BRB No. 11-0391 BLA

RAYMOND K. CULBERTSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 02/23/2012
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5224) of Administrative Law Judge Linda S. Chapman, rendered on a subsequent claim filed on January 26, 2009,[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944

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[1] Claimant has filed four previous claims for benefits, each of which was denied. Director's Exhibits 1, 2. Claimant's most recent prior claim, filed on July 11, 2003, was denied by Administrative Law Judge Stephen L. Purcell on April 21, 2006. Director's Exhibit 2. Judge Purcell found that while claimant proved that he is totally disabled pursuant to 20 C.F.R. §718.204(b), the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* Claimant appealed and the Board affirmed the denial of benefits. *Culbertson v. Clinchfield Coal Co.*, BRB No. 06-

(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 twenty-one years of underground coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to rebut the presumption by proving either that claimant does not have pneumoconiosis or that his respiratory disability did not arise out of, or in connection with his coal mine employment. Thus, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement since the denial of his prior claim, pursuant to 20 C.F.R. §725.309, and she awarded benefits.

On appeal, employer argues that amended Section 411(c)(4) is unconstitutional and is not applicable to this claim. Alternatively, employer argues that the administrative law judge erred in his consideration of the evidence relevant to rebuttal of the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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.[2] 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).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. If a miner files an application 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

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0613 BLA (Mar. 27, 2007) (unpub.). Claimant took no further action until he filed the current subsequent claim.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

"applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he has pneumoconiosis. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Applicability of Amended Section 411(c)(4)

Congress enacted recent amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 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.S.C. §921(c)(4)).

Employer contends that retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005 is unconstitutional because it violates employer's due process rights and results in an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. These arguments are substantially similar to the ones that the Board rejected 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), and we reject them in this appeal for the reasons set forth in that decision. *Id*. at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *aff'd W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011); *Keene v. Consolidation Coal Co*., 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011).

Employer argues that application of amended Section 411(c)(4) is unconstitutional because, when the presumption is coupled with the evidentiary limitations set forth at 20 C.F.R. §725.414, it is "virtually impossible" for an employer to rule out any connection between coal mine dust exposure and, therefore, the presumption is, in effect, irrebuttable. Employer's Brief in Support of Petition for Review at 8-9. Because employer bears the burden to establish a due process violation, and employer has failed to explain, specifically, how it was foreclosed from obtaining medical evidence sufficient to establish rebuttal of the amended Section 411(c)(4) presumption, we reject employer's argument. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 3 BLR 2-36, 2-43 (1975).

We also reject employer's assertion that, under amended Section 411(c)(4), a miner receives benefits based solely on his length of coal mine employment, contrary to case law holding that occupational dust exposure alone does not establish the existence of

pneumoconiosis. Employer's Brief in Support of Petition for Review at 11, *citing Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Contrary to employer's argument, amended Section 411(c)(4) does not grant automatic entitlement to a miner based on his or her length of coal mine employment alone. *See* 30 U.S.C. §921(c)(4). The presumption requires at least fifteen years of qualifying coal mine employment and medical evidence establishing a totally disabling respiratory or pulmonary impairment. *Id*. Moreover, the presumption is also rebuttable, based on medical evidence establishing the absence of either pneumoconiosis or a causal relationship between a miner's disability and his coal mine employment. *Id*.

Finally, we reject employer's assertion that the recent amendments apply only to survivor's claims. The Board has held that the plain language of Section 1556(c) mandates the application of the amendments to *all claims* filed after January 1, 2005, that are pending on or after March 23, 2010. *Stacy,* 24 BLR at 1-211. We also deny employer's request to hold this case in abeyance until the constitutional challenges to the Patient Protection and Affordable Care Act are finally decided, or the Department of Labor issues new regulations.[3] *See Florida v. U.S. Dept. of HHS,* 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 2011 WL 5515164 (U.S. Nov. 14, 2011) (No. 11-398); *Mathews*, 24 BLR at 1-201; Employer's Brief in Support of Petition for Review at 7.

We affirm, as unchallenged, the administrative law judge's findings that claimant has at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Employer's Brief in Support of Petition for Review at 10. We therefore affirm the administrative law judge's determination that claimant invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Decision and Order at 15-16. Because claimant is presumed to be totally disabled due to pneumoconiosis, pursuant to amended Section 411(c)(4), claimant satisfied his initial burden to demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See White,* 23 BLR at 1-3.

Rebuttal of the Amended Section 411(c)(4) Presumption

In considering whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge stated that employer was required to "demonstrate, by a preponderance of the evidence either that [claimant] does not suffer

[3] We reject employer's assertion that if any portion of the Patient Protection and Affordable Care Act is declared unconstitutional, the amendments to the Black Lung Benefits Act, including amended Section 932(*l*), must also be declared invalid. *See W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011).

from clinical pneumoconiosis or that [claimant's] totally disabling respiratory or pulmonary impairment does not arise out of his coal mine employment."[4] Decision and Order at 16. The administrative law judge found that the analog and digital x-ray evidence was in equipoise as to the existence of clinical pneumoconiosis, and that employer did not dispute such a finding.[5] *Id*; *see* Employer's Post-hearing Brief at 9. The administrative law judge found that the negative CT scan readings by Drs. Castle and Fino, standing alone, were insufficient to disprove the existence of clinical pneumoconiosis, as neither physician is a radiologist. Decision and Order at 17.

The administrative law judge found that, while Drs. Castle and Fino attributed claimant's disabling chronic obstructive pulmonary disease (COPD) entirely to smoking, they did not adequately explain why claimant's coal dust exposure was not a concurrent cause of claimant's respiratory disability. Decision and Order at 19-21. In contrast, the administrative law judge credited Dr. Baker's opinion that coal dust exposure contributed to claimant's COPD. *Id*. at 21. Thus, the administrative law judge concluded that employer failed to rebut the presumption at amended Section 411(c), by proving, by a preponderance of the evidence, either that claimant does not have clinical pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. *Id*.

Initially, we note that, although the administrative law judge did not separately address whether employer rebutted the presumption by establishing that claimant did not have legal pneumoconiosis,[6] the issue was subsumed in her analysis of whether employer

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[4] Although employer asserts that it was deprived of the right to develop additional evidence addressing the new legal standard, the record reflects that employer had the opportunity before the administrative law judge to request time for the submission of additional evidence but chose not to do so.

[5] "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id*.

[6] "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). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id*.

disproved a causal connection between claimant's disabling respiratory impairment and coal dust exposure. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Contrary to employer's argument, if employer is unable to establish that claimant's respiratory disability did not arise out of, or in connection with coal mine employment, employer likewise is unable to prove that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

With regard to the issue of disability causation, employer argues that the administrative law judge erred in relying on Dr. Baker's opinion. Employer argues that the administrative law judge improperly acted as a medical expert in finding that Drs. Castle and Fino did not rule out coal dust exposure as a causative factor for claimant's disabling COPD. Employer's Brief in Support of Petition for Review at 19-23. Employer also contends that the administrative law judge relied on an incorrect smoking history, which undermines her credibility determinations. Employer's arguments are rejected as without merit.

We first reject employer's contention that the administrative law judge erred in calculating the length and extent of claimant's smoking history. Relying on smoking histories reported by Drs. Cox and Griffith, employer argued before the administrative law judge that claimant had a forty-one year history of smoking at least two packs of cigarettes per day. Decision and Order at 4. The administrative law judge found, however, that claimant "has consistently disputed the more lengthy smoking histories reported by Dr. Cox and Dr. Griffith, and testified that he never smoked more than half a pack of cigarettes a day." *Id*. The administrative law judge specifically noted that claimant testified that "Dr. Cox must have 'got it down wrong. . . . All my other reports say a pack will last me two, two and a half days." *Id*., *quoting* Hearing Transcript at 18. She further noted that, "when [e]mployer's counsel asked [claimant] why his 1996 medical records from Dr. Griffith reported that he smoked a pack of cigarettes a day, he responded: 'I guess if you tell them you smoke, they'll assume it's a pack a day. I have no idea. But I never smoked a pack a day.'" Decision and Order at 4, *quoting* Hearing Transcript at 19. Because the administrative law judge permissibly found claimant to be a credible witness, we affirm her determination that claimant smoked one-half pack of cigarettes a day for forty-one years or "twenty-one pack years." Decision and Order at 5; *see Doss v. Itmann Coal Co.*, 53 F. 3d 654, 19 BLR 2-181 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-167 (1986).

We also reject employer's argument that the administrative law judge erred in her consideration of employer's rebuttal evidence. The administrative law judge properly considered the rationale underlying the opinions of Drs. Castle and Fino in determining whether their opinions were sufficiently reasoned to rebut the amended Section 411(c)(4) presumption. *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); *Clark,* 12 BLR at 1-151. The administrative law judge correctly stated that one of the reasons given by Dr. Castle for excluding coal dust exposure as a causative factor in claimant's COPD was that pulmonary function testing in 2009 showed an improvement in the FEV1 value, as compared to testing performed in 2005, and therefore demonstrated a degree of reversibility. Decision and Order at 9-10; Director's Exhibit 15; Employer's Exhibit 3. Dr. Castle explained that this improvement is not what one would expect with a fixed, irreversible obstructive impairment that is caused by coal dust exposure. Employer's Exhibit 3. As observed by the administrative law judge, however, the pulmonary function testing did not reveal complete reversibility of claimant's respiratory impairment. Decision and Order at 19. The administrative law judge permissibly rejected Dr. Castle's opinion because he "failed to discuss the contribution of coal mine dust to the irreversible portion of [claimant's] impairment, and acknowledged that [claimant's] most recent studies showed only very minimal change, which were not significant enough to conclude that his obstruction was reversible." Decision and Order at 19; *see Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. May 11, 2004) (unpub.); *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], No. 08-1232 (4th Cir. Apr. 5, 2004) (unpub.); *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995) (Decision and Order on Recon.) (en banc).

The administrative law judge rejected Dr. Castle's explanation that claimant's disability was unrelated to coal dust exposure because his pulmonary function testing "did not show restriction or diffusion abnormalities, whereas coal workers' pneumoconiosis 'generally' causes mixed . . . obstructive *and* restrictive ventilatory defects." Decision and Order at 19 (emphasis added). The administrative law judge observed correctly that Dr. Castle's rationale "precludes a diagnosis of legal pneumoconiosis in connection with any respiratory or pulmonary impairment that does not involve a restrictive component as well." *Id*. at 19 n.12. The administrative law judge permissibly assigned less weight to Dr. Castle's opinion because she found that he "ignore[s] the established concept that coal mine dust exposure can result in a purely obstructive ventilatory defect" and "fails to address the question of why, in [claimant's] specific case, the lack of a restrictive impairment means that his obstructive ventilatory defect could not be caused by coal dust exposure." Decision and Order at 19; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155.

In addition, the administrative law judge found that, while Dr. Castle pointed to findings on pulmonary function testing that were not "typical" of impairments caused by coal dust exposure, the mere fact that respiratory symptoms or findings are not "typical" or "expected" does not necessarily preclude a causal relationship between a miner's respiratory disability and coal dust exposure. Decision and Order at 19. The administrative law judge also rationally found that Dr. Castle's reliance on the reduction

in claimant's FEV/FVC to conclude that his impairment was unrelated to coal dust exposure, and was caused by smoking, was inconsistent with "comments to Section 718.201, [wherein] the Department of Labor has cited with approval studies that report that *coal dust exposure* results in decreased FEV1/FVC values." *Id*. at 20 (emphasis in original), *citing* 65 Fed. Reg. 79940, 79943 (Dec. 20, 2000); *see* Employer's Exhibit 3 at 58. Because the administrative law judge gave permissible reasons for assigning Dr. Castle's opinion little weight, we affirm her credibility determination. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155; Decision and Order at 20.

With regard to Dr. Fino's opinion, the administrative law judge noted that he "hypothesized that [claimant's] significant air trapping without clinically apparent emphysema was 'most likely' due to smoking." Decision and Order at 21. She further noted that Dr. Fino "think[s]" that variability in lung volumes during pulmonary function testing is more consistent with an impairment caused by smoking than by coal dust exposure. *Id*. Contrary to employer's contention, the administrative law judge permissibly determined that Dr. Fino's opinion regarding the etiology of claimant's disabling COPD is either vague or equivocal and fails to satisfy employer's burden of proof. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); Decision and Order at 21. Because the administrative law judge has discretion to assess the credibility of a medical expert and determine whether it is sufficiently reasoned and documented, we affirm the administrative law judge's decision to accord little weight to Dr. Fino's opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155.[7]

Thus, for the above-stated reasons, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the presumption at amended Section 411(c)(4), by establishing that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine

[7] Because we affirm the administrative law judge's finding that employer's affirmative evidence, standing alone, fails to establish rebuttal of the amended Section 411(c)(4) presumption, it is not necessary that we address employer's arguments regarding the weight accorded Dr. Baker's opinion. S*ee generally Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, BLR (6th Cir. 2011) (holding that rebuttal requires an affirmative showing that the miner does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work); Employer's Brief in Support of Petition for Review at 16-19.

employment.[8] Decision and Order at 23. We therefore affirm the administrative law judge's finding that claimant is entitled to benefits under the Act.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8] Since employer failed to disprove a causal connection between claimant's respiratory disability and his coal mine employment, employer cannot disprove the existence of pneumoconiosis. Thus, rebuttal of the amended Section 411(c)(4) presumption is precluded.