BRB No. 11-0310 BLA

JAMES L. CLAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PERFORMANCE COAL COMPANY	)	DATE ISSUED: 01/26/2012
	)	
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 on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Waseem A. Karim (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2008-BLA-05328) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on March 28, 2007, pursuant to 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). This case is before the Board for a second time. The relevant procedural history of this claim is set forth in the Board's prior decision and is incorporated herein. *Clay v. Performance Coal Co.*, BRB No. 09-0330 BLA, slip op. at 3 n. 4 (Dec. 29, 2009) (unpub.). The Board previously affirmed the

administrative law judge's findings that claimant established thirty-two years of coal mine employment, the existence of simple clinical pneumoconiosis, based on the biopsy evidence at 20 C.F.R. §718.202(a)(2), a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id.* at 3 n.4. The Board, however, vacated the administrative law judge's award of benefits and remanded the case for consideration of whether employer demonstrated good cause for the admission of Dr. Wiot's deposition testimony, in excess of the evidentiary limitations, and whether employer was entitled to have four x-ray readings admitted into the record as rebuttal evidence. *Id*. at 4-7. The administrative law judge was also directed to reconsider whether claimant established the existence of complicated pneumoconiosis or total disability due to either simple clinical or legal pneumoconiosis. *Id*. at 7-15.

On March 23, 2010, while the case was pending on remand, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

In his Decision and Order on Remand dated December 30, 2010, the administrative law judge found that, while the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, claimant invoked the presumption at amended 411(c)(4). The administrative law judge further determined that employer failed to rebut that presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues, *inter alia*, that the administrative law judge erred in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. 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.[1] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In considering the issue of rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge indicated that employer was required to prove that claimant does not have pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment.[2] Decision and Order on Remand at 20. The administrative law judge found that employer failed to disprove the existence of both clinical and legal pneumoconiosis.[3] *Id*. at 17, 20. The administrative law judge also found that employer failed to disprove a causal relationship between claimant's disability and his pneumoconiosis. *Id*. at 20.

Contrary to employer's contention, we see no error in the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. We reject employer's assertion, for the first time in this appeal, that the administrative law judge erred in relying on the biopsy evidence to find that claimant has simple clinical pneumoconiosis. As noted, *supra*, the Board previously affirmed, as unchallenged, the administrative law judge's finding that the biopsy

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant satisfied the requirements for invocation of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 20.

[3] 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. 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." 20 C.F.R. §718.201(a)(1).

Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

evidence established the existence of clinical pneumoconiosis.[4] *Clay,* BRB No. 09-0330 BLA, slip op. at 3 n.4; *see also* Decision and Order on Remand at 15-16. Because employer does not argue an exception to the law of the case doctrine, we rely on our prior holding and decline to consider the administrative law judge's findings with regard to the biopsy evidence. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (*en banc*); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Thus, in light of our prior affirmance of the administrative law judge's determination that the biopsy evidence established the existence of clinical pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by showing that claimant does not have pneumoconiosis. Decision and Order on Remand at 20.

Additionally, although employer relies on the opinions of Drs. Crisalli and Castle, that claimant's disability is unrelated to coal dust exposure, to establish rebuttal at amended Section 411(c)(4), the administrative law judge permissibly concluded that their opinions "'can carry little weight' in assessing the etiology" of claimant's disability, as neither physician diagnosed pneumoconiosis. Decision and Order on Remand at 20, *quoting Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *see also Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to rebut the presumption at amended Section 411(c)(4), by establishing that claimant's respiratory disability is unrelated to his coal mine employment.[5] *Id.*

[4] On remand, the administrative law judge repeated his prior findings that the existence of simple clinical pneumoconiosis is established, based on the biopsy reports of Drs. Oesterling and Koh. Decision and Order on Remand at 15-16.

[5] Employer asserts that the administrative law judge erred in excluding Dr. Wiot's deposition testimony, relevant to the issue of complicated pneumoconiosis. Employer's Brief at 4-9. However, since the administrative law judge specifically found that claimant failed to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, employer's assertion of error is moot. Decision and Order on Remand at 12. Furthermore, although employer challenges the administrative law judge's reliance on Dr. Rasmussen's opinion to find that claimant's disability is due to pneumoconiosis, it is not necessary that we address this argument, since we affirm the administrative law judge's finding that employer's evidence, standing alone, is insufficient to establish rebuttal of the amended Section 411(c)(4) presumption. Employer's Brief at 10-14.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand 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