BRB No. 11-0317 BLA

JAMES D. BURRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 01/31/2012
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, 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.

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05523) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a subsequent claim filed

on February 10, 2006,[1] 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). Adjudicating this claim pursuant to the regulations at 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation that claimant worked twenty-three years in coal mine employment. Based on employer's concession in its post-hearing brief that claimant is totally disabled, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further 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 that presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Employer also asserts that the administrative law judge erred in finding that claimant established fifteen years of qualifying coal mine employment for invocation of the amended Section 411(c)(4) presumption. Employer contends that the administrative law judge erred in his consideration of the evidence relevant to rebuttal of the presumption. Additionally, employer contends that retroactive application of amended Section 411(c)(4) of the Act is unconstitutional.

Claimant responds to employer's appeal, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief, urging the Board to reject employer's arguments with regard to 20 C.F.R. §725.309 and its constitutional challenges to amended Section 411(c)(4). The Director, however, agrees with employer that the administrative law judge did not explain the weight he accorded claimant's treating physician and that a remand is necessary for the administrative law judge to reconsider whether employer rebutted the amended Section 411(c)(4) presumption, by showing that claimant does not have pneumoconiosis. Employer has also filed a reply brief, reiterating its arguments.

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,

[1] Claimant filed an initial claim for benefits on April 16, 2001. On November 26, 2001, the district director denied the claim by reason of abandonment. Director's Exhibit 1.

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

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. 20 C.F.R. §725.309(d)

When a miner files a claim 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); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant abandoned his prior claim. Director's Exhibit 1. Under the regulations, a denial "by reason of abandonment" is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Thus, claimant had to establish, based on the newly submitted evidence, at least one of the requisite elements of entitlement in order to satisfy his burden of proof at 20 C.F.R. §725.309(d), and obtain a review of his claim on the merits of entitlement. *See White*, 23 BLR at 1-3.

In considering the requirements of 20 C.F.R. §725.309, the administrative law judge noted that employer conceded total disability in its post-hearing brief, as all of the physicians are in agreement that claimant is disabled by a severe obstructive respiratory impairment.[3] Decision and Order at 13, *citing* Employer's Post-Hearing Brief at 27. Therefore, the administrative law judge found that claimant satisfied his burden to

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[3] Employer conceded before the administrative law judge that, "[i]n the case at bar, all of the physicians agreed that [claimant] was totally disabled. Accordingly, [claimant] has proven a material change in conditions from the denial of his first claim in November 2011." Employer's Post-Hearing Brief at 27.

establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Decision and Order at 13.

Employer argues on appeal that, despite its concession, the evidence submitted in conjunction with claimant's subsequent claim does not show a "material change" in his condition, as the "pulmonary function study evidence clearly reveals that [claimant's] pulmonary function actually improved over time, and the most recent pulmonary function testing did not meet the [Department of Labor] standards for showing total disability." Employer's Brief in Support of Petition for Review at 7. Employer asserts that the administrative law judge erred in failing to analyze the evidence for a "material change" in claimant's condition under 20 C.F.R. §725.309. *Id.*

Employer's assertion of error is without merit. As discussed *supra*, pursuant to 20 C.F.R. §725.309, claimant must only submit new evidence, developed in connection with the current claim, that establishes one of the elements upon which the prior denial was based. *See White*, 23 BLR at 1-3; 65 Fed. Reg. 79,968 (Dec. 20, 2000). Furthermore, it is a well-established principle that stipulations are binding on the parties that entered into them, for the duration of the litigation. *See Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). Based on employer's stipulation, we affirm the administrative law judge's findings that claimant established total disability, an element of entitlement claimant failed to prove in the prior claim, and a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309.

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

Congress has 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 that, if a miner had at least fifteen years in an underground coal mine or in a surface mine in conditions substantially similar to those in an underground mine, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 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)).[4]

[4] We reject employer's assertion that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Employer's Brief in Support of Petition for Review at 27-28. The arguments employer makes are substantially similar to the ones that the Seventh Circuit and the Board have previously rejected. *See Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *Mathews v. United*

In this case, because the miner's claim was filed after January 1, 2005, and employer stipulated that claimant is totally disabled, claimant was eligible to invoke the rebuttable presumption at amended Section 411(c)(4), if the evidence established that claimant worked at least fifteen years in an underground coal mine or in a surface mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). Employer contends that claimant has not established fifteen years of qualifying *surface* coal mine employment.

In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is only required to proffer sufficient evidence of dust exposure in his or her work environment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *See Leachman*, 855 F.2d at 512.

In this case, the administrative law judge found that claimant worked for employer in surface coal mine employment for seventeen years, from 1974 until 1991, in conditions that were substantially similar to those of an underground mine. Decision and Order at 12. Employer concedes that claimant was exposed to coal dust for seven years, while he worked as a tipple repairman for employer from April 25, 1975 to January 9, 1976; as a truck driver from May 17, 1976 to June 3, 1976; and as a welder from June 4, 1976 to October 3, 1981. Employer's Brief in Support of Petition for Review at 11. Employer, however, asserts that claimant's work as a pan operator for employer from October 4, 1981 to October 30, 1988 and from February 2, 1989 to September 16, 1991, did not involve exposure to coal dust, and that the administrative law judge erred in crediting this work as qualifying coal mine employment. *Id*. We disagree.

The administrative law judge addressed claimant's various job titles and specifically considered whether claimant was exposed to coal dust while working as a pan operator. The administrative law judge noted:

Pocahontas Coal Co., 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We therefore reject employer's constitutional challenges for the reasons set forth in those decisions. *Id.; see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *pet. for reh'g filed* Jan. 20, 2012.

> Claimant worked in surface mines at Consolidation Coal Company from 1974 until 1991, totaling 17 years. At this company, he worked as a *pan operator* and a welder, and did numerous jobs on the mine's tipple and hopper. Claimant explained that he worked extensively on the hopper since it broke a lot, which was underground[,] where he was exposed to coal and rock dust. His work on the tipple also involved a lot of coal dust – he explained that most coal dust is around the strip mines and the tipple, where he was frequently doing repair jobs.

Decision and Order at 12 (emphasis added); *citing* Hearing Transcript at 12-15, 27.

Contrary to employer's contention, we see no error in the administrative law judge's characterization of claimant's testimony or his finding that claimant was exposed to coal dust while working for employer. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); Decision and Order at 12. We specifically reject employer's contention that claimant had no coal dust exposure while working as a pan operator.[5] Because the administrative law judge properly conducted the analysis required by *Leachman*, we affirm his finding that claimant established at least fifteen years of surface coal mine employment with employer, in conditions that were substantially similar to those of an underground mine.[6] *See Summers*, 272 F.3d at 479-480, 22 BLR at 2-275; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Leachman*, 855 F.2d at 512; Decision and Order at 12.

As employer raises no other argument with respect to invocation, we affirm the administrative law judge's finding that claimant invoked the presumption pursuant to amended Section 411(c)(4). Decision and Order at 14.

---

[5] Claimant explained that a pan operator drives a machine with an enclosed cab that either removes dirt from the area to be strip mined or puts the dirt back in place once the mining is finished. Hearing Transcript at 13. Claimant testified that while he was not exposed to coal dust while in the cab of the machine, he was called upon to do other duties, and because he was an "ex-welder" he was "one of the first ones" to get called to fix the loaders and draglines at the tipple or repair hopper parts that were underground. *Id*. at 13-15. Claimant further stated that, "the biggest part of the time," he was working on the hopper. *Id*. at 15.

[6] As claimant established at least fifteen years of qualifying coal mine employment with employer, it is not necessary that we address employer's arguments with regard to claimant's dust exposure with Bollmeir Construction Company. Employer's Brief in Support of Petition for Review at 11.

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

In order to rebut the amended Section 411(c)(4) presumption, the administrative law judge noted that employer was required to show that claimant does not have either clinical or legal pneumoconiosis,[7] or that claimant's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." Decision and Order at 14. As to the existence of clinical pneumoconiosis, the administrative law judge found that the x-ray and CT scan evidence was in equipoise. The administrative law judge considered five medical opinions from Drs. Vacca, Istanbouly, Houser, Tuteur and Westerfield,.[8] Id. at 8-10; Director's Exhibit 10; Claimant's Exhibits 5, 6; Employer's Exhibits 3, 4, 9-11, 14. The administrative law judge noted that three of the five physicians, Drs. Vacca, Istanbouly and Houser, diagnosed both clinical and legal pneumoconiosis, while Drs. Tuteur and Westerfield opined that claimant does not have either clinical or legal pneumoconiosis. Decision and Order at 17. The administrative law judge concluded that employer failed to disprove the existence of clinical or legal pneumoconiosis by a preponderance of the evidence. *Id.* at 18. In addressing the etiology of claimant's respiratory disability, the administrative law judge found that Drs. Tuteur and Westerfield did not adequately explain why coal dust did not contribute to claimant's disabling chronic obstructive pulmonary disease (COPD). *Id*. at 21. Thus, the administrative law judge concluded that employer also failed to rebut the presumption at amended Section 411(c)(4), by proving that claimant's disability did not arise out of, or in connection with, his coal mine employment. *Id*.

---

[7] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses." 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id.*

"Legal pneumoconiosis" includes "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).

[8] Drs. Vacca, Istanbouly and Houser diagnosed coal workers' pneumoconiosis and severe, disabling chronic obstructive pulmonary disease (COPD), which they attributed to smoking and coal dust exposure. Director's Exhibit 10; Claimant's Exhibits 5, 6. In contrast, Drs. Tuteur and Westerfield opined that claimant does not have coal workers' pneumoconiosis and attributed claimant's disabling COPD entirely to smoking. Employer's Exhibit 3, 4, 9-11, 14.

Employer argues that the administrative law judge erroneously relied on the numerical superiority of the positive x-ray, CT scan and medical opinion evidence, in finding that claimant has pneumoconiosis. Employer also contends that the administrative law judge did not give proper reasons for rejecting the opinions of Drs. Tuteur and Westerfield, as to the cause of claimant's respiratory disability.

We have considered the administrative law judge's Decision and Order, the evidence of record and the arguments of the parties in this appeal and conclude that the award of benefits is supported by substantial evidence. *See O'Keeffe,* 380 U.S. at 359. Specifically, we affirm the administrative law judge's finding that employer failed to rebut the presumption by establishing that claimant's respiratory disability did not arise out of, or in connection with, his coal mine employment. Decision and Order at 21.

All of the record physicians are in agreement that claimant has disabling COPD. In support of rebuttal, employer relies on the opinions of Drs. Tuteur and Westerfield to establish that claimant's respiratory disability is due entirely to smoking. Initially, we reject employer's contention that the administrative law judge erred in finding that claimant had a "46 pack year" history of smoking. Employer's Brief in Support of Petition for Review at 26-27. The administrative law judge noted that there are conflicting smoking histories recorded in the treatment records and medical reports, with regard to the amount of cigarettes claimant smoked per day, ranging from one pack to two packs per day. Decision and Order at 4. Contrary to employer's argument, however, the administrative law judge permissibly resolved the conflict in the evidence by crediting claimant's testimony that he smoked one pack of cigarettes a day for forty-six years.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc)*; Mabe v. Bishop Coal Co.*, 9 BLR at 1-67 (1986); Decision and Order at 4. Although employer maintains that the record establishes a longer smoking history, employer's argument amounts to a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988).

We also reject employer's contention that the administrative law judge applied the wrong legal standard of review in assessing employer's evidence relevant to rebuttal of the amended Section 411(c)(4) presumption.[10] The administrative law judge correctly stated that the "burden is on [employer] to rebut the presumption that the miner's coal

[9] Claimant testified that he smoked "maybe a pack a day" from the age of twenty until May 2005, when he underwent surgery. Hearing Transcript at 34. The administrative law judge noted that "[t]his statement was corroborated by the smoking history given in his medical record from Logan Primary Care." Decision and Order at 3; *see* Employer's Exhibit 5 at 5.

mine employment was *a contributing cause* of his total disability" and he weighed the evidence in accordance with that standard. Decision and Order at 21 (emphasis added); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, BLR (6th Cir. 2011).

Turning to the medical evidence, the record reflects that Dr. Tuteur examined claimant on January 17, 2007 and August 10, 2001. Employer's Exhibits 3, 4. In conjunction with each examination, Dr. Tuteur read an x-ray and CT scan as negative for clinical pneumoconiosis. *Id*. Based on the pulmonary function tests obtained, Dr. Tuteur diagnosed a severe obstructive respiratory impairment caused by COPD due to smoking. *Id*. In excluding coal dust as a contributing factor in claimant's disabling COPD, Dr. Tuteur cited to medical studies and statistics indicating that claimant had a twenty percent chance of developing "clinically meaningful" COPD from smoking, as opposed to "far less than a three percent chance" of developing it from coal mine employment. Employer's Exhibit 9 at 19.

Contrary to employer's contention, the administrative law judge permissibly gave less weight to Dr. Tuteur's disability causation opinion because Dr. Tuteur "did not relate" the statistics he cited "to an individual assessment of claimant." Decision and Order at 21. An administrative law judge has discretion to assign less weight to a medical opinion that is based on generalizations, as opposed to the specific conditions of the miner. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Because the administrative law judge rationally found that Dr. Tuteur did not explain the basis for his opinion, in light of the specifics of claimant's case, we affirm the administrative law judge's finding that Dr. Tuteur's opinion does "not serve to rebut the presumption that claimant's coal mine employment was a causative factor in claimant's disabling COPD." Decision and Order at 21; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001).

---

[10] Employer argues that the administrative law judge erroneously applied a "rule out" standard, noting that the administrative law judge stated at one point in his decision that medical literature cited by Dr. Tuteur does not "rule out" a causal connection between coal mine employment and claimant's disability. Employer's Brief in Support of Petition for Review at 23.

With respect to Dr. Westerfield, the record reflects that he reviewed the medical records and prepared a consultative report dated July 30, 2008. Employer's Exhibit 11. Dr. Westerfield opined that there was no relationship between claimant's coal mine employment and his respiratory impairment because "surface miners are less likely to develop [COPD] of this severity from their coal and rock dust exposure and [claimant's] *remote* exposure to his coal mine dusts [sic] would make it unlikely that his respiratory injury is due to that exposure." Employer's Exhibit 5 (emphasis added).

Contrary to employer's argument, the administrative law judge permissibly assigned less to Dr. Westerfield opinion on the ground that he did not have an accurate understanding of the nature of claimant's coal dust exposure in surface mining. Decision and Order at 21; *see Clark*, 12 BLR at 1-155. The administrative law judge observed that while Dr. Westerfield characterized claimant's dust exposure in surface mining as "remote," this was contrary to claimant's testimony and the administrative law judge's specific finding that "[c]laimant's employment in surface mines [was] substantially similar to conditions in an underground mine." Decision and Order at 21. Because the administrative law judge has broad discretion in assessing the credibility of the medical experts, we affirm the administrative law judge's finding that Dr. Westerfield's opinion is insufficient to establish that coal dust was not a contributing factor in claimant's respiratory disability. *See Stalcup*, 477 F.3d at 484, 22 BLR at 2-37; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318.[11]

Because the administrative law judge acted within his discretion in determining that the opinions of Drs. Tuteur and Westerfield do not affirmatively establish that claimant's disabling respiratory disease is not related to coal mine work, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption. *See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1277-78, 18 BLR 2-42, 2-48 (7th Cir. 1991); *Morrison*, 644 F.3d at 480. Thus, we affirm the administrative law judge's finding that claimant is entitled to benefits under the Act.[12]

[11] Because employer failed to disprove a causal connection between claimant's respiratory disability and coal mine employment, employer is unable to rebut the presumption by showing that the miner does not have legal pneumoconiosis.

[12] We reject employer's argument that benefits are precluded under *Peabody Coal Company v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), as employer does not cite to any evidence in the record indicating that claimant is totally disabled based on a pre-existing non-respiratory condition. *See also Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

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