BRB No. 11-0667 BLA

MICHAEL S. DAY, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 07/13/2012
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (2006-BLA-5411) of Administrative Law Judge Richard T. Stansell-Gamm, with respect to a claim filed on January 19, 2005, 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). This case is before the Board for a second time. In its previous Decision and Order, the Board affirmed the

administrative law judge's findings that claimant established at least thirty-three years of coal mine employment and total disability at 20 C.F.R. §718.204(b)(2), but vacated the denial of benefits and remanded the case for the administrative law judge to consider whether the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4) is applicable.[1] *Day v. Eastern Assoc. Coal Corp.*, BRB No. 10-0115 BLA (Oct. 14, 2010)(unpub.).

On remand, the administrative law judge found that claimant's thirty-three years of coal mine employment were all underground. Based upon this determination, and his prior finding that claimant established that he has a totally disabling respiratory impairment, the administrative law judge concluded that claimant invoked the amended Section 411(c)(4) presumption. The administrative law judge further found, however, that employer rebutted the presumption by establishing that claimant does not suffer from pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in admitting Dr. Scatarige's CT scan interpretation, improperly weighed the evidence, and inappropriately applied the presumption at amended Section 411(c)(4). Employer and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] 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, Public Law No. 111-148 (2010). Relevant to this claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-three years of qualifying coal mine employment and that claimant invoked the rebuttable presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United

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

Claimant asserts that the administrative law judge improperly relied on the Board's decision in *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007)(unpub.) to support the admission of Dr. Scatarige's interpretation of the May 23, 2005 CT scan into the record, for the same reasons that he alleged when this case was previously before the Board.[4] Claimant also renews his argument, raised in the prior appeal, that the administrative law judge erred by failing to discredit the opinions of Drs. Wheeler and Crisalli for considering evidence in excess of the evidentiary limitations. Claimant further contends, as he did when the case was previously before the Board, that the administrative law judge improperly weighed the evidence at 20 C.F.R. §718.202(a), by not considering that medical evidence favorable to the claimant was originally obtained by employer in the course of this litigation.

As claimant concedes, the Board addressed and rejected all of these allegations of error in its previous Decision and Order and those holdings now constitute the law of the case. *See Day*, slip op. at 4-8; *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000)(en banc)(Hall, J. and Nelson, J., concurring and dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Because claimant has not demonstrated that the Board's holdings were erroneous, or established any exception to the law of the case doctrine, we will not disturb them. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see also Stewart*, 22 BLR at 1-89.

Additionally, claimant argues that the administrative law judge erred in applying the amended Section 411(c)(4) presumption by continuing to place the burden upon claimant to prove the existence of pneumoconiosis. Claimant states, "[d]espite the redistribution of the burden of proof, the [administrative law judge's] analysis changed little, if at all, between the first and second decisions." Claimant's Brief at 4. Therefore,

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States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[4] Claimant argues that, because *Mullins v. Plowboy Coal Co.*, BRB No. 06-0900 BLA (Aug. 30, 2007)(unpub.) is unpublished, it is not controlling or legally binding precedent. Claimant also asserts that the admission of multiple interpretations of the same CT scan is contrary to the intent of the evidentiary limitations. Claimant further contends that the administrative law judge's admission of this CT scan tainted his overall weighing of the CT scan evidence.

claimant contends that the current decision is "little more than a repackaging of the prior decision with the addition of passages intended to display an application and analysis under the new standard." *Id*.

We disagree. Claimant acknowledges that the administrative law judge's current decision includes language indicating that he understood the proper application of the amended Section 411(c)(4) presumption. Claimant's Brief at 4. However, claimant appears to argue that, because the administrative law judge denied benefits, even after finding that claimant invoked the presumption of total disability due to pneumoconiosis, his reasoning is somehow flawed. Claimant does not raise any new arguments concerning the administrative law judge's weighing of the evidence at 20 C.F.R. §718.202(a). In addition, while the administrative law judge used similar language in setting forth his findings in the present Decision and Order, it is not identical to the language he used in his initial Decision and Order. Further, the administrative law judge correctly laid out the burden of proof concerning the amended Section 411(c)(4) presumption and rationally found that employer rebutted the presumption, as the preponderance of the evidence was negative for clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Therefore, we affirm the administrative law judge's determination that employer rebutted the presumption at amended Section 411(c)(4).

Accordingly, we affirm the administrative law judge's Decision and Order on Remand – Denial of Benefits.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge