BRB No. 12-0279 BLA

CLARENCE EUGENE MATNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOUR CORNERS CORPORATION	)	DATE ISSUED: 01/30/2013
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-5443) of Administrative Law Judge Pamela J. Lakes awarding benefits on a claim filed on July 29, 2009, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with in excess of 15 years of qualifying coal mine employment and found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge

therefore found that claimant invoked the rebuttable presumption that his total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of total disability due to pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.

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.[1] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. In order to rebut the Section 411(c)(4) presumption, the Act provides that the Secretary must show that the miner did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

[1] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibits 3, 6. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Initially, we affirm the administrative law judge's application of Section 1556 of the PPACA to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We also affirm the administrative law judge's unchallenged finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on her determinations that claimant established in excess of 15 years of qualifying coal mine employment and that the evidence established total respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Furthermore, with regard to rebuttal of the amended Section 411(c)(4) presumption, we affirm the administrative law judge's unchallenged finding that employer failed to establish that claimant does not have pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

Next, we address employer's contention that the administrative law judge erred in finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. The administrative law judge considered the reports of Drs. Forehand, Crisalli, and Oesterling. Dr. Forehand opined that coal dust exposure and cigarette smoking contributed to claimant's respiratory impairment. Director's Exhibit 12. By contrast, Dr. Crisalli opined that neither coal workers' pneumoconiosis nor coal mine dust exposure contributed to claimant's disabling respiratory impairment. Employer's Exhibit 15. Further, based on his review of histologic slides, Dr. Oesterling opined that "[t]here is evidence of an isolated micronodular lesion of coal workers' pneumoconiosis within the immediate subpleura" and that "[t]he limited changes due to dust appear insufficient to have in any way altered pulmonary function." Employer's Exhibit 14. Dr. Oesterling further opined that "[w]ithout alterations in pulmonary function coal workers' disease should not have produced any symptomatology or disability."[2] *Id*.

After considering the credentials[3] and opinions of Drs. Forehand, Crisalli, and Oesterling, the administrative law judge found that the opinions of Drs. Crisalli and

[2] Dr. Oesterling additionally opined, "[t]hus[,] coal dust was not an etiologic factor in producing [claimant's] major problems which appear to be related primarily to a smoking history which is set forth within medical records and described as a one pack per day history for approximately 33 years." Employer's Exhibit 14.

[3] The administrative law judge stated, "[i]n this case, Dr. Crisalli is [B]oard-certified in internal medicine with a subspecialty in pulmonary diseases, the highest qualification for identifying the causes of lung disease, and he possesses a credential that Dr. Forehand is lacking, while Dr. Oesterling is qualified in the field of pathology."

Oesterling were not reasoned.[4] The administrative law judge also found that "Dr. Forehand's opinion is lacking in that he assumed that [c]laimant only smoked 1/2 pack during his 31-years (sic) smoking history when, based upon his testimony, the amount he smoked varied from 1/2 packs up to 2 packs." Decision and Order at 11. Further, the administrative law judge found that, "[e]ven taking into account a possible underestimation of the [c]laimant's smoking history by Dr. Forehand, the opinions of Drs. Crisalli and Oesterling are still unpersuasive." *Id*. In so finding, the administrative law judge determined that the opinions of Drs. Crisalli and Oesterling were undermined because the doctors did not provide a basis for questioning Dr. Forehand's opinion that both coal dust exposure and cigarette smoking contributed to claimant's respiratory impairment. The administrative law judge also determined that the opinions of Drs. Crisalli and Oesterling were undermined because the doctors "did not have a clear view of what was causing [c]laimant's respiratory problems." *Id*. The administrative law judge therefore found that the opinions of Drs. Forehand, Crisalli, and Oesterling were in equipoise on the issue of disability causation. Hence, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption.

Employer asserts that the administrative law judge erred in discounting the opinions of Drs. Crisalli and Oesterling. Specifically, employer argues that the administrative law judge mischaracterized the opinions of Drs. Crisalli and Oesterling because, employer alleges, "both [physicians] have provided well-reasoned and well-documented opinions with regard to the etiology of claimant's pulmonary impairment." Employer's Brief at 19. We disagree.

Contrary to employer's assertion, the administrative law judge reasonably found that the opinions of Drs. Crisalli and Oesterling were not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). In so finding, the administrative law judge stated:

Decision and Order at 10. The administrative law judge also noted that "[t]here has been no suggestion that the pulmonary examination conducted by Dr. Forehand was insufficient to satisfy the regulations because he is not a [B]oard-certified pulmonologist." *Id*. Hence, the administrative law judge found that Dr. Forehand's opinion was not entitled to less weight on this basis.

[4] The administrative law judge found that, "[e]ven assuming that [Dr. Oesterling] is correct that the simple coal workers' pneumoconiosis was too minimal to have had an effect, that is not the same as ruling out coal mine dust as a contributing or aggravating factor to the [c]laimant's COPD and other possible lung conditions." Decision and Order at 11.

> After carefully reviewing the opinions of Drs. Crisalli and Oesterling, I find that they have failed to articulate a cogent basis for excluding coal mine dust exposure as a contributing factor to the [c]laimant's respiratory disability. Dr. Crisalli has failed to explain why coal mine dust exposure could not have been a contributing or aggravating factor. Dr. Oesterling's explanation is even more lacking, as he has suggested possibilities but not provided an explanation for the biopsy findings.

Decision and Order at 11. Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Crisalli and Oesterling because she mischaracterized their opinions. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's findings that employer failed to establish that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment and, thus, that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[5]

Furthermore, because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing either that claimant does not have pneumoconiosis, or that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment, we affirm the administrative law judge's award of benefits.

[5] Employer asserts that Dr. Forehand's opinion was outweighed by Dr. Crisalli's contrary opinion. In view of our holding that the administrative law judge reasonably found that the opinions of Drs. Crisalli and Oesterling were not reasoned, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc), we need not address employer's assertion that Dr. Forehand's opinion was outweighed by Dr. Crisalli's contrary opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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