BRB No. 11-0406 BLA

LARRY E. BARKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 03/08/2012
	)	
CUMBERLAND RESOURCES CORPORATION	)	
	)	
and	)	
	)	
TRAVELERS INDEMNITY COMPANY OF ILLINOIS	)	
	)	
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 and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (10-BLA-5180) of Administrative Law Judge Linda S. Chapman 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 subsequent claim filed on November 17, 2008.[1] Director's Exhibit 3.

The administrative law judge credited claimant with nineteen years of underground coal mine employment. The administrative law judge properly 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 living miner's claim, Section 1556(a) 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 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). 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 respiratory or pulmonary 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 as claimant established nineteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his respiratory or pulmonary impairment "did not arise out of, or in connection with," coal mine employment and thus, failed to rebut the presumption. Therefore, the administrative law judge found that the new evidence established that claimant is totally disabled due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering all of the evidence of record, the administrative law judge again found that employer did not meet its burden to rebut the presumption that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

[1] Claimant's prior claim, filed on January 23, 2006, was finally denied by the district director on February 26, 2007, because claimant failed to establish the existence of pneumoconiosis or that his totally disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 1.

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 evaluating one of its medical opinions when she found that employer did not establish that claimant's respiratory impairment is unrelated to his coal mine employment.[2] Claimant responds, 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 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.[3] 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 retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 3-10. Employer's arguments lack merit and are therefore rejected. *See W. Va. CWP Fund v. Stacy*, F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Consequently, we affirm the 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.

[2] Employer does not challenge the administrative law judge's findings of nineteen years of underground coal mine employment, that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), that employer did not establish the absence of clinical pneumoconiosis, and that Dr. Fino's opinion, submitted by employer, was insufficiently reasoned to establish that claimant's respiratory or pulmonary impairment is unrelated to his coal mine employment. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 8. Accordingly, the Board will apply the law 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*).

Employer argues that the administrative law judge erred in evaluating Dr. Rosenberg's medical opinion when she found that employer did not establish that claimant's respiratory or pulmonary impairment "did not arise out of, or in connection with," his coal mine employment.[4] Dr. Rosenberg attributed claimant's obstructive lung disease to smoking, based on claimant's reduced FEV1/FVC ratio. Specifically, Dr. Rosenberg opined that an impairment due to coal mine dust exposure generally would not result in a reduced FEV1/FVC ratio, but instead would exhibit a preserved FEV1/FVC ratio. Employer's Exhibit 2 at 11-12. Further, Dr. Rosenberg attributed claimant's obstructive lung disease to smoking, based on claimant's reduced diffusing capacity. *Id*. at 13.

The administrative law judge discounted Dr. Rosenberg's opinion because she found that it was contrary to the premises underlying the revised regulations, that coal mine dust exposure can cause a significant decrease in the FEV1/FVC ratio. Decision and Order at 26-27. Further, the administrative law judge found that Dr. Rosenberg's opinion, that claimant's impairment was due to smoking because of his reduced diffusing capacity, was unexplained. The administrative law judge therefore found that Dr. Rosenberg's conclusions were "not sufficient to rule out [claimant's] nineteen years of coal mine employment as a factor in his disabling impairment." Decision and Order at 27.

Employer contends that the administrative law judge erred in discounting Dr. Rosenberg's opinion, arguing that "Dr. Rosenberg's opinion is not hostile to the Act" because the physician did not say that coal mine dust exposure never causes a decrease in the FEV1/FVC ratio, only that it "generally" does not do so. Employer's Brief at 11-12. Contrary to employer's characterization of the administrative law judge's decision, the administrative law judge did not find that Dr. Rosenberg's opinion was "hostile to the Act." The administrative law judge found that Dr. Rosenberg's reasoning, that claimant's impairment is unrelated to coal mine employment because the FEV1/FVC ratio decreases with exposure to cigarette smoking, but is generally preserved with exposure to coal mine dust, is contrary to the Department of Labor's finding that the medical literature underlying its revision of the definition of legal pneumoconiosis establishes that coal mine dust exposure can cause a significant decrease in the FEV1/FVC ratio. Decision and Order at 26, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). The administrative law judge permissibly found that Dr. Rosenberg's opinion as to the etiology of claimant's chronic obstructive lung disease merited less weight,

[4] The administrative law judge also considered the medical opinions of Drs. Agarwal, Habre, Baker, and Fino, and discounted each one for reasons that we need not discuss in order to address the argument that employer raises on appeal. Decision and Order at 5-18, 23-26.

because the doctor relied on a premise at odds with the medical science credited by the Department of Labor when it promulgated the revised regulations. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

Further, employer does not challenge the administrative law judge's additional, permissible finding that Dr. Rosenberg did not adequately explain why claimant's reduced diffusing capacity ruled out coal mine dust exposure as a factor in his respiratory impairment. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Based on the foregoing discussion, we affirm the administrative law judge's decision to discount Dr. Rosenberg's opinion under Section 411(c)(4).

As employer raises no other arguments, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption. Therefore, we affirm the award of benefits.

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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REGINA C. McGRANERY
Administrative Appeals Judge