BRB No. 11-0305 BLA

WANLESS M. HARVEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELK RUN COAL COMPANY	)	DATE ISSUED: 01/30/2012
	)	
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 Adele Higgins Odegard, 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.

Ann Marie Scarpino (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 Awarding Benefits (2009-BLA-05494) of Administrative Law Judge Adele Higgins Odegard, with respect to a claim filed on July 24, 2008, 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). The administrative law judge credited the miner with at least twenty-six years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. With respect to the applicability of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge found that claimant had at least eighteen years of underground coal mine employment and that he established total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge determined, therefore, that claimant invoked the presumption set forth in amended Section 411(c)(4).[1] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that retroactive application of the recent amendments is unconstitutional, as it denies employer due process and constitutes a taking of private property. Employer also maintains that the rebuttal methods set forth in amended Section 411(c)(4) of the Act apply only to the Secretary of the United States Department of Labor (DOL) and not to responsible operators. Regarding the administrative law judge's consideration of the medical evidence, employer maintains that the administrative law judge erred in not making a finding concerning the existence of clinical pneumoconiosis. In addition, employer contends that the administrative law judge's determination, that employer did not rebut the presumption by disproving the existence of legal pneumoconiosis or total disability due to pneumoconiosis, is not supported by substantial evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief, asserting that the recent amendments apply to coal mine operators and that application of the amendments does not violate employer's due process rights or constitute an unconstitutional taking of private property.[2]

[1] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4) of the Act, 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).

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determinations, her finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and her finding that claimant established invocation of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[3] 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. Constitutionality of the Amendments

Employer argues that retroactive application of the amendments to the Act is unconstitutional because it denies employer due process and constitutes an unauthorized taking of private property. Claimant and the Director assert that these arguments have no merit. We agree. Employer's allegations are nearly identical to those that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-197-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed* No. 11-1620 (4th Cir. June 13, 2011).[4] Therefore, we reject them here for the reasons set forth in that decision. *Id*. at 1-197-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (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), *pet. for reh'g filed* Jan. 20, 2012.

II. Application of Amended Section 411(c)(4) to Responsible Operators

Employer asserts that, because amended Section 411(c)(4) of the Act provides that "the Secretary" can rebut the presumption, but does not include a reference to coal mine operators, the rebuttal provisions of amended Section 411(c)(4) do not apply to responsible operators. Employer maintains, therefore, that applying this section to responsible operators violates the principles of statutory construction. Employer's Brief

[3] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. 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*).

[4] Although *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed* No. 11-1620 (4th Cir. June 13, 2011), involved the automatic survivors' entitlement provision at 30 U.S.C. §932(*l*), as the Director, Office of Workers' Compensation Programs, states, retroactive application of amended Section 411(c)(4) serves the same purpose – "to compensate miners and their survivors for disabilities bred in the past by providing a less rigorous path to entitlement for claimants who have proven that the miner endured at least fifteen years of exposure to coal mine dust and suffered from a totally disabling respiratory . . . impairment." Director's Brief at 4.

at 21, *citing Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Claimant and the Director argue that the Board should reject employer's arguments. We agree. Employer's allegations are identical to those that the Board rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), *appeal docketed*, No. 11-2419 (4th Cir. Dec. 29, 2011). Therefore, we reject them here for the reasons set forth in that decision. *Id*.

III. Rebuttal of the Presumption – 20 C.F.R. §§718.202(a)(4), 718.204(c)

A. The Administrative Law Judge's Findings

The administrative law judge initially determined that Dr. Forehand's opinion was entitled to less weight than the opinions of Drs. Al-Khasawneh, Crisalli, and Fino, as they are Board-certified pulmonologists and he is not. Decision and Order at 18. The administrative law judge noted that, although all three of the pulmonologists acknowledged claimant's "extensive coal mine employment history," Drs. Crisalli and Fino excluded coal dust exposure as a causal factor in claimant's respiratory impairment because they found that he would be disabled, even if he never worked in coal mining. *Id*. The administrative law judge found that this case was analogous to *Westmoreland Coal Co. v. Amick*, 289 F.App'x. 638 (4th Cir. 2008), in which the United States Court of Appeals for the Fourth Circuit held that the physicians who provided evidence for the employer did not explain why the miner's thirty-three years of coal mine employment did not contribute to his disabling coal mine employment. *Id*. at 19. The administrative law judge indicated that the court also stated that its holding did not improperly shift the burden of proof to employer, as the physicians who provided evidence for claimant provided support for their conclusion that claimant's impairment was due, in part, to coal dust exposure. *Id*.

The administrative law judge further determined that Dr. Al-Khasawneh's opinion, that claimant's impairment is due to coal dust exposure and cigarette smoking, was entitled to greater weight because it was well-reasoned, as Dr. Al-Khasawneh considered claimant's significant coal dust exposure and smoking histories. Decision and Order at 19-20. The administrative law judge further found that, while Drs. Crisalli and Fino gave a detailed explanation as to why claimant's impairment was due to emphysema caused by smoking, they did not indicate why "[c]laimant's two decades of coal dust exposure did not cause lung impairment." *Id*. at 19. In addition, the administrative law judge determined that neither physician commented on the residual, totally disabling impairment that remained after the administration of bronchodilators on claimant's pulmonary function studies. *Id*. Therefore, the administrative law judge gave less weight to the opinions of Drs. Crisalli and Fino, as she found they were not well-reasoned. *Id*. at 20. Based upon the administrative law judge's weighing of the medical opinion evidence, she determined that the opinions of Drs. Crisalli and Fino were insufficient to

rebut the presumption that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment, and she awarded benefits. *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge erred by failing to separately consider the issues of legal pneumoconiosis and disability causation and by presuming that an obstructive lung impairment in a former coal miner is always due to coal dust exposure. Additionally, employer contends that the administrative law judge's finding, that Drs. Crisalli and Fino did not explain why claimant's coal dust exposure did not contribute to his impairment, is not supported by the record, as both gave reasons in support of their conclusions. Employer also maintains that the administrative law judge substituted her opinion for that of the experts by discrediting the opinions of Drs. Crisalli and Fino for failing to comment on claimant's fixed respiratory impairment.

Employer is correct in arguing that the administrative law judge did not consider legal pneumoconiosis and total disability causation separately, when determining whether employer rebutted the Section 411(c)(4) presumption. However, remand is not required on this basis, as employer has not identified any harm resulting from the administrative law judge's consideration of these issues together. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."); *see Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Additionally, contrary to employer's contention, the administrative law judge did not presume that coal dust exposure necessarily contributes to all obstructive impairments in former coal miners. Rather, she weighed the relevant medical opinion evidence and rationally concluded that it was insufficient to establish that claimant does not have legal pneumoconiosis or that he is not totally disabled by it. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Although Drs. Crisalli and Fino discussed why they attributed claimant's impairment to cigarette smoking, consistent with the administrative law judge's finding, they did not explain why they ruled out coal dust exposure as a contributing cause and did not address the significance of claimant's residual disabling impairment. *See Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. 2004); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). Further, contrary to employer's assertion, the administrative law judge did not substitute her opinion for that of the medical experts in referring to claimant's residual impairment. Rather, the administrative law judge acted within her discretion in according the opinions of Drs. Crisalli and Fino less weight for failing to address evidence that called into question their determination that claimant's impairment was caused solely by his cigarette smoking. *See Underwood*, 105 F.3d at 949, 21 BLR at 2-28. We affirm, therefore, the administrative law judge's determination that employer did not rebut the

amended Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment.[5]

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[5] Based on our decision to affirm the administrative law judge's findings concerning legal pneumoconiosis, it is not necessary to address employer's contention that the administrative law judge erred in failing to render a specific finding as to whether claimant suffers from clinical pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).