BRB No. 10-0593 BLA

ANTHONY MARUSA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANTERBURY COAL COMPANY	)	
	)	
and	)	
	)	
FRONT ROYAL INSURANCE COMPANY/ROCKWOOD INSURANCE COMPANY	)	DATE ISSUED: 05/25/2011
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Emily Goldberg-Kraft (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/carrier (employer) appeals the Decision and Order - Awarding Benefits (2009-BLA-5222) of Administrative Law Judge Daniel L. Leland 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). The administrative law judge credited claimant with twenty-six years of coal mine employment,[1] twenty-four of which were underground, and found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), as stipulated by the parties. The administrative law judge properly noted that under a recently enacted amendment to the Act, amended Section 411(c)(4),[2] 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), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.SC. §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 claimant'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) to this miner's claim, the administrative law judge found invocation of the rebuttable presumption established. 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, and, therefore, failed to rebut this presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of the recent Section 1556 amendments to this case. Employer also argues that, assuming the applicability of amended Section 411(c)(4), the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that

[1] The record indicates that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 3, 6, 15. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[2] 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 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Claimant responds, urging affirmance of the administrative law judge's award of benefits.[3] The Director, Office of Workers' Compensation Programs (the Director), urges the Board to reject employer's constitutional arguments, but does not address employer's arguments regarding the merits of entitlement.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contests the administrative law judge's application of Section 1556 to this case. Employer specifically asserts that the automatic entitlement provision revived by the Section 1556 amendments, contained at amended Section 932(*l*),[4] "could be found to be unconstitutional and a violation of due process," because employer could not have foreseen the necessity to adjust its insurance premiums to provide benefits for both an entitled miner and his survivor. Employer's Brief at 3. Employer's argument lacks merit.

As the Director asserts, employer's argument is premature, as this case does not involve the miner's survivor, and there has been no award of benefits under amended Section 932(*l*). Director's Brief at 2. Moreover, the arguments made by employer are substantially similar to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.). We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, BLR ,

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established twenty-six years of coal mine employment, with twenty-four years underground, that claimant suffers from a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b), and that employer failed to establish rebuttal of the Section 411(c)(4) presumption by disproving the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The recent amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that an eligible survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

BRB No. 10-0113 BLA, slip op. at 8 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106, at *5, (7th Cir. 2011).

Further, employer notes, but does not develop an argument, that "there has been no administrative 'rulemaking' implementing the statute, yet, by the Department of Labor, and no public comment in regard to same." Employer's Brief at 3. To the extent that employer is requesting that this claim be held in abeyance pending the promulgation of regulations implementing the Section 1556 amendments, employer's request is denied.

We also reject employer's contention that there is "some perceived ambiguity as to whether the amendment, as worded, applies to lifetime claims . . . ."[5] Employer's Brief at 3. Contrary to employer's assertion, the Board held in *Stacy* that the plain language of Section 1556(c) mandates the application of the amendments to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *Stacy*, BRB No. 10-0113 BLA, slip op. at 4, *citing* Pub. L. No. 111-148, §1556(c).

Consequently, we affirm the administrative law judge's application of Section 1556 to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We further affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), based on the administrative law judge's unchallenged findings that claimant established more than fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment.

We next address employer's argument that the administrative law judge erred in finding that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, and thus, failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 3-7.

In weighing the evidence regarding the cause of claimant's totally disabling respiratory impairment, the administrative law judge considered the opinions of Drs. Celko,[6] Rasmussen,[7] and Cohen,[8] that claimant's respiratory impairment is due in part to

[5] Without further explanation from employer, we presume that employer refers to the fact that Section 1556 is entitled "Equity for Certain Eligible Survivors."

[6] Dr. Celko concluded that claimant's respiratory impairment, comprised of bronchospasm, hypoxemia, and hypercarbia, is due to both coal mine dust exposure and smoking. Director's Exhibit 10.

coal mine dust exposure, together with the opinion of Dr. Kaplan,[9] that coal mine dust may have contributed to claimant's impairment, and the opinion of Dr. Fino,[10] that coal mine dust played no role in claimant's respiratory impairment. Decision and Order at 8-9. The administrative law judge accorded greatest weight to the "well reasoned" opinion of Dr. Cohen, based on Dr. Cohen's superior credentials in the area of occupational lung disease. The administrative law judge accorded less weight to the opinion of Dr. Fino, the only physician to opine that claimant's coal mine dust exposure played no role in his respiratory impairment, because Dr. Fino possesses less relevant qualifications than does Dr. Cohen, and because his opinion is unreasoned. Decision and Order at 9.

Employer asserts that in finding the evidence insufficient to rebut the Section 411(c)(4) presumption, the administrative law judge erred in discounting the opinion of Dr. Fino. Employer's Brief at 4-7. First, contrary to employer's arguments, substantial evidence supports the administrative law judge's permissible conclusion that Dr. Fino possesses lesser qualifications than does Dr. Cohen in the area of occupational disease.[11]

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[7] Dr. Rasmussen opined that claimant's loss of lung function, reflected by his obstructive impairment and impairment in oxygen transfer, is due to both coal mine dust exposure and smoking. Claimant's Exhibits 2, 5.

[8] Dr. Cohen concluded that claimant's obstructive lung disease, with diffusion impairment and resting and exercise gas exchange abnormalities, is due to both coal mine dust exposure and smoking. Claimant's Exhibit 4.

[9] Dr. Kaplan conceded that coal mine dust exposure may have contributed to a minor degree to claimant's airflow obstruction and hypoxemia. Employer's Exhibit 2. The administrative law judge found that Dr. Kaplan's concession renders his opinion insufficient to rebut the Section 411(c)(4) presumption. As this finding is unchallenged by employer, it is affirmed. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

[10] Dr. Fino opined that claimant's obstructive ventilatory defect is due solely to smoking, and that claimant's oxygen transfer impairment is due to his obstructive sleep apnea and obesity, with no contribution from coal mine dust. Employer's Exhibits 1, 5.

[11] As employer asserts, the record reflects that Dr. Fino is Board-certified in Internal Medicine with a subspecialty in Pulmonary Disease, has treated pulmonary patients, exclusively, since 2003, and, prior to that time, had a private practice which included treating patients diagnosed with pneumoconiosis. Employer's Exhibit 5 at 3-4. However, as the administrative law judge recognized, not only is Dr. Cohen Board-certified in Internal Medicine with a subspecialty in Pulmonary Disease, his experience includes: Chairman of Pulmonary and Critical Care Medicine at Cook County Health

See Soubik v. Director, OWCP, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997); Decision and Order at 9.

We further reject employer's contention that the administrative law judge erred in finding Dr. Fino's opinion to be inadequately reasoned. Employer's Brief at 4. Dr. Fino opined that claimant is disabled from a respiratory standpoint due to his significantly low resting blood oxygen levels, or hypoxemia. Employer's Exhibit 5 at 10. However, Dr. Fino concluded that, because claimant's hypoxemia has been variable, with claimant's oxygen levels intermittently returning to normal, the impairment is not due to coal mine dust exposure, but is due to claimant's sleep apnea and obesity. Employer's Exhibit 5 at 7-8. Dr. Fino explained that coal mine dust-related diseases do not improve over time and are not variable. Employer's Exhibit 5 at 7-8. Contrary to employer's argument, the administrative law judge permissibly discounted Dr. Fino's opinion as inadequately reasoned, in part, because, while Dr. Fino explained his conclusion that claimant's resting hypoxemia is not due to coal dust exposure, the record also reflects a diagnosis of marked exercise hypoxemia, by Dr. Rasmussen, which Dr. Fino did not address.[12] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge properly found that, as Dr. Rasmussen's April 8, 2009 exercise blood gas study is the only exercise study of record, there is no evidence that claimant's exercise hypoxemia is variable. *See Soubik*, 366 F.3d at 233, 23 BLR at 2-97; Decision and Order at 9; Claimant's Exhibit 2. Moreover, as the administrative law judge accurately noted, while Dr. Rasmussen agreed with Dr. Fino that claimant's resting hypoxemia was attributable to his sleep apnea or obesity, or both, Dr. Rasmussen explained that neither sleep apnea nor obesity would have any effect on exercise blood gas oxygen levels. Decision and Order at 7; Claimant's Exhibit 5 at 30, 32-34. Rather, Dr. Rasmussen explained the mechanism by which both smoking and coal mine dust

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and Hospitals System; Medical Director of Pulmonary Physiology and Rehabilitation, Divisions of Pulmonary and Occupational Medicine at Stroger Hospital; and Medical Director of the Black Lung Clinics Program at Stroger Hospital. Dr. Cohen has also been an occupational and environmental lung disease consultant for various institutions since 1998, and has written and lectured extensively on occupational disease. Decision and Order at 5, 9; Claimant's Exhibit 4.

[12] By contrast, Dr. Cohen reviewed Dr. Rasmussen's exercise blood gas studies and agreed that claimant's exercise gas exchange abnormalities were due to both coal mine dust exposure and smoking. Claimant's Exhibit 4.

combined to cause claimant's exercise oxygen transfer impairment, resulting in his disabling respiratory impairment. Decision and Order at 5, 7; Claimant's Exhibit 2 at 3-4. Therefore, we reject employer's allegations of error with respect to the weight accorded to Dr. Fino's opinion. *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Employer's Brief at 5-6.

It is the function of the administrative law judge to evaluate the physicians' opinions, *see Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8, and the Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). As the administrative law judge properly analyzed the medical opinions and explained his reasons for crediting or discrediting the opinions he reviewed, we affirm his finding that employer failed to meet its burden to establish that claimant's respiratory impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4); *see Soubik*, 366 F.3d at 233, 23 BLR at 2-97. Because claimant established invocation of the Section 411(c)(4) presumption, that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's 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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BETTY JEAN HALL
Administrative Appeals Judge