BRB No. 12-0347 BLA

DONALD L. LANE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EAST STAR MINING, INCORPORATED	)	DATE ISSUED: 03/11/2013
	)	
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 Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Jeffrey S. Goldberg (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-05560) of Administrative Law Judge Robert B. Rae, rendered on a claim filed on May 21, 2007,

pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with over thirty years of underground coal mine employment, based on the stipulation of the parties. The administrative law judge determined that, because claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis, set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as amended by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556(a) (2010).[1] The administrative law judge further found that employer failed to rebut the presumption by establishing either that claimant does not have pneumoconiosis or that his disability does not arise out of, or in connection with, coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005 violates employer's right to due process and constitutes an unconstitutional taking of private property.[2] Employer also contends that the administrative law judge erred in crediting Dr. Rasmussen's opinion regarding disability causation. Claimant responds, urging the Board to reject employer's contentions and to affirm the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Board to reject employer's arguments regarding the constitutionality of amended Section 411(c)(4).

[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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Relevant to this claim, Section 1556 reinstated the presumption of 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 underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[2] Employer's request to hold this case in abeyance pending resolution of the legal challenges to the constitutionality of the PPACA and the severability of its non-health care provisions is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); Employer's Brief in Support of Petition for Review at 8.

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).

Applicability of the Amended Section 411(c)(4) Presumption

As an initial matter, we reject employer's contention that retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005, violates employer's right to due process and constitutes an unlawful taking of private property under the Fifth Amendment of the United States Constitution. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010); Employer's Brief in Support of Petition for Review at 9-15.

In addition, we affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established more than thirty years of underground coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 15. We, therefore, affirm the administrative law judge's determination that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Decision and Order at 15.

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

In order to establish rebuttal of the presumption at amended Section 411(c)(4), the administrative law judge required employer to affirmatively establish that claimant did not have either clinical or legal pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, coal mine employment. Decision and Order at 16; *see* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 900, 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 (4th Cir. 1980).

Initially, we affirm as unchallenged on appeal, the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *Skrack*, 6 BLR at 1-711. Employer's sole contention with respect to rebuttal of the

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

amended Section 411(c)(4) presumption is that the administrative law judge erred in crediting Dr. Rasmussen's opinion on the issues of the existence of legal pneumoconiosis and disability causation, as being reasoned and documented. Although employer alleges error in the weight accorded claimant's evidence, employer does not specifically challenge the administrative law judge's decision to accord little weight to the opinions of employer's experts, Drs. Fino and Rosenberg, that claimant's respiratory disability was not related to coal mine employment. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Employer also does not challenge the administrative law judge's application of the law pertaining to rebuttal, specifically his determination that it is employer's burden to affirmatively show that claimant's disabling respiratory or pulmonary impairment is unrelated to coal dust exposure. Decision and Order at 16. Consequently, the sufficiency of claimant's evidence is not at issue. *See Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9; *Barber*, 43 F.3d at 900, 19 BLR at 2-67; *Rose*, 614 F.2d at 939. Thus, we affirm as unchallenged, the administrative law judge's finding that the opinions of Drs. Fino and Rosenberg fail to establish that the miner's disability did not arise out of, or in connection with, coal mine employment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16-17. We therefore affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge