BRB No. 12-0574 BLA

BILL CANTRELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOTCO ENERGY COMPANY, INCORPORATED	)	DATE ISSUED: 07/22/2013
	)	
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 on Remand - Granting Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jonathan Rolfe (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 on Remand – Granting Benefits (2011-BLA-5058) of Administrative Law Judge Alan L. Bergstrom rendered on a claim[1] 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 is before the Board for the second time. In the last appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's determinations that claimant worked in coal mine employment for seventeen years and eleven months and that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). However, because the administrative law judge did not provide adequate rationales for his weighing of the medical opinion evidence, and relied on an inaccurate characterization of the preamble to the amended regulations, the Board vacated the administrative law judge's findings that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c). The Board instructed the administrative law judge to initially consider, on remand, whether claimant was entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and to allow the parties to submit evidence, in accordance with the evidentiary limitations set forth in 20 C.F.R. §725.414, to address the change in law. Lastly, the Board declined to address employer's arguments with respect to the constitutionality of the amendments to the Act as premature, and denied employer's request to hold the case in abeyance. Accordingly, the Board affirmed in part, and vacated in part, the Decision and Order awarding benefits, and remanded the case to the administrative law judge for further consideration. *Cantrell v. Dotco Energy Co.*, BRB No. 10-0269 BLA (Jan. 11, 2011) (unpub.).

On remand, the administrative law judge allowed for the submission of additional evidence to address the change in law, and admitted Claimant's Exhibit 3 and Employer's Exhibits 9 and 10 into the record, subject to the evidentiary limitations at 20 C.F.R.

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[1] Claimant, Bill Cantrell, filed his claim for benefits on November 2, 2007. Director's Exhibit 2.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

§725.414. The administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4), based on the Board's affirmance of his undisputed findings that claimant established seventeen years and eleven months of underground coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer challenges the constitutionality and applicability of amended Section 411(c)(4) to this case. On the merits of entitlement, employer argues that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption under amended Section 411(c)(4), and erred in his weighing of the medical opinion evidence relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response letter, urging the Board to reject employer's arguments regarding the constitutionality and applicability of amended Section 411(c)(4).

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.[3] 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).

Initially, employer maintains that the retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. We reject this contention for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010); *see also Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Likewise, employer contends that the provisions of amended Section 411(c)(4) are not applicable in cases where an employer is liable for benefits, as the plain language of 30 U.S.C. §921(c)(4) provides limitations on rebuttal evidence which apply only to claims brought against "the Secretary." Employer's Brief in Support at 14-20. The Board rejected this identical argument in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No.

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the same reasons set forth in *Owens*. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). We also reject employer's argument that the application of amended Section 411(c)(4) to this case is premature for lack of implementing regulations, as the mandatory language of amended Section 411(c)(4) supports the conclusion that its provisions are self-executing. *See Mathews*, 24 BLR at 1-201. Thus, the administrative law judge properly found that the provisions of amended Section 411(c)(4) are applicable, and that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis thereunder.[4]

Employer next contends that the administrative law judge erred in finding that the evidence failed to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Employer first argues that the administrative law judge erred in applying the "rule out" standard in determining whether rebuttal was established. Contrary to employer's argument, however, the administrative law judge properly relied on the rebuttal standard articulated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011). The court held that "rebuttal requires an affirmative showing … that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work." *Morrison*, 644 F.2d at 480, 25 BLR at 2-9 [emphasis in original]; Decision and Order on Remand at 15. Hence, we reject employer's argument.

Employer next maintains that the opinions of Drs. Hippensteel and Jarboe are sufficient to affirmatively rebut the amended Section 411(c)(4) presumption, and that the administrative law judge erred in discrediting these opinions. Specifically, employer argues that the administrative law judge selectively analyzed the opinions of Drs. Hippensteel and Jarboe, and ignored multiple factors, based upon the totality of the medical evidence, that these physicians relied upon to conclude that claimant does not have legal pneumoconiosis and that coal dust exposure was not a cause of claimant's disabling impairment. In so doing, employer asserts that the administrative law judge substituted his opinion for that of the physicians. Employer's arguments lack merit.

A review of the Decision and Order on Remand reveals that the administrative law judge provided a comprehensive discussion of both Dr. Hippensteel's opinion, contained in narrative reports dated July 9, 2008 and February 28, 2011, and in deposition

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[4] Employer's request to hold this appeal in abeyance is rendered moot, based on the United States Supreme Court's denial of the petition for certiorari in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. ___ (2012).

testimony dated March 20, 2009, and Dr. Jarboe's opinion, contained in narrative reports dated October 12, 2008 and February 17, 2011, and in deposition testimony dated April 2, 2009. Decision and Order on Remand at 9-14, 16-18; Employer's Exhibits 1, 2, 7, 9, 10. The administrative law judge fully delineated each physician's findings and the underlying bases for their conclusions that smoking caused claimant's disabling impairment and, after critically examining each opinion, rationally determined that neither physician had rendered an adequately explained and supported opinion. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order on Remand at 16-18. The administrative law judge determined that the probative value of Dr. Hippensteel's opinion, that claimant's lung disease is due to cigarette smoking, was undermined because it was predicated on Dr. Hippensteel's belief that "severe obstructive impairment from coal workers' pneumoconiosis is usually associated with x-ray evidence of pneumoconiosis which is not present in this case," contrary to the well-established principle that "negative x-rays do not preclude a diagnosis of pneumoconiosis." Decision and Order on Remand at 17; Employer's Exhibit 7. The sole reference to the issue of legal pneumoconiosis contained in Dr. Hippensteel's deposition testimony included his understanding of the regulatory definition of legal pneumoconiosis and his opinion that, in this case, claimant "does not have the type of physiologic impairment expected from coal mine dust exposure." Therefore, the administrative law judge properly found that Dr. Hippensteel's analysis of claimant's potential for having legal pneumoconiosis was "deficient." Decision and Order on Remand at 17; Employer's Exhibit 10 at 16-17. Further, the administrative law judge reasonably discounted Dr. Hippensteel's opinion because the physician failed to adequately explain why claimant's lung disease was solely attributable to smoking, rather than to multiple causes, including pneumoconiosis, or why claimant's significant reversibility demonstrated on pulmonary function studies necessarily eliminated a finding of pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-484 (6th Cir. 2007); Decision and Order on Remand at 16-17. As Dr. Hippensteel failed to adequately explain how he eliminated more than seventeen years of coal dust exposure as a contributing or aggravating cause of claimant's totally disabling respiratory impairment and to sufficiently support his opinion that smoking was the sole causative factor in claimant's impairment, the administrative law judge permissibly concluded that Dr. Hippensteel's opinion was entitled to little weight. Decision and Order on Remand at 17; *see Clark*, 12 BLR at 1-155.

Similarly, the administrative law judge found that Dr. Jarboe, who opined that claimant's disability was attributable to bronchial asthma and emphysema caused by smoking, failed to adequately explain why the reversibility of claimant's pulmonary obstruction, as demonstrated during the post-bronchodilator test of claimant's pulmonary function study, "necessarily preclude[d] a finding of legal pneumoconiosis." Decision and Order on Remand at 17; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-484. The administrative law judge found that Dr. Jarboe's elimination of coal dust exposure as a

cause of claimant's impairment was further undermined by his reliance on a study that concluded that coal dust inhalation combined with smoking causes an increased residual lung volume of, at most, 135% above normal. At his deposition, in applying the study's findings to claimant's residual lung-volume increase of 385% above normal, Dr. Jarboe testified that only 130% of the increase above normal could be caused by smoking and/or coal dust, and he attributed claimant's increased residual lung volume to smoking-induced emphysema and bronchial asthma, excluding coal dust exposure as a contributing cause of the increase. Decision and Order on Remand at 18; Employer's Exhibit 9 at 22-27, 33-34. The administrative law judge concluded that Dr. Jarboe's residual volume analysis was inconsistent and unpersuasive, and acted within his discretion in finding that Dr. Jarboe's opinion was insufficiently reasoned and entitled to diminished weight. Decision and Order on Remand at 18; *see Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Accordingly, the Decision and Order on Remand – Granting Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge