BRB No. 12-0194 BLA

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| JOHN A. OGLE | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| BIG BRANCH RESOURCES, INCORPORATED | ) | DATE ISSUED: 01/09/2013 |
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| Employer/Carrier-Petitioners | ) | |
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| 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 William S. Colwell, 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 and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Maia S. Fisher (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-05115) of Administrative Law Judge William S. Colwell rendered on a claim

filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on November 5, 2007.[1] Director's Exhibit 3.

The administrative law judge credited claimant with approximately twenty-one years of underground coal mine employment,[2] based on the evidence of record, and noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that claimant established approximately twenty-one years of underground coal mine employment. Additionally, the administrative law judge found that the new medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of Section 411(c)(4) to this case. Employer further asserts that the administrative law judge

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[1] This is claimant's second claim. Claimant's prior claim, filed on August 19, 2002, was denied on September 2, 2003, because claimant did not establish any elements of entitlement. Director's Exhibit 1.

[2] Claimant's last coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, the Board 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).

erred in his analysis of the medical opinion evidence when he found that employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments regarding the application of Section 411(c)(4).[3]

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. 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).

Employer asserts that the retroactive application of amended Section 411(c)(4) constitutes a due process violation and an unconstitutional taking of private property, and that its rebuttal provisions do not apply to claims brought against a responsible operator. Employer's Brief at 12-14, 72-82. Employer's contentions are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision. Further, we reject employer's argument that the application of amended Section 411(c)(4) to this case is premature for lack of implementing regulations. Employer's Brief at 5-12. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing.[4] *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

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[3] Employer does not challenge the administrative law judge's findings that the new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Nor does employer challenge the administrative law judge's finding that claimant has approximately twenty-one years of qualifying coal mine employment, sufficient to satisfy the requirement of Section 411(c)(4). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Employer's request that this case be held in abeyance pending the United States Supreme Court's resolution of the petition for certiorari filed in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342), is moot. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); Employer's Brief at 73. Employer's request that this case be held in abeyance pending the resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, is also moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); Employer's Brief at 72.

Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).[5]

Employer raises no additional challenges to the administrative law judge's application of Section 411(c)(4) to this case, or his finding that, having established the requisite years of qualifying coal mine employment, and total disability, claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, pursuant to Section 411(c)(4). Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Accordingly, we turn to employer's contentions regarding rebuttal of the Section 411(c)(4) presumption.

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011). The administrative law judge found that employer did not establish either method of rebuttal. Decision and Order at 25-26.

Weighing the medical evidence relevant to rebuttal, the administrative law judge initially found, based upon x-ray evidence, that employer disproved the existence of clinical pneumoconiosis.[6] Decision and Order at 28-29. In determining whether

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[5] Employer additionally contends that the administrative law judge failed to explain and provide notice of the rebuttal criteria applicable to this claim. Employer's Brief at 7-9. Employer asserts that it is an error of law and a violation of employer's due process rights to apply amended Section 411(c)(4) to this claim without allowing employer the opportunity to present evidence and arguments addressing the new standards. Employer's Brief at 8-9. Employer's arguments lack merit. The record reflects that in a July 14, 2011 Order, the administrative law judge informed the parties that Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)), would be applied to this case, and allowed the parties to submit arguments and additional medical evidence that, in their judgment, was relevant to any of the elements of entitlement, in light of the change in law. Employer submitted supplemental medical reports from Drs. Jarboe and Castle.

[6] Clinical pneumoconiosis is defined as "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

employer disproved the existence of legal pneumoconiosis[7] the administrative law judge considered the medical opinions of Drs. Baker, Agarwal, Forehand, Jarboe, and Castle. Dr. Baker opined that claimant suffers from legal pneumoconiosis, in the form of disabling chronic obstructive pulmonary disease (COPD), chronic bronchitis, and hypoxemia, each predominantly caused by cigarette smoking, but significantly contributed to, and substantially aggravated by, coal mine dust exposure. Claimant's Exhibit 1. Dr. Agarwal diagnosed legal pneumoconiosis, in the form of a disabling mixed obstructive and restrictive ventilatory impairment, due to smoking, with substantial aggravation by coal mine dust exposure. Employer's Exhibit 1. Dr. Forehand also diagnosed legal pneumoconiosis, in the form of a totally disabling mixed obstructive and restrictive ventilatory impairment, due to a combination of cigarette smoking and coal mine dust exposure. Claimant's Exhibit 2. In contrast, Drs. Jarboe and Castle opined that claimant does not have legal pneumoconiosis, but suffers from a totally disabling respiratory impairment due to cigarette smoking, obesity and a paralyzed left diaphragm, unrelated to coal mine dust exposure.[8] Director's Exhibit 16; Employer's Exhibits 4, 10-12. The administrative law judge found that the opinions of employer's physicians, Drs. Jarboe and Castle, were not sufficiently reasoned to disprove the existence of pneumoconiosis. Decision and Order at 31-32.

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reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] 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 encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] Dr. Jarboe opined that claimant suffers from a totally disabling respiratory impairment, which includes a severe restrictive and a mild, significantly reversible, obstructive component. Dr. Jarboe concluded that the restrictive portion of claimant's impairment is due to coronary artery bypass grafting, possible rounded atelectasis, a paralyzed left diaphragm, and obesity, and that the obstructive portion of claimant's impairment is due to smoking and possible asthma, with no contribution from coal mine dust. Director's Exhibit 16; Employer's Exhibits 11, 16. Dr. Castle opined that claimant is totally disabled by a mild restrictive impairment and a mild to moderate, significantly reversible obstructive impairment. Dr. Castle opined that claimant's restrictive impairment resulted from an elevated left hemidiaphragm and previous cardiac surgery, and that his obstructive impairment is due to cigarette smoking, and that coal mine dust exposure played no role. Employer's Exhibits 4, 12, 15.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Jarboe and Castle do not establish rebuttal. Employer's Brief at 14-52. Moreover, employer argues that the administrative law judge erred in crediting the opinions of Drs. Baker, Agarwal, and Forehand. Employer's Brief at 52-59.

Initially, we reject employer's assertion that the administrative law judge failed to provide valid reasons for discounting the opinions of Drs. Jarboe and Castle. The administrative law judge noted that both physicians relied, in part, on the absence of x-ray evidence of clinical pneumoconiosis to support their conclusions that only the miner's cigarette smoking, and not his coal mine dust exposure, could have caused his obstructive respiratory impairment.[9] Decision and Order at 31-32. The administrative law judge assigned less weight to the opinions of Drs. Jarboe and Castle, in part, because they were contrary to the Department of Labor's (DOL) recognition that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2)*; A & E Coal Co. v. Adams*, F.3d , No. 11-3926, 2012 WL 3932113 at *3-4 (6th Cir. Sept. 11, 2012); *Cumberland River Coal Co. v. Banks*, F.3d , 2012 WL 3194224 at *7-8 (6th Cir. 2012); Decision and Order at 31. An administrative law judge may discredit a medical opinion he finds to be divergent from the prevailing view of the medical community and scientific literature relied upon by DOL in promulgating the revised regulations. *See Adams*, 2012 WL 3932113 at *3-4; *Banks*, 2012 WL 3194224 at *7-8; Decision and Order at 31. Moreover, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Adams,* 2012 WL 3932113 at *3-4. Thus, the administrative law judge acted within his discretion in discounting the opinions of Drs. Jarboe and Castle, as contrary to the views accepted by DOL, and inadequately explained. Decision and Order at 31-32; 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

The administrative law judge further permissibly found that, to the extent Drs. Jarboe and Castle relied on the improvement in claimant's pulmonary function after

[9] In concluding that claimant does not have any impairment due to coal mine dust exposure, Dr. Jarboe testified that while a miner can have legal pneumoconiosis and have a normal x-ray he "still believe[s]" that if coal dust were causing claimant's vital capacity of forty-four percent, there "ought to be some [dust-induced] scarring in the x-ray . . . and we don't see that" in this case. Employer's Exhibit 11 at 30-31. Dr. Castle stated, in his most recent report, that he relied, in part, on the "the absence of radiographic findings" to "totally exclude or rule out coal mine dust exposure as playing any role" in claimant's pulmonary impairment. Employer's Exhibit 15 at 5.

bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment,[10] neither physician adequately explained why claimant's response to bronchodilators necessarily ruled out any contribution from coal mine dust exposure, or why claimant's twenty-one years of coal mine dust exposure did not contribute, along with his cigarette smoking and other medical conditions, to his pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *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 (1989) (en banc); Decision and Order at 31. We, therefore affirm, as supported by substantial evidence, the administrative law judge's determination that the opinions of Drs. Jarboe and Castle are not sufficiently reasoned to meet employer's burden to disprove the existence of legal pneumoconiosis. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 30-31.

The determination of whether a medical opinion is sufficiently documented and reasoned is a credibility matter within the purview of the administrative law judge. *Rowe,* 710 F.2d at 255, 5 BLR at 2-103; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. As the administrative law judge provided valid reasons for discounting the opinions of Drs. Jarboe and Castle, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Martin*, 400 F.3d at 306, 23 BLR at 2-285; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *see also Barber v.*

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[10] Dr. Jarboe noted that the presence of reversible airflow obstruction had been identified on several of claimant's pulmonary function studies, and opined that "[r]eversible airway disease is not caused by the inhalation of coal mine dust," which results in a fixed impairment. Employer's Exhibit 16 at 2, 3. Dr. Jarboe further opined that claimant "could have a mild air flow obstruction from [coal mine dust], and while he "wouldn't expect it to show the reversible component . . . it could." Employer's Exhibit 11 at 36. Dr. Jarboe concluded that "the presence of reversible disease argues against the inhalation of coal mine dust as a cause of [claimant's] impairment. Employer's Exhibit 16 at 3. Dr. Castle opined that claimant's pulmonary function studies demonstrated a mild to moderate degree of obstruction with a very significant degree of reversibility. Employer's Exhibits 4 at 12; 12 at 4; 15 at 5. Dr. Castle opined that reversible airway obstruction is not seen with coal workers' pneumoconiosis but is typical of tobacco smoke-induced chronic airway obstruction. Employer's Exhibits 4 at 12; 10 at 28; 12 at 4.

*Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Finally, employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the Section 411(c)(4) presumption by showing that claimant's respiratory impairment did not arise out of, or in connection with, coal mine employment. Employer's Brief at 53-56. We disagree. The administrative law judge accurately noted that all of the physicians agree that claimant's disability is due to his pulmonary impairment. Decision and Order at 24. The same reasons for which the administrative law judge discounted the opinions of Drs. Jarboe and Castle, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004); *Clark*, 12 BLR at 1-155; *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 33. Because the opinions of Drs. Jarboe and Castle are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal.

In sum, substantial evidence supports the administrative law judge's finding that employer's evidence is not sufficient to disprove the existence of pneumoconiosis, or to establish that the miner's disabling impairment did not arise out of, or in connection with, coal mine employment.[11] Decision and Order at 30-33. We, therefore, affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8; *Martin*, 400 F.3d at 306, 23 BLR at 2-285.

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[11] Thus, we need not address employer's allegations of error regarding the administrative law judge's consideration of the medical opinions of Drs. Baker, Agarwal, and Forehand.

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