decision and Order at 12; Director's Exhibit 6.

Dec. 29, 2010), we reject employer's argument that the rebuttal provisions at amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Morrison*, 644 F.3d at 473, 25 BLR at 2-1; *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Lastly, there is no merit to employer's assertion that application of amended Section 411(c)(4) is barred, pending promulgation of implementing regulations. *See Mathews*, 24 BLR at 1-201. Thus, the administrative law judge properly found that the provisions of amended Section 411(c)(4) are applicable to this claim. As the administrative law judge's findings that the evidence establishes more than fifteen years of underground coal mine employment and total respiratory disability pursuant to Section 718.204(b)(2) are unchallenged on appeal, we affirm his finding that claimant is entitled to invocation of the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer next challenges the administrative law judge's weighing of the evidence relevant to rebuttal, arguing that the administrative law judge selectively analyzed the conflicting medical opinions of record. Employer contends that the administrative law judge improperly discredited the opinions of Drs. Hippensteel[5] and Rosenberg,[6] that claimant does not have pneumoconiosis and that his disabling respiratory impairment is unrelated to coal dust exposure, and failed to subject the contrary opinions of Drs. Habre[7] and Al-Khasawneh[8] to the same level of scrutiny. Lastly, employer asserts that the

[5] Dr. Hippensteel's findings included obesity, heart problems, chronic bronchitis, and a "purely obstructive lung disease related to his long history of cigarette smoking." Employer's Exhibit 1. Dr. Hippensteel concluded that claimant's obstructive lung impairment is sufficient by itself to prevent him from performing his usual coal mine employment, but that claimant does not have clinical or legal pneumoconiosis. Decision and Order at 8-9; Employer's Exhibits 1, 8, 11, 14.

[6] Dr. Rosenberg reviewed claimant's medical records, and opined that claimant does not have clinical or legal pneumoconiosis, but suffers severe and disabling chronic obstructive pulmonary disease due to smoking. Decision and Order at 9-10; Employer's Exhibits 5, 12, 15.

[7] Dr. Habre treated claimant for his breathing problems and diagnosed "both smoke induced lung disease and coal induced lung disease." Decision and Order at 6; Claimant's Exhibit 8.

[8] Dr. Khaled Al-Khasawneh, referenced by the administrative law judge as Dr. Khal, diagnosed clinical and legal pneumoconiosis, and opined that both smoking and coal dust exposure significantly contributed to claimant's totally disabling pulmonary impairment. Decision and Order at 8; Claimant's Exhibit 2.

administrative law judge failed to adequately address claimant's smoking history. Employer's arguments lack merit.

Initially, we reject employer's argument that the administrative law judge erred in failing to "address and resolve the [c]laimant's profound cigarette smoking" and "make a conclusion from [claimant's] testimony and the relevant evidence of record." Employer's Brief at 42-43. The administrative law judge accurately summarized claimant's testimony with regard to the duration and extent of his smoking habit, Decision and Order at 3, Hearing Transcript at 16-17, and the smoking histories relied upon by the various physicians were generally consistent with claimant's testimony and with each other.[9] As employer has not shown that a significant unresolved issue exists as to the extent of claimant's smoking history, or that reliance on an inaccurate smoking history materially affected any physician's ability to render an opinion on the issues of pneumoconiosis and disability causation, employer's argument is rejected.

In evaluating the conflicting medical opinions of record relevant to rebuttal, the administrative law judge properly reviewed the physicians' rationales for their conclusions to determine whether they were consistent with the conclusions contained in the medical literature and scientific studies relied upon by the Department of Labor (DOL) in drafting the definition of legal pneumoconiosis.[10] *See* 20 C.F.R. §718.201(a); 65 Fed. Reg. 79,920-79,945 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). The administrative law

[9] Claimant testified that he started smoking while a teenager, and smoked for twenty or thirty years at the rate of approximately one-half pack per day while working, and a pack and a half per day otherwise. Decision and Order at 3. Dr. Hippensteel relied on a smoking history of 0.5 to 1.5 pack per day (ppd) from claimant's late teens until 2002. Decision and Order at 8. Dr. Habre noted 1 to 1.5 ppd for twenty or thirty years, quitting in 2002. Decision and Order at 6. Dr. Argarwal relied on 1 to 1.5 ppd between 1963 and 2002. Decision and Order at 7. Dr. Rasmussen noted a smoking history of slightly more than a pack a day from 1960 until 2002. Decision and Order at 7. Dr. Rosenberg noted various estimates indicating "well over twenty pack-years, probably in the range of forty to sixty pack-years," and relied on a "long smoking history" of over "forty pack years." Employer's Exhibits 5 at 6, 9, 12 at 9.

[10] "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory of pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

judge permissibly accorded "little probative value" to Dr. Hippensteel's opinion, that claimant's chronic bronchitis[11] was unrelated to coal dust exposure, because the physician stated that "industrial bronchitis from coal mine dust exposure usually subsides within a period of several months after leaving work in the mines, and this man stopped working in August 2000." Decision and Order at 13, 15; Employer's Exhibit 1 at 5. Because pneumoconiosis is recognized as a latent and progressive disease, the administrative law judge rationally found Dr. Hippensteel's view to be inconsistent with the regulations. Decision and Order at 15-16; *see* 20 C.F.R. §718.201(c); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, BLR (6th Cir. 2012); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Additionally, the administrative law judge was not persuaded by Dr. Hippensteel's opinion, that claimant's obstructive abnormalities in lung function were unrelated to coal dust exposure but due entirely to smoking, or his conclusion that claimant's "partially reversible obstructive lung disease is not compatible with the fixed and irreversible obstruction expected from coal mine dust exposure." Decision and Order at 13; *see* Employer's Exhibits 11, 14 at 1, 3. The administrative law judge acknowledged that the preamble to the amended regulations recognizes a clinically significant relationship between obstructive impairments and coal dust exposure, Decision and Order at 15, *see* 65 Fed. Reg. 79,937-45, and found that Dr. Hippensteel failed to adequately explain why coal dust exposure could not be a contributing cause of the irreversible component of claimant's disabling impairment.[12] Decision and Order at 13; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Thus, the administrative law judge acted within his discretion in concluding that Dr. Hippensteel's opinion was not well reasoned and merited little weight.

Similarly, the administrative law judge determined that the opinion of Dr. Rosenberg, that claimant does not have legal pneumoconiosis and that his disabling

[11] The administrative law judge additionally determined that Dr. Forehand, who performed the 2002 pulmonary evaluation of claimant for the Department of Labor, opined that the sole cause of claimant's impairment was chronic bronchitis due to smoking. However, as Dr. Forehand failed to explain why he did not attribute any portion of the impairment to claimant's 26 years of coal dust exposure, the administrative law judge permissibly found his opinion to be inadequately reasoned and insufficient to meet employer's burden on rebuttal. Decision and Order at 12, n.18; Director's Exhibit 3; *see Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc).

[12] The administrative law judge determined that all of claimant's pulmonary function studies produced qualifying values for total respiratory disability, both before and after bronchodilation. Decision and Order at 4; Director's Exhibit 16; Claimant's Exhibits 1, 2; Employer's Exhibit 1.

respiratory impairment is unrelated to coal dust exposure based on the pattern of airflow obstruction,[13] is inconsistent with the scientific studies approved by DOL in the preamble to the amended regulations. While Dr. Rosenberg maintained that "a disproportionate decrease in the FEV_1 compared to the FVC is characteristic of a cigarette smoke-induced lung disease," not legal pneumoconiosis, and that there is usually a parallel reduction in the FEV_1 and FVC when an impairment is caused by coal mine dust, the administrative law judge noted that the preamble recognizes that "coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV_1/FVC ratio." Decision and Order at 16; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000). Consequently, the administrative law judge acted within his discretion in finding that Dr. Rosenberg's opinion was not well reasoned, and merited little weight. Decision and Order at 13, 16-17; *see Obush*, 24 BLR at 1-125; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

As the administrative law judge permissibly discredited all of the medical opinions supportive of employer's burden on rebuttal, and substantial evidence supports his credibility determinations, we affirm his finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4), *see Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011), and need not reach employer's arguments with respect to the opinions of Drs. Habre and Al-Khasawneh. Consequently, we affirm the administrative law judge's finding that claimant is entitled to benefits.

[13] Dr. Rosenberg testified that a "differentiating factor" in determining whether impairment is due to coal dust exposure or smoking is "the ratio of the FEV_1 divided by the FVC [which] generally is preserved in relationship to coal mine dust-related forms of obstruction," and that claimant's "marked decrement of FEV_1/FVC ratio is consistent with a smoking related form of obstruction." Employer's Exhibit 12 at 17-18, 20, 21, 23, 32, 34. He further stated that claimant's FEV_1/FVC ratio with general preservation of the FVC is a "classic" finding for a smoking-related form of COPD and emphysema. *Id*. at 21, 37. Dr. Rosenberg opined that a decreased FEV_1 and FEV_1/FVC ratio does not "generally apply" to legal pneumoconiosis, while, conversely, smoking related obstruction is "characterized by a reduction of the FEV_1/FVC ratio." Employer's Exhibit 5 at 7.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge