BRB No. 12-0286 BLA

PAUL J. BLOOMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 01/31/2013
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton (Bowles Rice McDavid Graff & Love, LLP), Charleston, West Virginia, for employer.

Emily Goldberg-Kraft (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5065) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge found that claimant established sixteen years of underground coal mine employment, and that he had a totally disabling

respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2).[1] The administrative law judge, therefore, found that claimant was entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4). The administrative law judge also found that the presumption was not rebutted. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding a change in an applicable condition of entitlement established pursuant to 20 C.F.R. §725.309, based on invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[3] Additionally, employer asserts that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by failing to show that claimant did not have legal pneumoconiosis or that his totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment.[4] Claimant has not responded to employer's appeal. The Director, Office of

[1] Claimant filed six previous claims. Claimant's most recent claim, filed on February 27, 2006, was denied on January 8, 2008, because, although claimant established total disability pursuant to 20 C.F.R. §718.204(b), he failed to establish that he suffered from pneumoconiosis or that he was totally disabled by pneumoconiosis on the merits. 20 C.F.R. §§718.202(a); 718.204(c); Director's Exhibit 6. Claimant did not further pursue the claim.

[2] 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), Public Law No. 111-148 (2010). Relevant to this living miner's claim, the amendments 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 if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

[3] Employer's "Motion to Accept Petition for Review and Brief in Support thereof Two Days Out of Time," is granted. *See* 20 C.F.R. §802.211(d).

[4] The administrative law judge found that the evidence establishes that claimant does not have clinical pneumoconiosis. *See* 30 U.S.C. §921(c)(4); Decision and Order at 18.

Workers' Compensation Programs (the Director), responds, asserting only that the Board should reject employer's argument that a change in the applicable condition of entitlement cannot be shown pursuant to Section 725.309(d) by establishing invocation of the Section 411(c)(4) presumption.

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.[5] 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).

At the outset, we reject employer's argument that the administrative law judge erred in finding a change in an applicable condition of entitlement established pursuant to Section 725.309(d),[6] based on invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. A change in an applicable condition of entitlement is shown if claimant establishes one of the elements of entitlement he previously failed to establish. 30 U.S.C. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). One of the elements of entitlement that claimant previously failed to establish was that he was totally disabled due to pneumoconiosis. Contrary to employer's argument, because claimant is presumed to be totally disabled due to pneumoconiosis under Section 411(c)(4), if he can invoke the presumption, he will have satisfied his initial burden to demonstrate a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-3. Accordingly, as the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, she properly found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). *See White*, 23 BLR at 1-3.

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[5] The record indicates that claimant's coal mine employment was in West Virginia. Decision and Order at 6. 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, 1-202 (1989)(en banc).

[6] If a miner files an application 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); *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).

Next, we reject employer's argument that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis or that his totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge considered the opinion of Dr. Castle, who opined that claimant's "smoking history was sufficient to have caused him to develop chronic obstructive pulmonary disease." Decision and Order at 18. Dr. Castle concluded that claimant's "condition was due to tobacco smoking[,]" because "when coal workers' pneumoconiosis causes impairment, it 'generally' causes mixed, irreversible obstructive and restrictive ventilatory effect," as opposed to a strictly obstructive impairment. Decision and Order at 19. The administrative law judge properly accorded little weight to Dr. Castle's opinion, finding it inconsistent with the regulations that coal mine dust can cause an obstructive or restrictive impairment, or both. *Id*. *See* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

The administrative law judge also considered the opinion of Dr. Basheda, that claimant's respiratory impairment is due to smoking, and not coal dust exposure. Specifically, the administrative law judge found that Dr. Basheda's opinion was based, in part, on the improvement in the amount of coal dust to which miners were exposed subsequent to regulations implemented after 1970. The administrative law judge also found that Dr. Basheda's opinion was based, in part, on claimant's hereditary tendency to develop obstructive lung disease due to cigarette smoking.[7] The administrative law judge permissibly found that such reasoning reflected that Dr. Basheda's opinion was based, in part, on "generalities," "assumptions," and "speculation," rather than the specifics of claimant's medical condition. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 19. The administrative law judge, therefore, properly rejected Dr. Basheda's opinion.

[7] The administrative law judge theorized that because claimant's father died of lung cancer and chronic obstructive pulmonary disease, which he presumed were due to smoking, claimant has a "genetic tendency" to develop obstructive lung disease due to cigarette smoking. Decision and Order at 19.

In sum, the administrative law judge permissibly discredited all the medical opinion evidence that could support a finding that claimant did not have legal pneumoconiosis or that his totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. The administrative law judge, therefore, properly found that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Morrison v. Tennessee Consolidation Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

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