BRB No. 11-0568 BLA

JAMES W. BOWES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 06/15/2012
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 Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Paul L. Edenfield (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 Awarding Benefits (09-BLA-5724) of Administrative Law Judge Kenneth A. Krantz 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). Adjudicating this claim, filed on February 7, 2008, pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with 22.38 years of qualifying coal mine employment. Based on his determination that the evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and his determination that claimant had more than fifteen years of qualifying coal mine employment, the administrative law judge found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] as amended by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556(a) (2010). The administrative law judge also found that employer failed to establish rebuttal of the presumption by proving that claimant does not have either clinical or legal pneumoconiosis, or that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Accordingly, benefits were awarded, commencing as of February 1, 2008.

On appeal, employer contends that Section 1556 of the PPACA is unconstitutional because its retroactive application denies employer the right to due process and constitutes a taking of private property. Employer also maintains that the rebuttal provisions at amended Section 411(c)(4) apply to the Secretary of Labor, and not to responsible operators. Employer further contends that the administrative law judge erred in finding that the evidence was insufficient to rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments regarding the applicability of amended Section 411(c)(4).[2]

[1] Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 22.38 years of qualifying coal mine employment, and that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 24, 27-31.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 411(c)(4) to claims filed after January 1, 2005 constitutes a denial of due process and an unconstitutional taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *aff'd sub nom. West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2010), we also reject employer's argument that the rebuttal provisions at amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, and his determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis thereunder, based on the administrative law judge's unchallenged findings that claimant established more than fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning to the merits of entitlement, employer challenges the administrative law judge's weighing of the evidence in finding that employer failed to establish rebuttal of the presumption under amended Section 411(c)(4) by proving that claimant has neither clinical nor legal pneumoconiosis or that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. Employer argues that the administrative law judge selectively analyzed the evidence and failed to provide a sufficient explanation for his credibility determinations, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

§932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer's Brief at 23-33.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In evaluating the evidence relevant to rebuttal, the administrative law judge accurately summarized the conflicting medical opinions of record, and the underlying documentation and explanations for the physicians' conclusions, and determined that Drs. Rasmussen and Baker diagnosed disabling legal pneumoconiosis, whereas Drs. Hippensteel and Castle opined that claimant did not have pneumoconiosis and that his disabling impairment was due entirely to smoking, sleep apnea and/or obesity. Decision and Order at 11-21. The administrative law judge determined that Dr. Rasmussen based his diagnosis of legal pneumoconiosis/chronic obstructive pulmonary disease (COPD) on claimant's medical, employment and smoking histories, physical examination findings, and pulmonary function study results demonstrating an irreversible restrictive and obstructive ventilatory defect. Decision and Order at 11-14, 30, 35; Director's Exhibits 11, 39. Dr. Rasmussen opined that claimant's disabling impairment was attributable to coal dust exposure, smoking, obesity, and sleep apnea, and stated that claimant's ventilatory abnormality was primarily restrictive, with some evidence of small airways obstruction, resulting in at least a moderate loss of lung function. Decision and Order at 12-13, 35, 38; Director's Exhibits 11, 39. Dr. Rasmussen explained that the effects of coal dust exposure and smoking were indistinguishable by physical, physiologic, radiographic or anatomical means, except for slight differences in small airways pathology, and that both caused COPD, including chronic bronchitis, small airways disease and emphysema. Decision and Order at 12; Director's Exhibits 11, 39. While claimant's marked hypoxia on resting blood gas study was attributable to obesity and sleep apnea, Dr. Rasmussen concluded that coal dust exposure and smoking were equivalent causes of claimant's disabling COPD. Decision and Order at 12-14; Director's Exhibits 11, 39. Finding that Dr. Rasmussen's opinion was well-reasoned, supported by its underlying documentation, and consistent with the Department of Labor's recognition in the preamble to the amended regulations that dust-induced emphysema and smoking-induced emphysema occur through similar mechanisms, the administrative law judge permissibly accorded the opinion full probative weight. Decision and Order at 34, 38; *see* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Similarly, the administrative law judge found that Dr. Baker's diagnosis of legal pneumoconiosis was based on claimant's coal mine employment history, a smoking

history of twenty to thirty pack-years, physical examination findings, a moderate obstructive defect on pulmonary function testing, a moderate degree of resting arterial hypoxemia on blood gas study, and "widespread expert opinion that the combination of coal dust exposure and smoking may be additive in the causation of lung disorder." Decision and Order at 14; Director's Exhibit 26. The administrative law judge acted within his discretion in finding that Dr. Baker's diagnosis of legal pneumoconiosis was well-reasoned, supported by the underlying documentation and the preamble to the amended regulations, and entitled to full probative weight.[4] Decision and Order at 36; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). However, because Dr. Baker failed to address claimant's obesity and its impact on claimant's test results, the administrative law judge properly accorded slightly less than full weight to Dr. Baker's opinion regarding the cause of claimant's disabling respiratory impairment. Decision and Order at 39; *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

By contrast, the administrative law judge reasonably discounted Dr. Hippensteel's opinion, that claimant does not have pneumoconiosis and that his disabling impairment is attributable to obesity and sleep apnea, on the grounds that it was not fully supported by its underlying documentation or adequately explained. Decision and Order at 36-37; Director's Exhibit 26; Employer's Exhibits 9, 11; *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). While Dr. Hippensteel acknowledged that his own pulmonary function study was invalid, *see Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983), and he believed that the pulmonary function studies administered by Drs. Rasmussen and Baker were also invalid, the administrative law judge properly concluded that Dr. Hippensteel's invalidation of Dr. Rasmussen's pulmonary function study was not supported by the record taken as a whole, as two other pulmonary experts, Drs. Renn and Ranavaya, validated the test. Decision and Order at 36; Director's Exhibit 11; Employer's Exhibit 1; *see Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). Further, although Dr. Hippensteel reviewed claimant's treatment records, he did not address the qualifying pulmonary function study results or the diagnoses of COPD and pneumoconiosis contained therein. Decision and Order at 36. As Dr. Hippensteel failed to adequately explain how he eliminated twenty-two years of coal dust exposure as a contributing or aggravating cause of claimant's breathing difficulties, dyspnea on exertion, or the airflow obstruction he acknowledged on Dr.

[4] While the administrative law judge found that claimant had a 47.5 pack-year smoking history, and that Dr. Baker underestimated claimant's smoking history, the administrative law judge acted within his discretion in concluding that the underestimation was not sufficiently significant to undermine Dr. Baker's reasoning.

Castle's pulmonary function study, the administrative law judge permissibly concluded that Dr. Hippensteel's opinion was entitled to less than full weight. Decision and Order at 36-37; *see Clark*, 12 BLR at 1-155.

Similarly, while Dr. Castle found no pneumoconiosis, and attributed the restrictive impairment demonstrated on claimant's pulmonary function study to obesity and the obstructive impairment to smoking, the administrative law judge found that Dr. Castle failed to discuss how he eliminated twenty-two years of coal dust exposure as a contributing cause of claimant's dyspnea and obstructive ventilatory impairment, particularly since the preamble to the amended regulations acknowledges that medical literature "support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order at 38, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Thus, the administrative law judge permissibly concluded that Dr. Castle's opinion was entitled to less than full probative weight.

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 by a preponderance of the evidence, and affirm his award of benefits.[5] *See Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

[5] We agree with employer's argument that the administrative law judge substituted his opinion for that of a physician in finding that employer failed to affirmatively establish that claimant does not have clinical pneumoconiosis. In weighing the conflicting x-ray evidence of record, the administrative law judge credited Dr. Rasmussen's opinion, that claimant's 1/1 s/s opacities on the March 6, 2008 x-ray represented coal workers' pneumoconiosis (CWP), over Dr. Castle's contrary opinion, that such opacities were typical of obesity but not CWP, on the ground that "it would not have made sense for the [Department of Labor] to permit doctors to use the presence of small opacities (including s, t, and u)" on the approved ILO classification form if those opacities were not typical of pneumoconiosis. Decision and Order at 33. Employer correctly maintains, however, that the ILO form allows for the classification of all types of pneumoconiosis, and is not restricted to CWP. Employer's Brief at 25-26, 30. Nevertheless, any error in the administrative law judge's weighing of the evidence relevant to clinical pneumoconiosis is harmless and would not change the outcome of this case, as employer failed to affirmatively establish the absence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge