BRB No. 12-0158 BLA

| | | |
|---|---|---|
| LARRY F. HARGETT | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ISLAND CREEK COAL COMPANY | ) | DATE ISSUED: 12/17/2012 |
| | ) | |
| 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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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 Granting Benefits (2009-BLA-05932) of Administrative Law Judge Pamela J. Lakes, with respect to a subsequent claim filed on October 28, 2008, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge determined that claimant had at least twenty-four years of underground coal mine employment and that he established total disability at 20 C.F.R. §718.204(b)(2). The administrative law judge found, therefore, that claimant invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d).[2] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in applying amended Section 411(c)(4), as doing so violated several principles of constitutional law. Employer also asserts that the rebuttal methods set forth in amended Section 411(c)(4) are not applicable to responsible operators and that the amendments cannot be applied until the Department of Labor has promulgated implementing regulations. Employer further argues that the administrative law judge did not properly weigh the evidence in determining that employer failed to rebut the amended Section 411(c)(4) presumption.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filed a limited brief in which he urges the Board to hold that employer's constitutional arguments, and its assertions concerning the applicability of the rebuttal provisions to responsible operators and the need for implementing regulations, have no merit.[3]

---

[1] Claimant filed his initial claim for benefits on May 24, 1996. Director's Exhibit 1. On November 26, 1997, Administrative Law Judge Michael P. Lesniak issued a Decision and Order Denying Benefits, finding that claimant did not establish any element of entitlement. *Id*. The Board affirmed the denial of benefits on December 18, 1998. *Hargett v. Island Creek Coal Co.*, BRB No. 98-0462 BLA (Dec. 18, 1998)(unpub.). Claimant did not take any further action until he filed the present subsequent claim.

[2] On March 23, 2010, Congress adopted amendments to the Act, that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In pertinent part, the amendments reinstated Section 411(c)(4), 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant has at least twenty-four years of underground coal mine

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.[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).

## I. Application of the Amendments

We reject employer's argument that retroactive application of the amendments to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property.[5] *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010); *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. Dec. 29, 2010), we also 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 v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *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 regulations implementing the amendments. *See Rose*, 614 F.2d at 939; 2 BLR at 2-43; *Mathews*, 24 BLR at 1-201.

---

employment and established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) and invoked the rebuttable presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[5] Employer's request to hold the case in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act is denied. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

## II. Rebuttal of the Amended Section 411(c)(4) Presumption

### A. Existence of Pneumoconiosis

The administrative law judge first considered whether employer rebutted the amended Section 411(c)(4) presumption by establishing that claimant does not have clinical pneumoconiosis.[6] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accorded greater weight to the readings of the x-rays obtained on February 9, 2009 and October 8, 2010, based on their recency. The administrative law judge found that the February 9, 2009 film "suggests the presence of pneumoconiosis," as it was read as positive by three physicians – Drs. Alexander and DePonte, dually-qualified as Board-certified radiologists and B readers, and Dr. Rasmussen, a B reader – and read as negative by two dually-qualified radiologists, Drs. Wiot and Meyer. Decision and Order at 11. The administrative law judge determined that the October 8, 2010 x-ray is negative, as the negative readings by Drs. Wheeler and Scott, who are both dually-qualified, outweighed the positive reading by Dr. Rasmussen. *Id*. The administrative law judge concluded that the x-ray evidence was in equipoise and, therefore, "[e]mployer has failed to rebut the presumption of pneumoconiosis under [20 C.F.R. §]718.202(a)(1)." *Id*. at 12.

The administrative law judge then determined that employer did not establish rebuttal of the presumption that claimant has clinical pneumoconiosis, based upon a consideration of the digital x-ray readings, medical opinion evidence and treatment records at 20 C.F.R. §§718.107 and 718.202(a)(4).[7] Decision and Order at 12-14. The administrative law judge further found that, in light of employer's failure to disprove the existence of clinical pneumoconiosis, it was not necessary to discuss the evidence relevant to the existence of legal pneumoconiosis.[8] *Id*. at 14.

---

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

[7] The administrative law judge found that 20 C.F.R. §718.202(a)(2) and (a)(3) were not applicable to this claim. Decision and Order at 12.

[8] "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Employer argues that the administrative law judge did not "thoroughly analyze" the qualifications of the physicians interpreting the x-rays, as she did not consider Dr. Wiot's status as a former C reader[9] and the radiology professorships of Drs. Wiot, Meyer, Wheeler and Scott. Employer's Brief at 35. Employer also alleges that the administrative law judge did not properly consider the medical opinions concerning clinical pneumoconiosis, as she did not address the opinions of Drs. Hippensteel and Rosenberg in their entirety and did not provide adequate reasons for discrediting them.[10]

Although employer is correct in asserting that the administrative law judge may rely on a reader's academic qualifications in radiology as a basis for according greater weight to the readings rendered by that reader, she is not required to do so. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery and Hall, JJ., concurring and dissenting). The administrative law judge also acted within her discretion as fact-finder in discrediting Dr. Hippensteel's opinion, that claimant does not have clinical pneumoconiosis, because Dr. Hippensteel did not explain why he believes that claimant's obesity is the cause of the irregular opacities observed on x-ray.[11] *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). The administrative law judge also permissibly discredited Dr. Rosenberg's opinion, that clinical pneumoconiosis is not present, "because he appeared to give greater weight to [c]laimant's earlier [negative] x-rays," without adequately addressing the positive readings of the more recent x-rays.[12] Decision and Order at 13; *see Clark v. Karst-*

[9] The regulation that provided for certification as a C reader, a level higher than that of a B reader, is no longer in effect. 42 C.F.R. §37.51; *see Alley v. Riley Hall Coal Co.*, 6 BLR 1-376 (1983).

[10] Employer also argues that the administrative law judge erred in failing to render a finding as to the existence of legal pneumoconiosis. Because the administrative law judge's analysis with regard to the etiology of claimant's respiratory impairment, *see* discussion *infra*, subsumes the issue of the existence of legal pneumoconiosis, the administrative law judge's failure to render a specific finding as to whether employer rebutted the presumed existence of legal pneumoconiosis is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[11] Dr. Hippensteel testified, "I would note that Dr. Rasmussen saw irregular changes and what are the most fine of rounded changes on the x-ray[,] which can be an issue of question in persons who are obese like [claimant] is." Employer's Exhibit 8 at 16.

[12] As the administrative law judge stated, Dr. Rosenberg acknowledged the positive readings of the 2009 and 2010 x-rays rendered by Drs. Alexander and

*Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp*., 9 BLR 1-131 (1986); Employer's Exhibit 9 at 30, 12.

In addition, contrary to employer's contention, the administrative law judge considered all of the evidence on clinical pneumoconiosis together when reaching her finding, stating: "With respect to the current claim, the x-ray evidence is in equipoise and the medical opinions and treatment records tend to suggest the presence of pneumoconiosis. Accordingly, employer has failed to rebut the 15-year presumption using the first method." Decision and Order at 14. Therefore, we affirm the administrative law judge's finding that employer did not rebut the presumption that claimant has clinical pneumoconiosis.

**B. Disability Causation**

The administrative law judge considered the opinions of Drs. Hippensteel and Rosenberg, that claimant's impairment is entirely unrelated to coal dust exposure, and the opinion of Dr. Rasmussen, that coal dust exposure is a contributing cause of claimant's totally disabling impairment. The administrative law judge determined that employer did not rebut the presumed fact that claimant is totally disabled due to pneumoconiosis, as Drs. Hippensteel and Rosenberg did not fully address whether coal dust exposure could be a contributing cause of claimant's impairment. Decision and Order at 15.

Employer argues that the administrative law judge erred in requiring Drs. Hippensteel and Rosenberg to rebut Dr. Rasmussen's opinion, rather than the presumption. Employer also contends that the administrative law judge did not consider the medical evidence in its entirety, as Drs. Hippensteel and Rosenberg provided rational explanations for their conclusion that claimant's impairment is not due, in whole or in part, to pneumoconiosis.

Employer is correct that the administrative law judge stated that Drs. Hippensteel and Rosenberg "failed to rebut" Dr. Rasmussen's opinion. Decision and Order at 15. However, because Dr. Rasmussen's conclusion that pneumoconiosis was a contributing cause of claimant's totally disabling impairment is essentially identical to the presumed fact that employer is required to rebut, error, if any, was harmless. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Furthermore, the administrative law judge rationally found that, although Dr. Hippensteel identified alternative causes of claimant's respiratory impairment, he did not

---

Rasmussen and agreed that pneumoconiosis can be a latent and progressive disease. *See* Decision and Order at 13; Employer's Exhibits 4, 9 at 25, 33.

adequately explain why claimant's coal dust exposure did not also contribute to the impairment.[13] *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Similarly, the administrative law judge acted within her discretion in discrediting Dr. Rosenberg's opinion because he did not adequately explain why coal dust exposure did not contribute, in part, to claimant's respiratory impairment, particularly in light of Dr. Rosenberg's focus on clinical pneumoconiosis.[14] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). We affirm, therefore, the administrative law judge's determination that employer's evidence was insufficient to establish that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. Thus, we further affirm the administrative law judge's finding that employer did not rebut the presumption set forth in amended Section 411(c)(4).

[13] Dr. Hippensteel stated that the "likely cause" of claimant's hypoxemia with exercise was claimant's "obesity and sleep disordered breathing, but with no association with effects from coal mine dust exposure." Employer's Exhibit 11. Dr. Hippensteel also indicated that claimant "does not have permanently impaired gas exchange but has variability consistent with chronic bronchitis," unrelated to coal dust exposure. Employer's Exhibit 1.

[14] Dr. Rosenberg indicated that claimant's impairment relates to hypoventilation, and stated that the latter condition is unrelated to "clinical coal workers' pneumoconiosis." Employer's Exhibit 12.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge