BRB No. 11-0486 BLA

DONALD M. DANIEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAGIC COAL COMPANY	)	DATE ISSUED: 03/27/2012
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

Denise Kirk Ash, Lexington, Kentucky, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05689) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed on August 8, 2005, 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 claimant with twenty-two years of underground coal mine employment, as stipulated by the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that because the evidence was sufficient to establish a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The

administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that amended Section 411(c)(4) is unconstitutional and is not applicable to this claim. Employer also challenges the administrative law judge's weighing of the evidence relevant to rebuttal of the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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.[1] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. Applicability of Amended Section 411(c)(4)

Congress enacted recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

Employer contends that the application of amended Section 411(c)(4) is unconstitutional because it violates employer's due process rights and results in an unlawful taking of employer's property, in violation of the Fifth Amendment to the

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

United States Constitution. These arguments are substantially similar to the ones that the Board rejected 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), and we reject them in this appeal for the reasons set forth in that decision. *Id*. at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *aff'd W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Employer also generally asserts that amended Section 411(c)(4) is not applicable to any request for modification filed pursuant to 20 C.F.R. §725.310. Employer's Brief in Support of Petition for Review at 7-8. Employer's assertion is not relevant to this case as it involves an initial claim for benefits and not a modification request.[2]

We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has twenty-two years of underground coal mine employment and a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, we affirm the administrative law judge's determination that claimant invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Decision and Order at 15-16.

II. Rebuttal of the Amended Section 411(c)(4) Presumption

In order to rebut the presumption at amended Section 411(c)(4), the administrative law judge stated that employer was required to prove either that claimant does not have clinical or legal pneumoconiosis[3] or that "his respiratory or pulmonary impairment did

[2] Claimant filed his claim on August 8, 2005 and the district director awarded benefits. Director's Exhibits 2, 22. Employer requested a hearing, and the case was assigned to the administrative law judge. Following a hearing held on September 1, 2009, the administrative law judge issued his Decision and Order on March 11, 2011, which is the subject of this appeal.

[3] "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). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id*.

not arise out of, or in connection with, coal mine employment." Decision and Order at 15. The administrative law judge noted that employer relied upon negative x-ray evidence and the opinion of Dr. Broudy to satisfy its burden of proof.

With regard to the x-ray evidence, the administrative law judge considered seven interpretations of three x-rays dated August 30, 2005, September 27, 2005 and April 28, 2008. Decision and Order at 5, 16-17. The administrative law judge initially noted that he would assign greater weight to readings by physicians who are both Board-certified radiologists and B readers. *Id*. The administrative law judge found that Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, and Dr. Rasmussen, a B reader, read the August 30, 2005 x-ray as positive for pneumoconiosis, while Dr. Westerfield, a B reader, read the same x-ray as negative for pneumoconiosis. *Id*.; Director's Exhibit 12; Claimant's Exhibits 3, 5. Based on Dr. Alexander's "superior qualifications," the administrative law judge determined that this x-ray was positive for pneumoconiosis. Decision and Order at 16.

The administrative law judge noted that Dr. Westerfield and Dr. Broudy, also a B reader, read the September 27, 2005 x-ray as negative for pneumoconiosis. Decision and Order at 16; Director's Exhibit 14; Employer's Exhibit 4. Because there were no positive readings of this film, the administrative law judge found that the September 27, 2005 x-ray was negative for pneumoconiosis. *Id*.

The administrative law judge further noted that Dr. Alexander read the April 28, 2008 x-ray as positive for simple pneumoconiosis, while Dr. Wiot, also a dually qualified radiologist, read this same x-ray as negative for pneumoconiosis. *Id*.; Claimant's Exhibit 4; Employer's Exhibit 6. Because the administrative law judge acknowledged that both Drs. Alexander and Wiot are dually qualified, he found their conflicting readings of the April 28, 2008 x-ray to be in equipoise and that this x-ray was inconclusive. Decision and Order at 17. Thus, the administrative law judge concluded that the "x-ray evidence neither establishes pneumoconiosis nor the absence of the disease." *Id*.

Employer argues that a preponderance of the evidence establishes that claimant does not have clinical pneumoconiosis, since "the number of 'B' reader interpretations which were completely negative for the presence of coal workers' pneumoconiosis clearly outweighed the quantity of submitted readings which were positive for the

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"Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id*.

disease." Employer's Brief in Support of Petition for Review at 4. Contrary to employer's argument, however, it was proper for the administrative law judge to consider each x-ray individually and resolve the conflict in the readings of each of those films, based on his consideration of the radiological qualifications of the physicians. 20 C.F.R. §718.202(a)(1). The administrative law judge permissibly assigned greatest weight to the readings by the dually qualified radiologists and, therefore, he rationally found that, of the three x-rays, one was positive for pneumoconiosis, one was negative, and one was inconclusive. *Staton v. Norfolk and Western Railway Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F. 2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 17. Because the administrative law judge permissibly determined that the x-ray evidence "neither establishes pneumoconiosis nor supports a contrary finding," we affirm the administrative law judge's finding that the x-ray evidence does not satisfy employer's burden to rebut the Section 411(c)(4) presumption. Decision and Order at 20; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

With regard to the medical opinion evidence, we reject employer's assertion that the administrative law judge erred in finding that Dr. Broudy's opinion was insufficient to rebut the amended Section 411(c)(4) presumption. The administrative law judge properly found that, to the extent that Dr. Broudy opined that claimant does not have clinical pneumoconiosis, based on his negative reading of the September 27, 2005 x-ray, his opinion is merely "an x-ray restatement" and does not constitute a reasoned and documented medical opinion for the purpose of proving or disproving the existence of pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Decision and Order at 19-20.

The administrative law judge also found that while Dr. Broudy reviewed Dr. Alexander's positive interpretation of the April 28, 2008 x-ray and opined that "it would be unusual for [pneumoconiosis] to progress from negative x-rays to positive x-rays in the interval between 2005 and 2009," he "ignored the positive readings that he reviewed by Drs. Rasmussen and Alexander of films from 2005 and 2008." Decision and Order at 18. We affirm the administrative law judge's rational finding that Dr. Broudy's opinion lacks "factual support." *Id*.; *see 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, 1-152 (1989) *(*en banc).

The administrative law judge also reasonably found that Dr. Broudy "conflates the issue of clinical and legal pneumoconiosis." Decision and Order at 18-19; *see* 20 C.F.R. §718.201; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. The administrative law judge accurately summarized Dr. Broudy's opinion, noting that Dr. Broudy attributed claimant's obstructive impairment entirely to smoking and stated that

"coal dust exposure causes a restrictive defect" and that he "would have expected to see *advanced* x-ray changes if [c]laimant's pulmonary problems were due to coal workers' pneumoconiosis." Decision and Order at 18 (emphasis added). The administrative law judge properly noted, however, that "[l]egal pneumoconiosis can involve an obstructive impairment, a restrictive impairment, or both." *Id*. at 18, *citing* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. at 79,920, 79,937-39 (Dec. 20, 2000). Moreover, the administrative law judge correctly observed that "legal pneumoconiosis 'encompasses a broader spectrum of diseases than those pathologic conditions which can be detected by clinical diagnostic tests such as x-rays or CT scans.'" *Id*. at 19, *quoting* 65 Fed. Reg. at 79,945 (Dec. 20, 2000). Because the administrative law judge rationally found that Dr. Broudy did not address the definition of pneumoconiosis provided for under the regulations at 20 C.F.R. §718.201(a)(2), we affirm the administrative law judge's finding that Dr. Broudy did not provide a credible opinion that claimant does not have legal pneumoconiosis. Decision and Order at 20.

Additionally, although employer relies on the opinion of Dr. Broudy, that claimant's disability is unrelated to coal dust exposure, to establish rebuttal at amended Section 411(c)(4), the administrative law judge permissibly concluded that his opinion is "less significant" in assessing the etiology of claimant's disability, as he failed to diagnose pneumoconiosis. Decision and Order at 20; *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to rebut the presumption at amended Section 411(c)(4).

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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JUDITH S. BOGGS
Administrative Appeals Judge