BRB No. 11-0286 BLA

VANUARD ENGLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JERICOL MINING, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 01/31/2012
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Paul L. Edenfield (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2008-BLA-5188) of Administrative Law Judge Alice M. Craft rendered on a miner's claim 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).[1] This case involves a subsequent claim filed on July 25, 2005.[2] Adjudicating the case under 20 C.F.R. Part 718, the administrative law judge credited claimant with at least twenty-four years of underground coal mine employment, based on the parties' stipulation. The administrative law judge then found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against claimant and, therefore, she found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Addressing the applicability of amended Section 411(c)(4) of the Act,[3] the administrative law judge found that, because claimant established over fifteen years of underground coal mine employment and the evidence established a total respiratory disability pursuant to Section 718.204(b), claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the Board should hold this case in abeyance, pending resolution of the constitutionality of the Patient Protection and Affordable Care

[1] On March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) was enacted. Pub. L. No. 111-148 (2010). Section 1556 of the PPACA revived Section 411(c)(4) of the Act for claimants who filed their claims after January 1, 2005, and whose claims remained pending on the enactment date of the PPACA.

[2] Claimant filed a previous claim for benefits on March 25, 1993. Director's Exhibit 1. The district director denied the claim on September 15, 1993, because claimant failed to establish any of the requisite elements of entitlement. *Id.* There is no indication that claimant took any further action on the claim.

[3] Section 411(c)(4) provides, in pertinent part, that, if it is established that a miner had at least fifteen years of qualifying coal mine employment and the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. *See* 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)).

Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), and the severability of non-health care provisions by the federal courts. Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption by establishing that claimant did not have pneumoconiosis or that claimant's total respiratory disability is not due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that this case should be held in abeyance, pending resolution of the constitutionality and severability arguments relating to the PPACA.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address employer's contention that the Board should hold the case in abeyance, pending resolution of the constitutionality of the PPACA and the severability of non-health care provisions by the federal courts. Employer's Brief at 16-20. Claimant and the Director argue that this contention should be rejected. We agree. In *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011), the Board denied employer's request to hold the case in abeyance pending resolution of the legal challenges to the PPACA. Employer's allegation, herein, is nearly identical to the allegation that the Board rejected in *Fairman*. We, therefore, reject employer's allegation in this case for the reasons articulated in *Fairman*. *Fairman*, 24 BLR at 1-229; *see also 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); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-211 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, , F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *petition for reh'g en banc filed* (Jan. 20, 2012).

[4] Because claimant was last employed in the coal mining industry in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

We next address employer's contentions on the merits of entitlement.[5] Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 411(c)(4) presumption, arguing that the administrative law judge erred in weighing the medical evidence of record. Specifically, employer contends that the administrative law judge mischaracterized the evidence, and failed to consider all of the relevant evidence. Employer further contends that the administrative law judge failed to "even-handedly or consistently review the evidence" and, in doing so, substituted her own opinion for that the medical experts. Employer's Brief at 20.

Employer's contentions are without merit. Initially, employer contends that the administrative law judge mischaracterized the treatment records in finding that they contain a diagnosis of clinical and legal pneumoconiosis. Employer's Brief at 20, *citing* Decision and Order at 29. Employer contends that the treatment records do not contain a diagnosis of pneumoconiosis. Instead, employer contends that "[t]he treatment records show [only] that [claimant] believed he had [pneumoconiosis]."[6] Employer's Brief at 20-21. We disagree.

Contrary to employer's contention, the administrative law judge did not find that claimant's treatment notes contained a diagnosis of both clinical and legal pneumoconiosis. Rather, the administrative law judge found that "[c]laimant's **medical records** indicate that he has been diagnosed with both clinical and legal pneumoconiosis." Decision and Order at 29 [emphasis added]. Because the medical records referred to by the administrative law judge include claimant's treatment notes, as well as medical opinions diagnosing clinical and legal pneumoconiosis, we reject employer's argument that the administrative law judge mischaracterized claimant's treatment records. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Employer further contends that the administrative law judge erred in determining that Dr. Alam's finding of anthracosilicosis precluded rebuttal. Specifically, employer contends that the administrative law judge failed to weigh Dr. Alam's findings with the

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[5] Employer does not challenge the administrative law judge's finding that claimant is entitled to invocation of the Section 411(c)(4) presumption. That finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Claimant's treatment records encompass the years from 1993-2008, when claimant was being treated by Dr. Caudill. Director's Exhibit 18; Claimant's Exhibits 2, 3. In addition, the record contains treatment records from Dr. Alam and Mountain Comprehensive Health Care, dated from November 8, 2007 to December 4, 2007. Claimant's Exhibit 1.

contrary finding of Dr. Oesterling, who found that there was no carbon or crystalline material present that would indicate the presence of pneumoconiosis. Employer also contends that the administrative law judge erred in summarily accepting Dr. Alam's diagnosis of anthracosilicosis as precluding a finding of rebuttal, without also considering Dr. Rosenberg's statement that anthracosilicosis is not a disease process, but merely shows the presence of anthracotic pigment. We disagree.

Contrary to employer's contention, the administrative law judge considered all aspects of the biopsy evidence, in weighing the opinions regarding claimant's bronchoscopy.[7] Decision and Order at 30. Specifically, the administrative law judge noted Dr. Rosenberg's comment, that Dr. Alam's diagnosis of anthracosilicosis only represented anthracotic pigment, but rationally concluded that, because anthracosilicosis is a specifically enumerated condition included in the definition of clinical pneumoconiosis set forth in the regulations, Dr. Alam's opinion constituted a valid diagnosis of clinical pneumoconiosis. 20 C.F.R. §718.201; *see Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993); *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989); *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*)(Dolder and Smith, JJ, dissenting in part and concurring in part); Decision and Order at 30. Moreover, the administrative law judge reasonably exercised her discretion in finding that Dr. Oesterling's opinion, that claimant's bronchoscopy sample did not show carbon or crystalline material indicative of the presence of pneumoconiosis, is insufficient to establish the absence of pneumoconiosis, as Dr. Oesterling stated that the amount of material in the sample was not adequate to confirm or disprove the presence of an interstitial disease or coal dust inhalation. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 30; Employer's Exhibit 6. Because employer carries the burden of proof on rebuttal, we affirm the administrative law judge's finding that the biopsy evidence is insufficient to affirmatively establish the absence of pneumoconiosis in this case. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 479-480, BLR (6th Cir. 2011).

We also reject employer's contention that the administrative law judge erred in weighing the x-ray evidence of record. Contrary to employer's contention, the administrative law judge rationally weighed the x-ray readings, in finding that two out of the three new x-rays of record are positive for the existence of clinical pneumoconiosis,

[7] The biopsy evidence consists of the bronchial washings and brushings obtained during claimant's December 4, 2007 bronchoscopy, as well as the subsequent review of this evidence by Dr. Oesterling. Claimant's Exhibit 1; Employer's Exhibit 6.

and the third film is inconclusive.[8] Decision and Order at 30-31. Specifically, the administrative law judge reasonably exercised her discretion in finding that Dr. Poulos's interpretation of the September 20, 2005 x-ray, that while there are 2/1 opacities, they are "not typical of coal workers' pneumoconiosis, but more commonly associated with asbestosis," is not sufficiently definitive to establish that the film showed the absence of pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Moreover, contrary to employer's contention, the administrative law judge was not required to find that narrative x-ray interpretations included in claimant's treatment notes were negative for pneumoconiosis, because they did not mention the presence of pneumoconiosis. The significance of narrative x-ray readings, in which pneumoconiosis is not mentioned, is an issue to be resolved by the administrative law judge, in the exercise of his or her discretion as fact-finder. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Thus, the administrative law judge acted within her discretion in finding that the narrative x-ray readings were not definitively negative for the existence of pneumoconiosis, as they did not make a specific finding concerning pneumoconiosis, and the films were not classified under the ILO-U/C system. *See Marra*, 7 BLR at 1-218-19; Decision and Order at 31; Director's Exhibit 18; Claimant's Exhibit 2.

Further, contrary to employer's contention, the administrative law judge was not required to specifically weigh the CT scan evidence against the x-ray evidence of record. As set forth in the regulations, these are separate types of evidence and, therefore, the administrative law judge is not required to collectively weigh this evidence. 20 C.F.R.

[8] The record contains the interpretations of three x-ray films dated between September 20, 2005 and February 26, 2008. The September 20, 2005 x-ray was read as 2/1 by Dr. Baker, a B reader, as well as Drs. Poulos and Kendall, B readers and Board-certified radiologists. Director's Exhibits 12, 20; Claimant's Exhibit 5. However, Dr. Poulos also stated that the findings are "not typical of coal workers' pneumoconiosis, but more commonly associated with asbestosis," Director's Exhibit 20, whereas Dr. Kendall stated that the findings are "consistent with coal workers' pneumoconiosis." Claimant's Exhibit 5. The December 29, 2005 x-ray was read as 1/2 by Dr. Dahhan, a B reader. Director's Exhibit 19. Dr. West, a B reader and Board-certified radiologist, read the February 26, 2008 x-ray as 1/1, but further stated that the findings are not compatible with coal workers' pneumoconiosis. Employer's Exhibit 2. However, Dr. Alexander, also dually-qualified as a B reader and Board-certified radiologist, interpreted this x-ray as 2/1 and positive for coal workers' pneumoconiosis. Claimant's Exhibit 9.

§§718.202(a)(1) and 718.107. Rather, the administrative law judge is required to ultimately weigh all of the relevant evidence. *Morrison*, 644 F.3d at 479-480. Here, the administrative law judge considered Dr. West's negative CT scan, but reasonably found that it did not establish the absence of pneumoconiosis because it did not outweigh the evidence showing the presence of clinical pneumoconiosis and it did not address the issue of legal pneumoconiosis. *Morrison*, 644 F.3d at 479-480; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 31; Employer's Exhibit 3.

Employer further contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish rebuttal, arguing that the administrative law judge, in not crediting the opinion of Dr. Dahhan, erred in substituting her opinion for that of the medical expert. Specifically, employer contends that the administrative law judge erred in determining that the underlying blood gas study evidence did not support Dr. Dahhan's opinion. Employer's Brief at 24-25. We disagree. Contrary to employer's contention, the administrative law judge reasonably found that Dr. Dahhan did not adequately explain his diagnosis, in light of the underlying documentation. Decision and Order at 32. Specifically, the administrative law judge properly found that Dr. Dahhan did not adequately explain his original diagnosis, as set forth in his 2006 and 2008 medical reports,[9] that claimant is not totally disabled, despite the fact that the four blood gas studies he reviewed were all qualifying. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 32; Director's Exhibit 19; Employer's Exhibit 7. Additionally, the administrative law judge properly found that Dr. Dahhan failed to adequately explain the change in his assessment of claimant's respiratory condition in 2010. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark*, 12 BLR at 1-155; Decision and Order at 32; Employer's Exhibit 9.

[9] Dr. Dahhan, following his December 29, 2005 examination of claimant and a review of the evidence of record, opined that claimant had simple coal workers' pneumoconiosis, but that from a respiratory standpoint, he has a mild respiratory impairment that is not severe enough to be disabling. Director's Exhibit 19. Following review of additional evidence in August, 2008, Dr. Dahhan stated that he "continue[s] to conclude that [claimant] has no evidence of functional respiratory impairment" related to claimant's inhalation of coal dust or coal workers' pneumoconiosis. Employer's Exhibit 7. However, in 2010, Dr. Dahhan, again reviewed the medical records, but opined that while claimant's lung tissue samples and radiological evidence do not confirm the presence of a coal dust induced lung disease, he had developed a moderate hypoxemia, fifteen years after his last coal mine employment, which resulted in pulmonary impairment and disability. Employer's Exhibit 9.

In addition, employer asserts that the administrative law judge erred by relying on the preamble to the regulations, when weighing the medical opinion evidence relevant to the issue of legal pneumoconiosis. Employer alleges that, unlike the regulations, because the preamble was not subject to notice and comment, it is not binding on the Department of Labor (the Department).

The preamble to the amended regulations sets forth the Department's resolution of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the Department's discussion of sound medical science in the preamble. *See 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). Thus, we reject employer's assertion that the administrative law judge committed error by relying on the preamble to the amended regulations, when weighing the medical opinion evidence relevant to the issue of legal pneumoconiosis.

Lastly, we reject employer's contention that the administrative law judge erred in applying an inconsistent standard in weighing the conflicting evidence. Employer specifically argues that the administrative law judge merely accepted Dr. Baker's opinion, diagnosing total disability due to pneumoconiosis, at "face value," without applying the same level of scrutiny to the contrary opinions. *See* Employer's Brief at 27. Because employer bears the burden of proof, on rebuttal, to affirmatively establish the absence of pneumoconiosis or that claimant's total disability is not due to pneumoconiosis, error, if any, in the administrative law judge's weighing of Dr. Baker's opinion is harmless, as it is not supportive of employer's burden. 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 479-480.

Moreover, employer's challenges to the administrative law judge's findings are, in effect, a request to reweigh the medical evidence. However, the administrative law judge has broad discretion in assessing the credibility of the medical experts, and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Because the administrative law judge weighed all of the relevant evidence and reasonably exercised her discretion in finding that employer's evidence is insufficient to affirmatively establish the absence of clinical or legal pneumoconiosis or that claimant's total disability is not due to pneumoconiosis, we affirm her finding that employer did not establish rebuttal. 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 479-480.

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