BRB No. 12-0604 BLA

GRADY SHORTRIDGE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 07/19/2013
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 – Granting Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Maia S. Fisher (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits (2011-BLA-05271) of Administrative Law Judge Alan L. Bergstrom, 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). Claimant filed this claim on October 15, 2009.[1] Director's Exhibit 3.

In his Decision and Order issued July 30, 2012, the administrative law judge noted the recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress reinstated the presumption of Section 411(c)(4) of the Act. Under Section 411(c)(4), if a miner establishes at least fifteen years of underground or substantially similar coal mine employment, and establishes 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, 260 (2010) (codified at 30 U.S.C. §§921(c)(4)). If the presumption is invoked, the burden shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id*.

After crediting claimant with more than fifteen years of underground coal mine employment,[2] the administrative law judge found that new evidence established that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge thus found that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d), and considered his claim on its merits. Based on claimant's years of underground coal mine employment and the finding of total disability, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the application of amended Section 411(c)(4) to subsequent claims. Employer also argues that the administrative law judge erred in

[1] Claimant's first claim, filed in 1990, was dismissed with prejudice by Administrative Law Judge Christine M. Moore in 1995, for claimant's failure to appear at a hearing. Director's Exhibit 1. Claimant filed a subsequent claim in 2002, but voluntarily withdrew it in 2003. He filed another subsequent claim in 2003, but voluntarily withdrew it in 2004. Both of the withdrawn claims are considered not to have been filed. 20 C.F.R. §725.306(b).

[2] Claimant's coal mine employment was in Virginia. Director's Exhibit 4. 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).

finding that employer failed to rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis.[3] Claimant has filed a response brief, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments regarding the application of amended Section 411(c)(4) to this claim. In a reply brief, employer reiterates its arguments regarding rebuttal of the Section 411(c)(4) presumption.[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. 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).

To establish entitlement to benefits under the Act, a claimant must establish by a preponderance of the evidence that he or she 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

As an initial matter, employer argues that the operative date for determining whether amended Section 411(c)(4) applies to a subsequent claim is the filing date of the original claim. Employer's Brief at 23-24. The United States Court of Appeals for the Fourth Circuit has rejected a substantially similar argument. *See Union Carbide Corp. v. Richards*, Nos. 12-1294 & 12-1978, 2013 WL 3358994 (4th Cir. July 5, 2013); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388-89, 25 BLR 2-65, 2-82-85 (4th Cir. 2011), *cert.*

[3] Employer does not challenge the administrative law judge's findings that claimant has more than fifteen years of underground coal mine employment, that claimant has a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2), and that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] In its opening brief, employer also argued that retroactive application of amended Section 411(c)(4) is a violation of due process, and an unconstitutional taking of private property under the Fifth Amendment to the United States Constitution. But employer withdrew those arguments in its reply brief, citing the recent decision of the United States Court of Appeals for the Sixth Circuit in *Vision Processing, LLC v. Groves*, 705 F.3d 551 (6th Cir. 2013).

denied, 568 U.S. (2012). For the reasons set forth in *Richards* and *Stacy*, we reject employer's argument. Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, which was filed after January 1, 2005, and was pending on March 23, 2010.

After finding that claimant invoked the Section 411(c)(4) presumption, the administrative law judge noted that the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis,[5] or by proving that claimant's respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305). The administrative law judge found that employer failed to rebut the presumption by either method. Decision and Order at 25-30. Specifically, the administrative law judge first considered the x-ray, biopsy, and medical opinion evidence and found that employer failed to disprove the existence of pneumoconiosis. *Id*. at 27-29. Next, the administrative law judge considered the medical opinion evidence and found that employer failed to prove that claimant's impairment did not arise out of his coal mine employment. *Id*. at 29-30. Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Vuskovich and Hippensteel. Employer's Brief at 18-21. We disagree.

Dr. Vuskovich opined that claimant does not have clinical or legal pneumoconiosis, and diagnosed him with mild, non-disabling chronic obstructive pulmonary disease caused by cigarette smoking, and disabling hypoxemia caused by claimant's use of narcotic pain medication. Employer's Exhibit 1 at 34-39. The administrative law judge, however, discounted Dr. Vuskovich's opinion "due to the lack of consideration of available treatment records and examinations subsequent to 2006 that were submitted into evidence." Decision and Order at 13. An administrative law judge may give less weight to a medical opinion that he or she finds to be based on limited

[5] To rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, employer must affirmatively prove the absence of both clinical and legal pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

clinical data. *See Sabett v. Director, OWCP*, 7 BLR 1-299, 1-301 n.1 (1984). The administrative law judge further observed that Dr. Vuskovich's opinion was also entitled to less weight because it "is weighed heavily by pulmonary evaluations from previously disposed claims for benefits under the Act and one that exceeded evidentiary restrictions," and because it is "internally inconsistent." Decision and Order at 13. Employer does not challenge the administrative law judge's decision to discredit Dr. Vuskovich's opinion on any of those bases. Therefore, we affirm the administrative law judge's finding that Dr. Vuskovich's opinion is deficient and entitled to little weight.[6] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13, 29.

Dr. Hippensteel also opined that claimant does not have clinical or legal pneumoconiosis, and diagnosed him with "variable airflow obstruction consistent with his previous smoking history," and gas exchange problems due to sleep apnea and chronic heavy narcotic use. Employer's Exhibit 7 at 19; Employer's Exhibit 8 at 4. Dr. Hippensteel concluded that claimant is totally disabled as a whole man, based on qualifying arterial blood gas values, but opined that those values were unrelated to lung disease or coal mine dust exposure. Employer's Exhibit 7 at 22-23, 31; Employer's Exhibit 8 at 4. Employer contends that the administrative law judge erred in finding Dr. Hippensteel's opinion contradicted by that of claimant's treating physician, without examining the treating physician's reasoning or qualifications. Employer's Brief at 21. We disagree.

The administrative law judge did not weigh Dr. Hippensteel's opinion against the opinion of claimant's treating physician, Dr. Anderson. Instead, the administrative law judge took note of the treatment prescribed by Dr. Anderson over a two-year period beginning in December 2007, and found that it did not support Dr. Hippensteel's opinion that claimant's reduced blood gas values and his need for supplemental oxygen stem from his use of pain medication. Decision and Order at 30. Dr. Hippensteel opined that claimant's qualifying arterial blood gas values are due in large part to his use of narcotic pain medication, and that he would be capable, from a pulmonary standpoint, of returning to his coal mine employment if he stopped using the narcotics. Employer's Exhibit 7 at 22; Employer's Exhibit 8 at 4. The administrative law judge, however, observed that Dr. Anderson encouraged claimant to use supplemental oxygen. Employer's Exhibit 14; Decision and Order at 30. The administrative law judge noted further that Dr. Anderson

[6] Because we affirm the administrative law judge's credibility determination regarding Dr. Vuskovich's opinion on the grounds stated above, we need not address employer's additional arguments that the administrative law judge erred in discrediting Dr. Vuskovich's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

did not attribute any decrease in claimant's pulmonary capacity to his pain medication, even though Dr. Anderson was aware of the medication and consistently diagnosed claimant with mild obstructive lung disease, decreased diffusion capacity, and dyspnea over the two-year period. Employer's Exhibit 14; Decision and Order at 30. The administrative law judge also noted that when claimant went to the emergency room for syncope on May 31, 2009, the treating physician diagnosed him with oxygen-dependent COPD, and that when claimant returned to the emergency room with shortness of breath on July 12, 2010, he was told to continue using supplemental oxygen. Employer's Exhibit 16 at 17-18, 82-83. The administrative law judge acted within his discretion when he found that Dr. Hippensteel's opinion was not well-supported by the medical treatment evidence in the record, and therefore permissibly discredited it. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Willis v. Birchfield Mining Co.*, 15 BLR 1-59, 1-61-62 (1991); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989).

Upon invocation of the Section 411(c)(4) presumption, it is presumed that claimant has clinical and legal pneumoconiosis, and that his disabling respiratory impairment arose out of his coal mine employment. Because the administrative law judge permissibly discredited the contrary opinions of Drs. Vuskovich and Hippensteel, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption.[7] Therefore, we affirm the award of benefits.

[7] Because employer has not met its burden of affirmatively rebutting the Section 411(c)(4) presumption, we need not address its argument that the administrative law judge erred in crediting Dr. Al-Khasawneh's opinion that claimant has legal pneumoconiosis. Employer's Brief at 21-22.

Accordingly, the administrative law judge's Decision and Order – Granting Benefits is affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge