BRB No. 11-0688 BLA

JAMES L. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED: 07/31/2012
	)	
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 on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

Sarah M. Hurley (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 BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand Awarding Benefits (2008-BLA-5607) of Administrative Law Judge Linda S. Chapman on a claim filed on January 22, 2007, 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 the second time. In her original Decision and Order, the administrative law judge credited claimant with 28.21 years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

Pursuant to employer's appeal, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(b), (c), and the award of benefits, and remanded the case for reconsideration of the evidence relevant to the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis. *Davis v. Dominion Coal Corp.*, BRB No. 10-0181 BLA (Nov. 17, 2010)(unpub.). The Board also vacated the administrative law judge's finding regarding the date from which benefits commence and instructed the administrative law judge to reconsider this issue on remand, if reached. In addition, the Board instructed the administrative law judge to consider whether claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4), 30 U.S.C. §921(c)(4).[1]

In her Decision and Order on Remand, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Based upon this finding, the filing date of the claim, and the length of claimant's coal mine employment, the administrative law judge found that claimant invoked the amended Section 411(c)(4) presumption. The administrative law judge further determined that employer failed to rebut the presumption, as it did not affirmatively prove that claimant does not have pneumoconiosis and that claimant's total disability is unrelated to his coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred by limiting the parties to one supplemental report by a physician of record to address the new legal

[1] Relevant to this miner's 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(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

standard. Employer further asserts that the administrative law judge erred in finding that the evidence established that claimant was totally disabled and in finding that employer did not rebut the presumption. Further, employer contends that the administrative law judge's determination of the date for the commencement of benefits is not supported by the record or consistent with law. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's evidentiary challenge, urging the Board to reject employer's argument that the administrative law judge erred in limiting employer to one supplemental medical report on remand. Employer has filed a reply brief in which it reiterates 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 supported by substantial evidence, is rational, and is in accordance with applicable law.[2] 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).

I. The Administrative Law Judge's Evidentiary Ruling

On remand, but prior to receiving the case file, the administrative law judge issued an Order dated January 18, 2011, initially noting that employer submitted a motion to remand the claim to the district director or, alternatively, to reopen the record for discovery in light of the change in the law effected by the amendments. The administrative law judge further noted that employer had served discovery requests on claimant and that claimant had filed objections to the discovery requests and opposed the motion to remand the case to the district director. In light of the potential applicability of amended Section 411(c)(4), and the Board's remand instructions, the administrative law judge allowed the parties to submit one supplemental medical report and/or deposition testimony from any physician who rendered an affirmative medical report and/or deposition testimony addressing the relevant medical issues. The administrative law judge found that "this provides both parties sufficient opportunity to submit additional evidence to address the change in law under the [amendments]." January 18, 2011 Order at 1. In rejecting employer's discovery request, the administrative law judge stated that:

> I note that in this claim, there were several issues with regard to the medical evidence submitted by the Employer, in particular, reports by Dr. Fino and

[2] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 3. 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).

> Dr. Wheeler, which I excluded as exceeding the evidentiary limitations. The Board upheld my exclusion of Dr. Fino's report on appeal; the employer apparently did not appeal my exclusion of Dr. Wheeler's report. At this stage, I find that it is not appropriate to allow Employer to engage in wholesale discovery and submission of additional medical evidence, which is not necessary in light of my decision to allow the parties to submit supplemental medical reports or deposition testimony from physicians who prepared an affirmative medical report, and which would have the effect of allowing the Employer to cure the reports by Dr. Fino and Dr. Wheeler, which it submitted in violation of the evidentiary guidelines.

Id. at 2. The administrative law judge also stated that she would issue an Order upon receipt of the case file setting the schedule for the submission of supplemental medical reports and briefs.

On April 12, 2011, employer submitted a brief, along with Dr. Castle's February 17, 2011, supplemental medical report. On April 18, 2011, in an Order Regarding Additional Evidence on Remand, the administrative law judge reopened the record for the submission of supplemental medical reports, noting that employer had previously submitted Dr. Castle's supplemental medical report, which was admitted into the record as Employer's Remand Exhibit 1. On May 4, 2011, the administrative law judge issued an Order closing the record and setting a schedule for the submission of written briefs. Employer submitted an amended brief, but did not request leave to submit any additional evidence beyond Dr. Castle's supplemental report. Employer also noted its disagreement with the administrative law judge's ruling regarding discovery and preserved the issue for appeal. Claimant also submitted a brief on remand, but neither claimant nor the Director submitted additional evidence.

Employer contends that the administrative law judge's ruling permitting the parties to submit only one supplemental medical report to address the recent amendments to the Act violated its right to due process. Employer asserts that "[t]he Board instructed that the parties be allowed to submit evidence to address the change in law, without restricting the manner in which the parties could do so." Employer's Brief in Support of Petition for Review at 8. Employer further argues that the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), supports employer's right to develop a greater quantity of evidence, as it "mandates that parties to an agency proceeding are entitled to notice of the standard and to the right to defend themselves." *Id*. at 10.

The Director responds, asserting that the administrative law judge reasonably exercised her discretion in permitting the parties to submit one additional medical opinion

to address the change in the law effected by the amendments, as her ruling comports with the evidentiary limitations contained in 20 C.F.R. §725.414 and afforded employer an opportunity to respond to the medical evidence that the administrative law judge relied on to award benefits. The Director further notes that employer was not prejudiced, as neither the Director, nor claimant, submitted additional medical opinions on remand and, thus, Dr. Castle was able to review and respond to all of the medical evidence of record in his supplemental medical opinion dated February 17, 2011 and submitted by employer. *Id*. at 4; *see* Employer's Remand Exhibit 1.

Because the administrative law judge is given broad discretion in resolving procedural matters, including evidentiary issues, a party seeking to overturn an administrative law judge's evidentiary ruling must prove that the administrative law judge's action represented an abuse of his or her discretion. 20 C.F.R. §725.455(c); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). We agree with the Director that employer has not shown in this case that the administrative law judge abused her discretion by limiting the submission of evidence in response to the recent changes to the Act. The administrative law judge afforded the parties the opportunity to supplement the record with proof directed at the new standard, via a supplemental report from physicians whose opinions were originally submitted under 20 C.F.R. §725.414. On appeal, employer does not explain why the supplemental medical opinion it obtained from Dr. Castle did not afford it an opportunity to address the change in the law. Under these circumstances, where employer submitted a supplemental medical opinion from Dr. Castle to address the change in law, we agree with the Director and reject employer's assertion that the administrative law judge's limitation on the amount of additional evidence deprived employer of the opportunity to respond to the change in the law. *See Keener*, 23 BLR at 1-236. Therefore, we also hold that employer has not demonstrated that the limitation the administrative law judge placed on the development of additional evidence violated employer's right to due process.

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

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[3] the administrative law judge considered the medical opinions of Drs. Rasmussen, Koenig, Robinette, Baker, Fino and Castle.[4]

[3] The administrative law judge initially found that claimant did not establish total disability through the pulmonary function and blood gas study evidence, pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and further found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order on Remand at 5.

The administrative law judge found that Dr. Fino's opinion was sufficient to establish total disability, observing that he performed the most recent examination of claimant and that he reviewed claimant's medical records. Decision and Order on Remand at 6. The administrative law judge further determined that Dr. Fino's diagnosis of a totally disabling impairment outweighed the contrary evidence of record. *Id*. The administrative law judge concluded, therefore, that claimant established total disability at 20 C.F.R. §718.204(b)(2). *Id*.

Employer contends that the administrative law judge erred in crediting Dr. Fino's opinion, based on recency, and asserts that the administrative law judge should have accorded diminished weight to Dr. Fino's diagnosis of total disability because he relied on inadmissible evidence. Employer's Brief in Support of Petition for Review at 20-21. Furthermore, employer maintains that the administrative law judge failed to explain how Dr. Fino's opinion outweighed the contrary opinions of Drs. Rasmussen, Robinette, Baker and Castle. *Id*. at 23-24. In addition, employer contends that the administrative law judge did not properly weigh the medical opinion evidence against the non-qualifying pulmonary function and blood gas study evidence. *Id*. at 24.

Employer's allegations of error are without merit. The administrative law judge considered the entirety of Dr. Fino's opinion, correctly noting that Dr. Fino supported his diagnosis of a totally disabling impairment with reference to his findings on physical examination and the results of the pulmonary function studies and "explained how [claimant's] pulmonary impairment progressed over time to the point that it prevents him from returning to his previous coal mine employment."[5] Decision and Order on Remand

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[4] Drs. Koenig and Fino opined that claimant is totally disabled from a respiratory standpoint from performing his usual coal mine work, with its attendant requirement for heavy manual labor. Claimant's Exhibit 4; Employer's Exhibits 3, 8. In contrast, Drs. Rasmussen and Castle opined that claimant is capable of performing his usual coal mine work from a respiratory standpoint. Director's Exhibit 10; Employer's Exhibit 5; Employer's Remand Exhibit 1. Drs. Robinette and Baker did not express an opinion regarding whether claimant has a totally disabling respiratory impairment or whether claimant retains the respiratory capacity to perform his usual coal mine employment from a respiratory standpoint. Claimant's Exhibits 1, 5.

[5] Dr. Fino stated, "The lung function studies do show a progressive obstructive ventilatory abnormality that was moderate by the time I saw him for this examination. His last classified job was a roof bolter. His obstructive is irreversible. That is, the obstructive disease would prevent him from performing his last job in the mines." Employer's Exhibit 3.

at 7. In addition, the administrative law judge correctly found that, although Dr. Castle's February 17, 2011 supplemental report post-dated Dr. Fino's report, Dr. Fino's examination of claimant on February 26, 2009, was the most recent of record. *Id*. at 6; Claimant's Exhibit 4; Employer's Remand Exhibit 1. Thus, the administrative law judge rationally determined that Dr. Fino's diagnosis of a totally disabling respiratory impairment was well-reasoned and well-documented. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000); *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 7; Employer's Exhibit 3. Furthermore, the administrative law judge acted within her discretion as fact-finder in rejecting employer's contention that Dr. Castle's opinion is the best-supported opinion of record, stating:

> For reasons that are not explained . . . Dr. Castle did NOT review all of the available evidence, specifically, Dr. Fino's narrative report and his deposition testimony. It is correct that none of the pulmonary function studies in the record met the regulatory criteria to establish total disability. But the regulations also provide that a miner can establish total disability by a reasoned medical opinion, even if the results of testing do not meet the disability standards. Dr. Fino, having reviewed all of the pulmonary function studies, and noted a fairly consistent obstructive abnormality that progressed over the years, concluded that [claimant's] current, moderate obstructive impairment would prevent him from returning to his previous job in the mines. In contrast, Dr. Castle reported the results of those tests, and that they did not meet the disability criteria, but he did not discuss the picture they painted over time, or their progressively worsening nature.

Decision and Order on Remand at 7; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34**,** 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42**,** 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In addition, contrary to employer's contention, the administrative law judge's decision to accord greatest weight to Dr. Fino's opinion encompassed a consideration of the nonqualifying objective studies, along with the medical opinions that did not diagnose total disability. As indicated above, the administrative law judge explicitly accorded greatest weight to Dr. Fino's opinion that the non-qualifying pulmonary function studies showed a progressive decline and supported the diagnosis of a moderate obstructive impairment that prevented claimant from performing his last job as roof bolter, which required heavy labor. Decision and Order on Remand at 7; Employer's Exhibits 3, 8. It is evident, therefore, that the administrative law judge concluded that Dr. Fino's opinion was not outweighed by the non-qualifying objective evidence or the contrary medical

opinions.[6] *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc). Accordingly, we affirm the administrative law judge's finding that Dr. Fino's opinion is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and invocation of the amended Section 411(c)(4) presumption.[7]

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

Employer alleges that the administrative law judge erred in finding that employer did not rebut the presumption by proving that claimant's totally disabling pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment.[8] Specifically, employer challenges the administrative law judge's determination that the opinion of Dr. Fino was insufficient to establish rebuttal of the presumption at amended Section 411(c)(4), based on her finding that Dr. Fino's opinion, that claimant's totally disabling impairment is not related to coal dust exposure, was not well-reasoned or well-documented.

We reject employer's allegation of error, as the administrative law judge acted within her discretion in finding that employer did not satisfy its burden to affirmatively establish that claimant's disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment. Decision and Order on Remand at 8; *see*

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[6] The non-qualifying blood gas studies do not detract from the administrative law judge's reliance upon Dr. Fino's view that the pulmonary function studies establish that claimant is totally disabled under 20 C.F.R. §718.204(b)(2), as blood gas studies and pulmonary function studies measure different types of impairment. *See Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984).

[7] Although the administrative law judge did not explicitly address the weight to which Dr. Rasmussen's opinion, that claimant can perform his usual coal mine employment, was entitled, her findings according greater weight to Dr. Fino's opinion than to Dr. Castle's contrary opinion apply to Dr. Rasmussen's opinion as well. Dr. Rasmussen's examination of claimant occurred on March 29, 2007, while Dr. Fino examined claimant on February 26, 2009 and Dr. Rasmussen, unlike Dr. Fino, did not comment on the progressive decrement in claimant's pulmonary function study values. Director's Exhibit 10; Employer's Exhibit 3.

[8] As the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing the absence of clinical pneumoconiosis is unchallenged on appeal, it is affirmed. 30 U.S.C. §921(c)(4); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Affirmance of this finding precludes employer from establishing rebuttal by proving that claimant does not have legal pneumoconiosis.

Morrison v. Tenn. Consol. Coal Co., 644 F.3d 473, 479, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge provided a rational reason for her determination that Dr. Fino's exclusion of coal dust exposure as a cause of claimant's obstructive impairment was not credible, stating:

> Dr. Fino has indicated that [claimant's] x-ray was consistent with both pneumoconiosis and sarcoidosis, but he has not explained what made him pick sarcoidosis over pneumoconiosis as the *sole* etiology of the abnormalities on [claimant's] x-ray, which he in turn concluded were the cause of his obstructive pulmonary disability.

Decision and Order on Remand at 11; *see Hicks*, 138 F.3d at 533-34**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42**,** 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. Moreover, the administrative law judge addressed employer's argument that the opinions of Drs. Castle and Rasmussen establish that claimant's totally disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment. The administrative law judge stated:

> Dr. Castle concluded that the symptoms reported in [claimant's] medical records were consistent with and indicative of bronchial asthma, and that he also had a mild degree of airway obstruction on some pulmonary function studies. But I find that his summary conclusion that [claimant] had evidence of bronchial asthma or reactive airway disease, and that this is a condition totally unrelated to coal mine dust exposure and coal workers' pneumoconiosis, is not sufficient to rule out coal mine dust exposure as a cause of the disabling obstructive impairment that Dr. Fino has concluded [claimant] now suffers from. Nor is Dr. Rasmussen's opinion supportive of rebuttal, because he concluded that [claimant] did not have a measurable loss of lung function, and thus did not address the etiology of [claimant's] current disabling impairment.

Decision and Order on Remand at 12. Thus, the administrative law judge provided appropriate reasons for her conclusion that the opinions of Drs. Castle and Rasmussen did not rule out coal mine employment as a cause of claimant's disabling respiratory impairment. *See Hicks*, 138 F.3d at 533-34**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42**,** 21 BLR at 2-275-76. Consequently, we affirm the administrative law judge's determination that employer failed to prove that the miner is not suffering from a disabling impairment arising out of his coal mine employment. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335. Because we have affirmed the administrative law judge's findings that claimant established invocation of the amended Section 411(c)(4) presumption and that employer has not rebutted the presumption, we affirm the award of benefits.

IV. Commencement of Benefits

Finally, employer asserts that the administrative law judge's determination that January 2007, the month in which claimant filed his claim for benefits, is the date from which payment of benefits should commence, cannot be affirmed, as she "offered no analysis to support that determination." Employer's Brief in Support of Petition for Review at 31. This contention has merit.

If the medical evidence does not establish the date that a miner became totally disabled due to pneumoconiosis, benefits are payable as of the filing date of the claim, unless credited medical evidence indicates that the miner was not totally disabled at some point after that date. 20 C.F.R. §725.503; *Edmiston v. F&R Coal Co*., 14 BLR 1-65 (1990); *see also Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In this case, the administrative law judge did not discuss the evidence or explain why it did not permit her to determine the month of onset of total disability due to pneumoconiosis. In addition, as employer notes, there are three medical conclusions from Drs. Rasmussen, Castle and Baker expressly ruling out a disabling impairment as of April 2007, December 2007 and October 2008, along with Dr. Robinette's opinion in July 2008, which weighs against disability, and Dr. Castle's latest report reviewing evidence obtained between 2007 and 2009, which ruled out disability. Because the administrative law judge's finding of total disability was based upon Dr. Fino's report of his February 26, 2009 examination of claimant, the evidence cited by employer could, if credited, establish that claimant was not totally disabled for a period prior to this date and subsequent to the filing of his claim. Thus, we must vacate the administrative law judge's determination that benefits commence as of January 2007 and remand the case for the administrative law judge to reconsider the date from which benefits are payable, in light of her weighing of the conflicting evidence.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the result only.

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JUDITH S. BOGGS
Administrative Appeals Judge