BRB No. 11-0528 BLA

JOHNNY E. BUNNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/15/2012
	)	
ISLAND CREEK KENTUCKY MINING, C/O CONSOL ENERGY, SELF-INSURED THROUGH CONSOL ENERGY, INCORPORATED, C/O WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Allison Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Michelle S. Gerdano (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/carrier (employer) appeals the Decision and Order Awarding Benefits (08-BLA-5460) of Administrative Law Judge Joseph E. Kane rendered on a claim filed 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 involves a claim filed on June 12, 2007. Director's Exhibit 2.

In his decision, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. 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)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that claimant established eighteen years of underground coal mine employment[1] and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption. Turning to rebuttal, the administrative law judge found that employer disproved the existence of clinical pneumoconiosis, but did not disprove the existence of legal pneumoconiosis.[2] The administrative law judge also

[1] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3 at 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] "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. This

found that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer failed to rebut the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also asserts that the administrative law judge erred in weighing the medical opinion evidence when he found that employer did not rebut the presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's arguments that amended Section 411(c)(4) may not be applied to this case.

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).

Employer contends that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 10-18. Employer argues further that the administrative law judge erred in applying amended Section 411(c)(4), because its rebuttal provisions do not apply to claims brought against a responsible operator. Employer's Brief at 18-19. Employer's contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), slip op. at 4, *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision.[4] Consequently, we affirm the

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definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[3] Employer does not challenge the administrative law judge's findings of eighteen years of underground coal mine employment, and that claimant invoked the Section 411(c)(4) presumption. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Employer's request that this case be held in abeyance pending the resolution of the legal challenges to Public Law No. 111-148 is denied. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383, n.2 (4th Cir. 2011); *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-

administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

In determining whether employer rebutted the amended Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Castle, Selby, Houser, Simpao, and Rasmussen. Drs. Castle and Selby opined that claimant does not have legal pneumoconiosis, but suffers from impairments unrelated to coal mine dust exposure, namely, an obstructive impairment due to bronchial asthma, and a restrictive impairment due to obesity. Director's Exhibit 13 at 6; Employer's Exhibit 4 at 11-12; Employer's Exhibit 12 at 45, 66; Employer's Exhibit 13 at 8-9; Employer's Exhibit 14 at 3; Employer's Exhibit 16 at 3. Dr. Houser, claimant's treating physician, opined that claimant has both obstructive and restrictive disease due to coal mine dust exposure, and does not have asthma. Claimant's Exhibit 5 at 16-17, 19-20, 22, 25. Dr. Simpao diagnosed claimant with chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure. Director's Exhibit 11 at 23; Employer's Exhibit 5 at 5. Dr. Rasmussen stated that claimant's coal mine dust exposure possibly contributes minimally to his impairment. Claimant's Exhibit 6 at 5; Claimant's Exhibit 10 at 2.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge found that Drs. Houser and Simpao provided credible diagnoses of legal pneumoconiosis, whereas Dr. Rasmussen's opinion did not support a diagnosis of legal pneumoconiosis. Decision and Order at 21-22. The administrative law judge discounted the opinions of Drs. Castle and Selby, because he found the physicians' reasoning to be problematic. *Id*. at 22. Specifically, the administrative law judge found that Drs. Castle and Selby did not adequately explain why the partial reversibility of claimant's impairment on pulmonary function testing eliminated coal mine dust exposure as a cause of the impairment. The administrative law judge further found that the opinions of Drs. Castle and Selby, that claimant's obstructive impairment is due to asthma, were not supported by claimant's medical treatment records. Moreover, the administrative law judge found that the opinions of Drs. Castle

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207 (2010); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); Employer's Brief at 4-10. We also deny employer's request to hold this case in abeyance until the Department of Labor issues guidelines or promulgates new regulations implementing the statutory amendments. Employer's Brief at 19-21. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations. *See Mathews*, 24 BLR at 1-201.

and Selby, that claimant's restrictive impairment is due to obesity, were not supported by the results of claimant's 2003 and 2007 pulmonary function studies. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Castle and Selby. Employer's Brief at 31-35. We disagree. The administrative law judge reasonably discounted the opinions of Drs. Castle and Selby, that claimant's pulmonary disease is due to bronchial asthma, unrelated to coal mine dust exposure, because the doctors did not adequately explain why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's impairment, in light of the qualifying nature of the most recent post-bronchodilator pulmonary function study. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Decision and Order at 23; Employer's Exhibit 4 at 11; Employer's Exhibit 12 at 31-32, 67; Employer's Exhibit 13 at 21; Employer's Exhibit 15 at 1; Employer's Exhibit 16 at 3. Moreover, the administrative law judge reasonably questioned the opinions of Drs. Castle and Selby, that asthma is the cause of claimant's obstructive impairment, when no diagnosis of asthma appeared in claimant's treatment records.[5] *See Snorton v. Zeigler Coal Co.*, 9 BLR 1-106, 1-107 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16, 1-19 (1985); Decision and Order at 22-23. Lastly, contrary to employer's contention, the administrative law judge reasonably questioned the opinions of Drs. Castle and Selby, that claimant's restrictive impairment is due to obesity, based on Dr. Houser's observation that, although claimant's weight remained approximately the same, his pulmonary function study values worsened from 2003 to 2007. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Claimant's Exhibit 5 at 45. As the administrative law judge permissibly discounted the opinions of Drs. Castle and Selby, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[6] *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d

[5] Dr. Castle's February 14, 2008 report outlines the diagnoses found in the treatment records, and does not identify asthma as a diagnosis. Employer's Exhibit 4 at 4-5, 7-9. At his deposition, Dr. Castle conceded that his knowledge of this case is derived from his review of the medical records, Employer's Exhibit 12 at 19, and that the diagnosis of asthma appears only in Dr. Selby's medical report. Employer's Exhibit 12 at 67. Review of the treatment records does not reveal a diagnosis of asthma. Claimant's Exhibits 2-4, 8; Employer's Exhibits 1-3, 6.

[6] Contrary to employer's contention, the administrative law judge did not err by presuming the existence of legal pneumoconiosis. The administrative law judge properly

473, 480 (6th Cir. 2011); Decision and Order at 21-24; Director's Exhibit 13 at 6; Employer's Exhibit 4 at 11; Employer's Exhibit 12 at 25, 58, 66; Employer's Exhibit 14 at 3; Employer's Exhibit 16 at 3.

In determining that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment, the administrative law judge discounted Dr. Castle's opinion, that claimant is totally disabled due to bronchial asthma, obesity, cardiac disease, and diabetes, all unrelated to coal mine dust exposure, because Dr. Castle did not diagnose legal pneumoconiosis. *Id*. at 24-25. The administrative law judge further found that Dr. Selby's opinion, that claimant is not totally disabled, was silent on the issue of disability causation, and thus did not support employer's rebuttal burden. Decision and Order at 25.

Employer argues that the administrative law judge erred in finding that employer failed to establish that claimant's pulmonary impairment did not arise out of, or in connection with, his coal mine employment. Employer's Brief at 36. We disagree. Because Dr. Castle did not diagnose legal pneumoconiosis, the administrative law judge permissibly discounted his opinion as to the cause of claimant's total disability. *See Morrison*, 644 F.3d at 480; *see also Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 825-26, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008). The administrative law judge also found, accurately, that Dr. Selby's opinion was silent as to the cause of claimant's disability, because Dr. Selby opined that claimant is not totally disabled.[7] *See Skukan*, 993 F.2d at 1233, 17 BLR at 2-

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placed the burden on employer to disprove the existence of legal pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480 (6th Cir. 2011); Decision and Order at 24; Employer's Brief at 22-25.

[7] Employer points to Dr. Selby's statement that, if claimant lost weight and were properly treated for asthma, his impairment would resolve, and argues that, contrary to the administrative law judge's finding, Dr. Selby opined that claimant is totally disabled due to asthma and obesity. Employer's Brief at 36. The administrative law judge, however, specifically found that portion of Dr. Selby's opinion to be speculative, and inconsistent with the doctor's initial statement that claimant is not totally disabled. Decision and Order at 18. Employer does not challenge this aspect of the administrative law judge's treatment of Dr. Selby's opinion, and thus, it is affirmed. *See Skrack*, 6 BLR at 1-711. Moreover, even assuming that Dr. Selby rendered an opinion as to the cause of claimant's total disability, Dr. Selby's failure to diagnose legal pneumoconiosis would

103-04; Decision and Order at 25; Director's Exhibit 13 at 6; Employer's Exhibit 13 at 18; Employer's Exhibit 17 at 2. Thus, we affirm the administrative law judge's finding that employer did not establish that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment.

Because the opinions of Drs. Castle and Selby are the only opinions potentially supportive of a finding that claimant does not suffer from legal pneumoconiosis or that his pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. Therefore, we affirm the administrative law judge's award of benefits. *See* 30 U.S.C. §921(c)(4).

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undermine his opinion for the same reason the administrative law judge discounted Dr. Castle's opinion. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge