BRB No. 11-0402 BLA

CHARLES R. HASH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MUD LICK MINING CORPORATION	)	DATE ISSUED: 03/29/2012
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, 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 Awarding Benefits (2010-BLA-05199) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim[1] 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). The administrative law judge credited the miner with 23.19 years of qualifying coal mine employment, and adjudicated this claim, filed on June 18, 2007, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that new evidence submitted subsequent to the denial of the miner's prior claim was sufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge found that invocation of the rebuttable presumption of total disability due to pneumoconiosis was established, and that employer failed to establish rebuttal.[2] 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, arguing that retroactive application thereof constitutes a denial of due process and an unconstitutional taking of private property. Employer also challenges the administrative law judge's weighing of the medical opinions of Drs. Caffrey and Rosenberg in finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4). Both claimant[3] and the

[1] The miner's previous two claims were finally denied on November 19, 1997, and June 10, 2002, respectively, for failure to establish any of the elements of entitlement. Decision and Order at 2-3, 21; Director's Exhibits 1, 2.

[2] Congress recently enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, 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, 124 Stat. 119 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by proving that the miner did not have pneumoconiosis, or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

[3] The miner died on February 14, 2009, and the miner's widow, Mary Hash, is pursuing the claim on his behalf. Decision and Order at 16, 18; Director's Exhibit 54.

Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's award of benefits.[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.[5] 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, we reject employer's assertion 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, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (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 West Virginia CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6062116 (4th Cir. Dec. 7, 2011); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). As employer concedes that invocation of the presumption is appropriate if employer's constitutional arguments are rejected, *see* Employer's Brief at 12, we affirm the administrative law judge's finding of invocation under amended Section 411(c)(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer next contends that the administrative law judge failed to provide valid reasons for finding the opinions of Drs. Caffrey and Rosenberg insufficient to establish rebuttal under amended Section 411(c)(4). Employer asserts that both opinions are well-reasoned and meet employer's burden of showing that the miner's disabling respiratory impairment was unrelated to coal dust exposure. With regard to Dr. Caffrey,[6] employer

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of 23.19 years of coal mine employment, and her finding that the evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), total respiratory disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner's coal mine employment was in Virginia. Director's Exhibits 2 at 208-211, 9 at 9; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[6] Dr. Caffrey diagnosed moderate to severe emphysema and simple clinical pneumoconiosis. He attributed the miner's "pulmonary problems" exclusively to smoking, opining that "the paucity of coal dust in the lung tissue" would certainly not

concedes that the physician's opinion exceeds the scope of an autopsy report, but employer maintains that, since Dr. Caffrey's opinion is based primarily upon his review of the autopsy slides, the administrative law judge should have redacted those portions of the report that addressed other medical records. Employer's Brief at 12-14. With regard to Dr. Rosenberg,[7] employer maintains that his opinion is not hostile to the Act; that Dr. Rosenberg provided multiple reasons for ruling out coal dust exposure as a cause of the miner's disability; and that the administrative law judge failed to explain why the physician's opinion, taken as a whole, was insufficient to establish rebuttal. Employer's Brief at 14-16. Employer essentially seeks a reweighing of the evidence, which is beyond the scope of the Board's review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

In evaluating the evidence relevant to rebuttal, the administrative law judge determined that Dr. Caffrey's report was offered as an autopsy report, not a medical report and, as such, is subject to the evidentiary limitations contained at 20 C.F.R. §725.414(a). Decision and Order at 25; 20 C.F.R. §725.414(a)(3)(i); *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236-37 n.7 (2007)(en banc). Because Dr. Caffrey reviewed multiple medical records, in addition to the autopsy report and slides, the administrative law judge permissibly assigned the opinion little weight, finding that: "[i]t is difficult to separate Dr. Caffrey's opinions that rely strictly on his examination of the autopsy slides and autopsy report from his reliance on his review of [the miner's] medical records, which review exceeds the Employer's evidentiary limitations." Decision and Order at 25; Employer's Exhibit 5. Further, the administrative law judge rationally found that Dr. Caffrey's opinion, that the miner's moderate to severe emphysema was due exclusively to his history of cigarette smoking,[8] is "based heavily"

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have caused "any discernible pulmonary disability," and did not cause or contribute to the miner's death from metastatic lymphoma. Decision and Order at 15, 16; Employer's Exhibit 5 at 4-6; Director's Exhibit 54.

[7] Dr. Rosenberg diagnosed severe chronic obstructive pulmonary disease (COPD) related to smoking, and opined that the miner did not have legal pneumoconiosis. He testified at deposition that it is possible to differentiate respiratory impairments caused by smoking from those due to coal dust exposure, based on the pattern of obstruction demonstrated on pulmonary function study testing. Decision and Order at 10-14; Director's Exhibit 50; Employer's Exhibits 2, 7.

[8] While Dr. Caffrey acknowledged that coal dust can cause emphysema, he concluded that "the paucity of the coal dust in [the miner's] lungs is such that it certainly, in my opinion, would not have caused him any respiratory disability." Employer's Exhibit 5 at 5. As Dr. Caffrey did not address whether the miner's significant history of coal dust exposure was a contributing or aggravating factor in the miner's disabling emphysema, the administrative law judge permissibly found the opinion inadequately

on his review of the miner's medical records.[9] Decision and Order at 25; *see* Employer's Exhibit 5 at 1-2, 4-6. As employer fails to specify how the administrative law judge could have determined which portions of Dr. Caffrey's opinion to redact, *see Keener*, 23 BLR at 1-239 n.13, 1-242 n.15, we agree with the Director that employer has failed to demonstrate any error or abuse of discretion. Director's Response at 4; *see Dempsey v. Sewell Coal Co*., 23 BLR 1-47 (2004)(en banc). Thus, we affirm the administrative law judge's discounting of Dr. Caffrey's opinion, as supported by substantial evidence.

With regard to Dr. Rosenberg's opinion, that the miner's disabling impairment was due to smoking and not coal dust exposure, the administrative law judge determined that the physician relied on a premise that was inconsistent with the regulations, *i.e.*, that coal dust exposure causes only a minimal decrease in FEV_1, and that the miner's markedly reduced FEV_1/FVC ratio was typical for a smoking-related, but not a coal dust-related, obstruction. Decision and Order at 23-24; Employer's Exhibits 2, 7. Noting that the Department of Labor (DOL), in comments to 20 C.F.R. §718.201, cited with approval studies reporting that coal dust exposure results in decreased FEV_1/FVC values, and because Dr. Rosenberg's opinion cannot be reconciled with 20 C.F.R. §718.204(b)(2)(i)(C), which allows a miner to establish disability on the basis of a qualifying FEV_1 accompanied by an FEV_1/FVC value equal to or less than 55%, the administrative law judge permissibly assigned the opinion little weight. Decision and Order at 24; *see* 65 Fed. Reg. 79943 (Dec. 20, 2000)("coal miners have an increased risk of developing COPD [which] may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC"]; *see also Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008). While Dr. Rosenberg also relied on the significant reversibility in the miner's pulmonary function studies to support his opinion, the administrative law judge noted that the miner's three most recent pulmonary function studies produced qualifying values even after the administration of bronchodilators, and permissibly found that Dr.

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reasoned and, thus, insufficient to meet employer's burden on rebuttal under amended Section 411(c)(4). Decision and Order at 25-26; *see* 20 C.F.R. §718.201; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

[9] Dr. Caffrey stated: "[A]fter review of these multiple medical records, the autopsy report, and the autopsy slides, it is my opinion that [the miner had very minimal clinical pneumoconiosis and did not have legal pneumoconiosis]." Dr. Caffrey referenced x-rays, medical records, smoking and coal mine employment histories, the miner's death certificate, and scientific articles in explaining why he concluded that the miner suffered from emphysema due to smoking. Employer's Exhibit 5 at 4-6.

Rosenberg failed to adequately explain how he ruled out coal dust exposure as a causal or contributory factor in the miner's residual disabling respiratory impairment. Decision and Order at 24; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *see also Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). In sum, the administrative law judge properly found Dr. Rosenberg's opinion deficient as to its analysis, the quality of its reasoning, and the extent to which its conclusions are consistent with the prevailing medical and scientific views accepted by DOL. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28.

Because the administrative law judge weighed all of the relevant evidence and reasonably exercised her discretion in finding it insufficient to affirmatively establish that the miner's total respiratory disability did not arise out of, or in connection with, his coal mine employment, we affirm her finding that employer failed to establish rebuttal under amended Section 411(c)(4), 30 U.S.C. §921(c)(4). *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 473, 479-480, BLR (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