BRB No. 13-0531 BLA

ARVIS R. TOLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 07/07/2014
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 on Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand on Reconsideration (2009-BLA-05255) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (2012)(the Act). This case involves a miner's subsequent claim[1] filed on February 20, 2008, and is before the Board for the second time.[2]

In his initial decision, the administrative law judge accepted employer's stipulations to twenty-seven years of coal mine employment,[3] and that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Applying amended Section 411(c)(4),[4] the administrative law judge found that claimant worked in underground coal mine employment for at least sixteen years. In view of the findings of more than fifteen years of qualifying coal mine employment, and total disability, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board vacated the administrative law judge's decision, and remanded the case so that the parties could submit evidence in response to the change in the law due to the reinstatement of Section 411(c)(4) after the hearing. *Toler v. E. Associated Coal Corp.*, BRB No. 10-0640 BLA, slip op. at 3-4 (July

[1] Claimant's prior claim, filed on February 4, 1993, was finally denied because claimant did not establish the existence of pneumoconiosis. *Toler v. E. Associated Coal Corp.*, BRB No. 96-1499 BLA (July 29, 1997)(unpub.), *aff'd*, No. 97-2148 (4th Cir. Aug. 19, 1998)(unpub.).

[2] The Board set forth the full procedural history of this case in its last decision. *Toler v. E. Associated Coal Corp.*, BRB No. 10-0640 BLA, slip op. at 2-3 (July 28, 2011)(unpub.).

[3] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 5, 7. 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).

[4] 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, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4)(2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

28, 2011)(unpub.). In remanding the case for the administrative law judge to reopen the record, the Board rejected employer's argument that the administrative law judge had to "render pre-judgment rulings" before he could refer to the preamble to the 2001 regulatory revisions when weighing the medical opinion evidence. *Toler*, slip op. at 4 n.4. Additionally, the Board denied employer's request that the case be reassigned to a different administrative law judge on remand. *Toler*, slip op. at 4-5.

On remand, following the submission of additional evidence and briefs,[5] the administrative law judge again credited claimant with twenty-seven years of coal mine employment, of which at least sixteen years were spent in underground coal mine employment, and found that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Rejecting employer's argument that principles of finality precluded the application of amended Section 411(c)(4) to claimant's subsequent claim, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, thereby establishing a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that principles of res judicata and the separation of powers barred the administrative law judge from applying Section 411(c)(4) to claimant's subsequent claim. Further, employer contends that the administrative law judge erred in his analysis of the medical evidence in finding that employer failed to rebut the Section 411(c)(4) presumption. Finally, employer requests that the case be reassigned to a different administrative law judge on remand.[6] Claimant has not responded to this

[5] On remand, the administrative law judge reopened the record for sixty days for the submission of additional evidence. When no new evidence was submitted, he reinstated his original decision awarding benefits. Employer moved for reconsideration, noting that the order reopening the record was never served on employer's counsel. The administrative law judge granted reconsideration, and reopened the record for sixty days for the submission of evidence, with thirty days thereafter in which to submit briefs. Employer timely submitted a supplemental medical report from Dr. Rosenberg. After the time for submitting evidence expired, claimant submitted an additional medical report, which employer challenged as untimely, and which the administrative law judge excluded. Following the submission of briefs, the administrative law judge issued his Decision and Order on Remand on Reconsideration, which is the subject of this appeal.

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-seven years of coal mine employment, at least sixteen of which were in underground coal mine employment, and his finding that claimant is totally disabled by a

appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments that the application of Section 411(c)(4) to this subsequent claim violated principles of res judicata and the separation of powers.

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).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim 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(c)(1);[7] *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(c)(3). Claimant's last claim was denied because he did not establish the existence of pneumoconiosis. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(c)(3),(4).

Application of Amended Section 411(c)(4)

Employer contends that, because claimant filed a prior claim and lost, and the United States Court of Appeals for the Fourth Circuit affirmed that decision, res judicata "preclude[s] the relitigation of that claim," via the application of amended Section 411(c)(4). Employer's Brief at 14. Employer's contention lacks merit. Claimant does not seek to relitigate or reopen his prior claim. He filed a subsequent claim, which is a new assertion of entitlement, based on new evidence. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(en banc)("A new

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respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] The Department of Labor revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c).

black lung claim is not barred, as a matter of ordinary [res judicata,] by an earlier denial, because the claims are not the same. The health of a human being is not subject to once-in-a-lifetime adjudication."). The administrative law judge's adjudication of claimant's subsequent claim left the prior denial of benefits undisturbed. We therefore reject employer's argument that res judicata compels the denial of claimant's subsequent claim.

Employer argues further that applying amended Section 411(c)(4) to claimant's subsequent claim violates the constitutional separation of powers principle by retroactively nullifying the final decision of the Article III court that affirmed the denial of claimant's prior claim. Employer's Brief at 14-16, *citing Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). However, as discussed supra, a subsequent claim is not the same cause of action as the original denied claim, and does not reopen the prior claim. *See Rutter*, 86 F.3d at 1362, 20 BLR at 2-235. Thus, unlike the legislation at issue in *Plaut*,[8] amended Section 411(c)(4) as applied to claimant's subsequent claim does not disturb the final judgment of a federal court. As the Director notes, the United States Court of Appeals for the Sixth Circuit recently rejected the identical separation of powers argument in a case involving the application of amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), to a survivor's subsequent claim:

> Petitioner claims that the Board's retroactive application of the [statutory] amendments contravenes the general principle that "Congress cannot deprive final judicial judgments by Article III courts of their conclusive effect." As noted above however, the Board's decision to award benefits in response to [claimant's] subsequent claim did nothing to alter, undermine, disturb or overturn the . . . prior denial of her 2003 claim; nor does it challenge this Court's affirmance of that decision. Therefore, Petitioner's separation of powers argument . . . fails.

[8] In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the plaintiffs' original action for securities fraud under Section 10(b) of the Securities Exchange Act had been dismissed as time-barred, under the Supreme Court's construction of the statute of limitations in *Lampf v. Gilbertson*, 501 U.S. 350 (1991). No appeal was taken and the decision dismissing the action became final. *Plaut*, 514 U.S. at 214. Thereafter, Congress amended the Securities Exchange Act to return the statute of limitations to what it was on June 19, 1991, one day before the *Lampf* decision, and made the new limitations period applicable to suits that had already been dismissed as time-barred under *Lampf*, allowing plaintiffs, upon motion, to reinstate their dismissed claims. *Plaut*, 514 U.S. at 214-15. Upon review, the Supreme Court struck down the reinstatement provision as a violation of the separation of powers principle, because it "retroactively command[ed] the federal courts to reopen final judgments…." 514 U.S. at 219.

Consolidation Coal Co. v. Maynes, 739 F.3d 323, 328 (6th Cir. 2014). Therefore, we reject employer's argument that the administrative law judge's application of Section 411(c)(4) to claimant's subsequent claim violated the separation of powers principle.

Invocation of the Section 411(c)(4) Presumption and Establishing a Change in an Applicable Condition of Entitlement

Employer argues that the administrative law judge erred by finding the existence of pneumoconiosis by presumption, thus relieving claimant of his burden to prove a change in the applicable condition of entitlement. Employer's Brief at 18. We disagree. Claimant's presumed total disability due to pneumoconiosis under Section 411(c)(4), based on invocation of the presumption, satisfies his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309. *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794 (7th Cir. 2013)(holding that the elements of entitlement may be established by the Section 411(c)(4) presumption for purposes of demonstrating a change in an applicable condition of entitlement). Therefore, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[9] or by proving 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); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer asserts that the administrative law judge applied an improper rebuttal standard under Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at

[9] "Clinical pneumoconiosis" consists of "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).

28. Contrary to employer's argument, the administrative law judge correctly explained that, because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order on Remand at 13. Moreover, the Fourth Circuit has explicitly stated that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure.[10] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we reject employer's argument that the administrative law judge applied an improper rebuttal standard.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Renn and Rosenberg, who opined that claimant does not have pneumoconiosis, but suffers from disabling chronic obstructive pulmonary disease (COPD) that is due solely to smoking.[11] Employer's Exhibits 5-6, 12-13; Dr. Rosenberg's Supplemental Report, May 28, 2013 (Unstamped Exhibit). The administrative law judge found that the opinions of Drs. Renn and Rosenberg "as to the etiology of [c]laimant's impairment [were] not persuasive," because their reasoning for eliminating coal mine dust exposure as a source of claimant's COPD was at odds with the medical science accepted by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order on Remand at 11. Therefore, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge substituted his judgment for that of the physicians in analyzing the opinions of Drs. Renn and Rosenberg. Employer's Brief at 19, 21-28. We disagree. The administrative law judge noted that Drs. Renn and Rosenberg eliminated coal mine dust exposure as a source of claimant's COPD, in part, because they found a significant reduction in claimant's FEV1/FVC ratio which, in their opinions, is characteristic of obstruction due to smoking, but not of lung disease caused by coal mine dust exposure. Employer's Exhibits 5-6, 12-13; Unstamped Exhibit at 3-4.

[10] Similarly, the implementing regulation that was promulgated after the administrative law judge's decision requires the party opposing entitlement in a miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii).

[11] The administrative law judge also considered the medical opinion of Dr. Burrell, who diagnosed claimant with chronic obstructive pulmonary disease due to both cigarette smoking and coal mine dust exposure. Director's Exhibits 13, 14.

The administrative law judge permissibly found that the reasoning Drs. Renn and Rosenberg used to eliminate coal mine dust exposure as a source of claimant's COPD was inconsistent with the medical science accepted by DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

Employer contends that the administrative law judge ignored the fact that Dr. Rosenberg cited medical studies published after the preamble, to support his opinion "regarding the significance of the FEV1% and the impact of cigarette smoking on the cause of emphysema based on particle size and particle content." Employer's Brief at 24. Contrary to employer's contention, Dr. Rosenberg's reliance on more recent medical studies did not require the administrative law judge to conclude that advances in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs, that was endorsed by the DOL in the preamble. *See Cochran*, 718 F.3d at 324 (observing that neither of employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the Preamble").

Moreover, the administrative law judge found that, even if he accepted Dr. Rosenberg's view that a more recently published study showed that an earlier study cited by DOL had underestimated the effects of cigarette smoking on lung function, Dr. Rosenberg did not adequately explain why claimant's years of coal mine dust exposure did not also contribute to, or aggravate, his COPD, along with smoking. Decision and Order on Remand at 10. The administrative law judge acted within his discretion in evaluating the credibility of Dr. Rosenberg's opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. The failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[12] *See Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Accordingly, we affirm the administrative law judge's determination

[12] Consequently, we need not address employer's arguments regarding the administrative law judge's finding that employer also failed to disprove the existence of clinical pneumoconiosis. Employer's Brief at 19-21; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

The administrative law judge next addressed whether employer established that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). The administrative law judge found that Dr. Rosenberg's disability causation opinion was "flawed" for the same reasons the administrative law judge gave for discounting the physician's opinion as to the existence of legal pneumoconiosis. Decision and Order on Remand at 11. Additionally, the administrative law judge discounted the opinions of Drs. Renn and Rosenberg, because "they both failed to diagnose [c]laimant with pneumoconiosis[,] contrary to [his] findings." *Id*.

Employer argues that the administrative law judge erred in finding that it did not rule out a relationship between claimant's disability and his coal mine employment. Employer's Brief at 28. Contrary to employer's contention, the administrative law judge permissibly discounted the disability causation opinions of Drs. Renn and Rosenberg, because the physicians did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013). Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption. Therefore, we affirm the award of benefits. 30 U.S.C. §921(c)(4). Employer's request to reassign the case is, therefore, moot. Employer's Brief at 30.

Accordingly, the administrative law judge's Decision and Order on Remand on Reconsideration is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I agree with my colleagues that neither res judicata nor the separation of powers principle bars the application of amended Section 411(c)(4) to claimant's subsequent claim. Further, I concur in the result on the basis that the administrative law judge permissibly determined that employer had not rebutted the Section 411(c)(4) presumption because he found that employer's physicians, Drs. Renn and Rosenberg, did not adequately address whether coal mine dust exposure aggravated claimant's COPD. *See* 20 C.F.R. §718.201(a)(2); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013)(Niemeyer, J., concurring). Thus, regardless of the rebuttal standard, the administrative law judge permissibly found that the opinions of employer's physicians as to the etiology of claimant's COPD were not credible. *Id*. Consequently, I concur in the result.

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JUDITH S. BOGGS
Administrative Appeals Judge