BRB No. 12-0314 BLA

JOSEPH MARKOVICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EMERALD COAL RESOURCES, L.P.	)	DATE ISSUED: 03/27/2013
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

Richard A. Seid (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-5860) of Administrative Law Judge Michael P. Lesniak on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with 27.5 years of coal mine employment,

with 26.5 of those years spent underground, and adjudicated this claim, filed on October 16, 2009, pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and was, therefore, sufficient to invoke 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). *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §921(c)(4)).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of the PPACA and the retroactive application of the amendments to the Act contained therein to this case. Employer also maintains that the administrative law judge applied the wrong standard on rebuttal, and challenges the administrative law judge's weighing of the evidence in finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited brief, urging the Board to reject employer's arguments concerning the constitutionality and applicability of the amendments to the Act, and the administrative law judge's reliance on the preamble to the amended regulations in weighing the medical opinions of record.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[2] 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).

Subsequent to the filing of employer's brief, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567

[1] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 5.

U.S. , 132 S.Ct. 2566 (2012).[3] Additionally, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has rejected employer's argument that retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property. *See B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Campbell* and *Stacy*, we reject employer's arguments to the contrary.

We also reject employer's allegation that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. The courts have consistently ruled that amended Section 411(c)(4), including the language pertaining to rebuttal, applies to operators, despite the reference therein to "the Secretary." Employer's Brief at 23, 24 n.17; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1975); *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); *see Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011).

Further, we reject employer's assertion that it was premature for the administrative law judge to find that employer failed to rebut the amended Section 411(c)(4) presumption when neither the administrative law judge, nor the parties, had the benefit of guidance from the Department of Labor (DOL), in the form of implementing regulations, concerning the standard required to establish rebuttal. Employer's Brief at 24-26. The mandatory language of the amendments supports the conclusion that their provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *see also Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Ala. Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998). Additionally, the Act provides that, in order to rebut the Section 411(c)(4) presumption, the evidence must establish that the miner does not have pneumoconiosis or that the miner's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. *See* 30 U.S.C. §921(c)(4). Therefore, the administrative law judge did not err in considering the present claim pursuant to amended Section 411(c)(4). As this claim was filed after January 1, 2005, and was pending on March 23, 2010, and as employer has not challenged the administrative law judge's findings of total respiratory disability and more than fifteen years of underground coal mine employment, we affirm the administrative law judge's finding that claimant is

[3] Therefore, employer's request to hold this case in abeyance pending resolution of the constitutional issues is moot.

entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Decision and Order at 2, 11-12; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer next challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing that claimant does not have pneumoconiosis. Employer asserts that the administrative law judge erred in weighing the analog x-ray evidence; failed to fully consider the digital x-ray evidence; and improperly excluded the multiple negative x-rays and CT scans contained in the treatment records from consideration, based on the absence of radiological qualifications of the readers, contrary to the regulations at 20 C.F.R. §§718.102(c) and 718.107. Employer's Brief at 40-41. Employer's arguments lack merit.

The administrative law judge determined that the record contained six interpretations of three x-rays classified in accordance with the requirements at 20 C.F.R. §718.102, and found that the November 17, 2009 x-ray was inconclusive, as it was read as positive for pneumoconiosis by Dr. Ahmed, a dually qualified Board-certified radiologist and B reader, and as negative for pneumoconiosis by Dr. Meyer, an equally qualified reader. Decision and Order at 3, 15; Director's Exhibits 16, 18. The administrative law judge permissibly determined that the April 22, 2010 x-ray was positive for pneumoconiosis, despite Dr. Meyer's narrative impression,[4] as it was classified as positive for parenchymal abnormalities consistent with pneumoconiosis by Dr. Schaaf, a B reader, and by Dr. Meyer, a dually qualified reader. *See* 20 C.F.R. §718.102; *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-6 (1999)(en banc); Director's Exhibit 17; Employer's Exhibit 6; Decision and Order at 3, 15-16. Lastly, the administrative law judge determined that the April 7, 2011 x-ray was positive for pneumoconiosis, as he permissibly found that the positive interpretation by Dr. Groten, a dually qualified reader, outweighed the negative interpretation by Dr. Fino, a B reader.

[4] Dr. Meyer found fine linear and nodular opacities of primary size "s" and secondary size "p" with a profusion of l/1 in the right upper, mid and lower zones, and the left mid and lower lung zones. His impression was:

> Diffuse interstitial process suggesting smoking-related interstitial lung disease. This is not a pattern suggestive of coal [workers'] pneumoconiosis. This is not a manifestation of coal [workers'] pneumoconiosis, which invariably begins as an upper zone predominant nodular process. This is a mid and lower zone predominant fine linear process. This could be further characterized with high-resolution CT scan.

Employer's Exhibit 6.

Decision and Order at 3, 16; Claimant's Exhibit 2; Employer's Exhibit 8. Thus, the administrative law judge rationally concluded that the weight of these three x-rays was positive for pneumoconiosis.

The administrative law judge then reviewed the three interpretations of a May 17, 2010 digital x-ray,[5] and acted within his discretion in according them little weight on the ground that no party proffered explicit evidence as to whether it was medically acceptable and relevant in diagnosing pneumoconiosis. Decision and Order at 16; *see* 20 C.F.R. §718.107(b); *Harris v. Old Ben Coal Co.*, 24 BLR 1-13 (2007)(en banc recon.)(McGranery and Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006)(en banc)(McGranery and Hall, JJ., concurring and dissenting).

The administrative law judge determined that a CT scan of March 19, 2009 was interpreted by Dr. Meyer as negative for pneumoconiosis, and that Dr. Meyer submitted a statement regarding the medical acceptability and relevance of this evidence, as well as his experience in interpreting CT scans for the detection of pneumoconiosis. Consequently, the administrative law judge found that Dr. Meyer's negative CT scan interpretation was entitled to greater weight than the analog interpretations of lesser qualified readers, but noted that the Department of Labor has rejected the view that CT scan evidence is per se more probative than x-ray evidence in diagnosing pneumoconiosis. Decision and Order at 17; 65 Fed. Reg. 79,945 (Dec. 20, 2000).

The administrative law judge accurately summarized the conflicting medical opinions of record, and determined that the diagnoses of clinical pneumoconiosis by Drs. Martin and Schaaf, based on abnormal x-ray findings and the results of claimant's physical examination and blood gas study results, were entitled to greater weight than the contrary opinions of Drs. Fino and Basheda, based, respectively, on their negative interpretations of the April 7, 2011 analog x-ray and the May 17, 2010 digital x-ray, as discussed above. Additionally, the administrative law judge was not persuaded by Dr. Basheda's reliance on the irregular shape of claimant's x-ray opacities in declining to diagnose clinical pneumoconiosis, since the regulations do not require the presence of rounded opacities. Decision and Order at 17; *see* 20 C.F.R. §718.102.

The administrative law judge acknowledged that claimant's treatment records contained multiple negative analog x-rays and a negative CT scan, but permissibly declined to assign them "significant weight," as the record did not contain the qualifications of the interpreting physicians. Contrary to employer's assertion that the

[5] Dr. Basheda, a B reader, and Dr. Meyer, a dually qualified reader, interpreted the May 17, 2010 digital x-ray as negative for pneumoconiosis, while Dr. Ahmed, a dually qualified reader, interpreted this x-ray as positive for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibits 2, 12.

readings from the treatment records were "excluded," the administrative law judge permissibly accorded them less weight than that assigned to the x-ray readings that he determined were read in compliance with the quality standards, *see* 20 C.F.R. §718.202, and which were interpreted for the presence or absence of pneumoconiosis by physicians whose qualifications were discernible from the record.[6]

Weighing the positive and negative evidence together, the administrative law judge acted within his discretion in finding that the analog x-ray evidence was entitled to greater weight and that employer failed to meet its burden of establishing the absence of clinical pneumoconiosis by a preponderance of the evidence. As substantial evidence supports the administrative law judge's findings, they are affirmed. 30 U.S.C §921(c)(4); *see Morrison*, 644 F.3d 479-80, 25 BLR 2-8-9; Decision and Order at 17-18.

Employer next maintains that the administrative law judge held employer to an incorrect rebuttal standard in finding that employer failed to rule out a connection between claimant's disabling respiratory impairment and his coal mine employment. Employer also contends that the administrative law judge erred in relying on the preamble to the revised regulations to discredit the opinions of Drs. Fino and Basheda, and failed to hold claimant's experts to a minimum standard of scientific reliability. Employer's arguments lack merit.

At the outset, we reject employer's argument that the administrative law judge erred in referring to the preamble in weighing the conflicting medical opinions of record. The preamble sets forth how the Department of Labor (DOL) has chosen to resolve questions of scientific fact. 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,938, 79,943 (Dec. 20, 2000); *see Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Thus, the administrative law judge properly evaluated the expert opinions of record in conjunction with DOL's discussion of the medical science cited in the preamble to the amended regulations. *See J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Zeigler Coal Co. v. Kerr* [*Griskell*], 240 F.3d 572, 22 BLR 2-247 (7th Cir. 2000), *citing Freeman United Coal Mining Co. v. Summers*, 272

[6] Employer is correct that the quality standards do not apply to x-rays obtained in connection with a miner's hospitalization or medical treatment. *See* 20 C.F.R. §718.101(b); *J.V.S. v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008). However, as discussed above, the administrative law judge permissibly accorded greater weight to the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists, whereas the radiological qualifications of the doctors who read the miner's medical treatment x-rays and CT scan are not contained in the record. He therefore rationally found that those interpretations failed to "tip the balance" in employer's favor. Decision and Order at 18 n.37.

F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). In this case, the administrative law judge determined that Drs. Fino and Basheda opined that cigarette smoking is the sole cause of claimant's disability,[7] whereas Drs. Martin and Schaaf opined that both coal dust exposure and smoking caused the disability.[8] Decision and Order at 12. While Dr. Fino indicated that bullous emphysema is not consistent with coal dust exposure, and that he could differentiate between an impairment caused by coal dust exposure and one caused by smoking, the administrative law judge permissibly found that Dr. Fino's position was contrary to DOL's view that coal dust-related emphysema and smoking-induced emphysema occur through similar mechanisms. Decision and Order at 8, 13; *see* 65 Fed. Reg. 79,940, 79,943 (Dec. 21, 2000); *see also Summers*, 272 F3d at 473, 22 BLR at 2-265. Further, the administrative law judge was not persuaded by Dr. Fino's statement, that the significant drop in claimant's FEV_1 between 2009 and 2010 was "not atypical for cigarette smoking" and suggested a worsening of the bullous portion of claimant's emphysema, Employer's Exhibit 8 at 11, as he found that this statement did not affirmatively rule out coal dust exposure as a contributing cause of the non-bullous portion of claimant's disabling emphysema. Thus, the administrative law judge permissibly concluded that Dr. Fino's opinion was of limited probative value and was entitled to little weight. Decision and Order at 13; *see Obush*, 24 BLR at 1-117; *see also Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002);

[7] Dr. Fino opined that claimant does not suffer from clinical or legal pneumoconiosis, and diagnosed emphysema. Noting that claimant "had a rather accelerated drop in his FEV_1 between 2009 and 2010," which suggested that "the bullous portion of his emphysema may be worsening," Dr. Fino indicated that bullous emphysema is not associated with coal dust exposure, and attributed claimant's disability to smoking, adding that "I do not believe that coal mine dust has played a significant role in this case." Employer's Exhibit 8 at 11; Decision and Order at 7-8, 13-14.

Dr. Basheda diagnosed tobacco-induced chronic obstructive pulmonary disease (COPD)/emphysema, and found that claimant suffers a moderate to severe obstructive impairment with an asthmatic component. Employer's Exhibits 2, 3, 10. He stated that "the majority, if not all, of [claimant's] obstruction is most likely related to his smoking," and that "any obstruction arising from coal dust exposure would be insignificant compared to his tobacco-induced obstruction." Employer's Exhibit 10 at 32-33; Decision and Order at 9, 10.

[8] Dr. Martin opined that both smoking and coal dust exposure are significant causes of claimant's disabling impairment. Director's Exhibit 16; Employer's Exhibit 4. Dr. Schaaf opined that the impairment was predominantly caused by claimant's coal dust exposure, but he could not rule out some contribution from smoking. Director's Exhibit 17; Employer's Exhibit 9.

Consolidation Coal Co. v. Director, OWCP [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

Similarly, in summarizing Dr. Basheda's opinion, the administrative law judge noted that the physician stated "it would be unusual for the coal miner to have significant rapidly progressing airway obstruction after removal from the coal mines," and that "when estimating the loss of FEV_1 in coal dust exposure versus tobacco consumption, the loss of FEV_1 is far greater in tobacco smokers than in coal miners." Employer's Exhibit 2; Decision and Order at 9. The administrative law judge further reviewed Dr. Basheda's testimony that, although coal dust exposure can cause an obstructive defect or emphysema, "it's more common to develop obstructive lung disease from tobacco dependence than it is from coal mining dust," and that the majority of claimant's coal mine employment occurred after dust regulation, "so his risk for obstructive lung disease should be less based in that environment." Employer's Exhibit 10 at 32-33; Decision and Order at 9-10, 14. While acknowledging that coal dust exposure can cause an obstructive defect or emphysema, and that claimant had 28-29 years of coal mine employment, Dr. Basheda concluded that "the majority, if not all, of his obstruction is most likely related to his smoking, especially in [light of] the fact that he had continued to smoke long after he had told me." Employer's Exhibit 10 at 31-32; Decision and Order at 10. The administrative law judge noted, however, that Dr. Basheda did not directly respond to the question of whether he was able to decipher what portion of claimant's lung damage was from coal dust and what portion was from smoking. Decision and Order at 14; Employer's Exhibit 10 at 33-34. Rather, Dr. Basheda indicated that "I look at [claimant's] clinical history in the mines and after the mines, I look at his exposures and look at his tobacco consumption, look at his pulmonary function tests, look at his clinical history . . . . [a]nd there's nothing inconsistent with his clinical history or his findings that would say this is not related to his tobacco use." Employer's Exhibit 10 at 34. Considering these statements, the administrative law judge acted within his discretion in finding that Dr. Basheda's opinion was insufficient to affirmatively rule out a causal connection between claimant's coal dust exposure and his disabling impairment. 30 U.S.C §921(c)(4); Decision and Order at 14; *see Morrison*, 644 F.3d 479-80, 25 BLR 2-8-9; *see also Obush*, 24 BLR at 1-117. Because the remaining opinions of Drs. Martin and Schaaf were not supportive of employer's burden on rebuttal, the administrative law judge properly found that claimant was entitled to benefits.

As the trier-of-fact, it is the administrative law judge's function to assess the credibility of the medical opinions and assign them appropriate weight. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). 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 with proof that claimant does not have pneumoconiosis, or that his disabling respiratory impairment did not arise out of, or in connection with, coal mine employment.

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

SO ORDERED.

_____
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