BRB Nos. 11-0450 BLA
and 11-0450 BLA-A

ROGER D. ADKINS	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	DATE ISSUED: 03/23/2012
	)	
RAGLAND COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman and Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Rita Roppolo (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, and claimant cross-appeals, the Decision and Order Awarding Benefits (09-BLA-5548) of Administrative Law Judge Ralph A. Romano 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 August 1, 2008. Director's Exhibit 2.

The administrative law judge credited claimant with 20.03 years of underground coal mine employment,[1] and 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 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, because claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory or pulmonary 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 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

[1] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 3; Hearing Transcript at 15, 30. 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*).

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 his analysis of the medical opinion evidence when he found that employer did not rebut the presumption.[2] Claimant responds, urging affirmance of the administrative law judge's 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, and to affirm the award of benefits. Claimant has filed a cross-appeal, challenging the administrative law judge's determination that the conflicting x-ray readings were in equipoise as to the existence of clinical pneumoconiosis. Employer responds that the administrative law judge did not err in his weighing of the x-ray readings.

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 rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. Further, 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 5-22. 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.[3]

[2] Employer does not challenge the administrative law judge's findings of 20.03 years of underground coal mine employment, that claimant invoked the Section 411(c)(4) presumption, and that employer did not establish the absence of clinical pneumoconiosis based on the x-ray evidence. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Employer argues that the amendments to the Act are not severable from the portions of Public Law No. 111-148 that are challenged in federal court. Employer's Brief at 5-11. To the extent employer requests that this case be held in abeyance pending the resolution of the legal challenges to Public Law No. 111-148, its request is denied. *See W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510, at *3 n.2 (4th Cir. Dec.

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.

In determining whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Rasmussen, Fino, and Zaldivar. Dr. Rasmussen diagnosed claimant with clinical pneumoconiosis and legal pneumoconiosis,[4] in the form of chronic obstructive pulmonary disease (COPD) and emphysema due to both coal mine dust exposure and smoking. Director's Exhibit 11 at 4; Claimant's Exhibit 8 at 10. In contrast, Drs. Fino and Zaldivar diagnosed claimant with emphysema due entirely to smoking. Employer's Exhibit 3 at 4; Employer's Exhibit 5 at 13; Employer's Exhibit 8 at 21; Employer's Exhibit 9 at 27; Employer's Exhibit 12 at 1.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge accorded less weight to the opinions of Drs. Fino and Zaldivar, and credited the opinion of Dr. Rasmussen that claimant's coal mine dust exposure contributed to his COPD and emphysema. Decision and Order at 15-17. 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 his consideration of the opinions of Drs. Fino and Zaldivar. We disagree. The administrative law judge acted within his discretion in finding that Dr. Fino's opinion, that claimant's emphysema was due entirely to smoking, was entitled to little weight because Dr. Fino relied heavily on negative x-rays to eliminate coal mine dust exposure as a cause of claimant's emphysema. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-

---

21, 2011); *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).

[4] Clinical pneumoconiosis is defined as "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 is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This 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).

269, 2-275-76 (4th Cir. 1997); Decision and Order at 16. Dr. Fino opined that, because "the amount of pneumoconiosis correlates . . . with the amount of emphysema present," it is "very helpful to estimate the amount of clinical pneumoconiosis in order to assess the contribution to the clinical emphysema from coal mine dust inhalation."[5] Employer's Exhibit 5 at 12. Dr. Fino noted that claimant "does not have any obvious evidence of an increased retention of coal mine dust within his lungs," suggesting that "coal mine dust did not play a significant role." Employer's Exhibit 5 at 13. As the administrative law judge properly noted, Dr. Fino's reasoning is contrary to the regulations, which permit a finding of legal pneumoconiosis, notwithstanding the absence of radiographic evidence of clinical pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(4),(b); 718.201(a)(1),(2); *see also J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-382-83 (3d Cir. 2011); 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2008). Similarly, the administrative law judge permissibly discounted Dr. Zaldivar's reasoning that the lack of x-ray changes was a factor indicating that claimant's emphysema is unrelated to coal mine dust exposure, and that Dr. Zaldivar would expect to see radiographic changes if claimant's emphysema were related to coal mine dust exposure. *Id*.

Employer contends that the administrative law judge selectively analyzed the opinions of Drs. Fino and Zaldivar when he discounted them for the above reasons. We disagree. A review of the record indicates that the administrative law judge considered the physicians' opinions in their entirety when he found that, despite acknowledging that a miner could have legal pneumoconiosis absent radiographic evidence of pneumoconiosis, Drs. Fino and Zaldivar unpersuasively "rel[ied] on the fact that there was no clinical evidence of pneumoconiosis to diagnose emphysema due to cigarette smoking." Decision and Order at 16. The administrative law judge permissibly considered the rationale underlying the physicians' opinions, and substantial evidence supports his credibility determination. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). We therefore reject employer's allegation of error, and affirm the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. *See Barber v. Director, OWCP*, 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, 2-43-44 (4th Cir. 1980).

[5] Dr. Fino explained that a medical study by Dr. Leigh establishes that "the amount of clinical pneumoconiosis does estimate the amount of emphysema due to coal mine dust and, hence, the reduction in the FEV1 due to coal mine dust from emphysema." Employer's Exhibit 5 at 13. Dr. Fino stated that although a negative x-ray reading does not rule out legal pneumoconiosis, the medical liturature "allow[s], with reasonable certainty, an assessment for quantitation of the amount of obstruction due to coal dust induced emphysema by utilization of the ILO readings." *Id*.

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 the opinions of Drs. Fino and Zaldivar for the same reasons he gave in his analysis of the legal pneumoconiosis issue. Additionally, the administrative law judge discounted Dr. Fino's testimony that his opinion on the cause of claimant's impairment would not change even if he assumed the presence of legal pneumoconiosis. Employer's Exhibit 8 at 23-24. The administrative law judge found that Dr. Fino's assumption undermined his opinion that claimant's impairment is due solely to smoking, since "the definition of legal pneumoconiosis in Section 718.201(b) describes a respiratory impairment significantly related to [or] aggravated by dust exposure in coal mine employment." Decision and Order at 17. On appeal, employer makes the same arguments it made regarding the administrative law judge's finding that employer did not establish the absence of legal pneumoconiosis. Employer's Brief at 23-36. As we have already rejected those arguments, we affirm the administrative law judge's finding that employer did not establish that claimant's impairment did not arise out of, or in connection with, coal mine employment.

Therefore, we affirm, as supported by substantial evidence, the administrative law judge's findings the employer failed to rebut the presumption at amended Section 411(c)(4) by establishing that claimant does not have pneumoconiosis, or that his impairment did not arise out of his coal mine employment.[6] 30 U.S.C. §921(c)(4). Thus, we affirm the award of benefits. Because we affirm the award of benefits, we need not address claimant's cross-appeal challenging the administrative law judge's weighing of the x-ray evidence. *See also* n.2.

[6] Because we affirm the administrative law judge's finding that employer's evidence did not meet employer's burden to rebut the Section 411(c)(4) presumption, it is not necessary that we address employer's arguments regarding the weight that the administrative law judge accorded to Dr. Rasmussen's opinion, submitted by claimant. Employer's Brief at 31-36.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge