BRB No. 11-0529 BLA

HUGH LINKOUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 05/30/2012
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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly and Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (09-BLA-5910) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) rendered on a miner's subsequent 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). Claimant's initial claim, filed on March 15, 2004, Director's Exhibit 2, was denied by Administrative Law Judge Linda S. Chapman on October 3, 2006. Judge Chapman credited claimant with at least twelve years of coal mine employment,[1] but found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *H.C.L.* [*Linkous*] *v. Consolidation Coal Co.*, BRB No. 07-0184 BLA/A (Oct. 30, 2007)(unpub.).

Claimant filed this subsequent claim on December 5, 2008. Director's Exhibit 4. While the case was pending before the Office of Administrative Law Judges for a hearing, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this 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). 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),[2] the administrative law judge credited claimant with eighteen years of underground coal mine employment, and found that the

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. Director's Exhibit 5; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] In view of the potential applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), by pre-hearing Order dated April 6, 2010, the administrative law judge directed the parties to address the effect of Section 411(c)(4), and to indicate whether they needed to submit additional evidence. Claimant and the Director, Office of Workers' Compensation Programs, submitted position statements regarding the effect of Section 411(c)(4). No party requested leave to develop additional medical evidence in response to the change in law. At the hearing on May 19, 2010, the parties submitted their medical evidence. Employer's evidence included a deposition of one of its physicians taken on May 11, 2010. Employer's Exhibit 6.

new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).[3] Because claimant established at least fifteen years of qualifying coal mine employment and that he is totally disabled, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer failed to establish that claimant does not have pneumoconiosis, or that his impairment did not arise out of coal mine employment. Accordingly, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption, and awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer argues further that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and that he is totally disabled, and therefore erred in determining that claimant invoked the Section 411(c)(4) presumption. Additionally, employer argues that the administrative law judge erred in his analysis of the evidence when he found that employer failed to rebut the presumption that claimant is totally disabled due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments that amended Section 411(c)(4) may not be applied to this case.

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).

Application of Amended Section 411(c)(4)

Employer asserts 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 56-65. Further, employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's Brief at 44-45. Employer's contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo*

[3] Before addressing total disability, the administrative law judge found that the new medical opinion evidence established the existence of pneumoconiosis, and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 23-28.

Logan Coal Co., BLR , BRB No. 11-0154 BLA, slip op. at 4 (Oct. 28, 2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision. Further, we deny employer's request to remand this case so that employer may submit evidence of the amendment's economic impact on employer, to establish that a taking has occurred. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388 (4th Cir. 2011)(holding that "the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause").

Employer next argues that the application of Section 411(c)(4) is premature, because the Department of Labor has not yet promulgated regulations implementing the amendments to the Act. Employer's Brief at 46-48. We reject this argument. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *See 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). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as the claim was filed after January 1, 2005, and was pending on March 23, 2010.[4]

Invocation of the Section 411(c)(4) Presumption

Employer challenges the administrative law judge's finding that claimant has at least fifteen years of qualifying coal mine employment. Employer contends that, because the administrative law judge in the prior claim found twelve years of coal mine employment established, and claimant did not return to coal mining, the doctrine of collateral estoppel precludes relitigation of the length of coal mine employment issue. We disagree.

The United States Court of Appeals for the Fourth Circuit has held that there are five requirements that must be satisfied for collateral estoppel to apply, namely that (1) the issue sought to be precluded is identical to the one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and

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[4] Employer's request that this case be held in abeyance pending the resolution of the legal challenges to Public Law No. 111-148 is denied. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383, n.2 (4th Cir. 2011); *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *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); Employer's Brief at 51.

(5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co*., 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006).

In this case, the issue of the length of claimant's coal mine employment was not "a critical and necessary part of the judgment in the prior proceeding," as that denial was based on claimant's failure to establish the existence of pneumoconiosis. Therefore, contrary to employer's contention, collateral estoppel does not apply to preclude the administrative law judge from making a finding on the length of claimant's coal mine employment.

Employer next contends that the administrative law judge did not adequately explain his finding that claimant has at least fifteen years of qualifying coal mine employment. Employer's contention has merit.

The administrative law judge summarized the evidence of record regarding claimant's coal mine employment.[5] The administrative law judge then stated:

> Claimant's Social Security Itemized Statement of Earnings showed that he worked for Consolidation Coal (Employer) from the last quarter of 1967 through the second quarter of 1969, for a total of 7 quarters. Claimant reported earnings from Itmann Coal Co[.] from the third quarter of 1974 through 1982. The last mining company recorded was Mountaineer Mining and Minerals & Extraction, Inc. in 1990. (DX 7) The Coal Mine Employment Determination found a total of 18.01 years of coal mine employment for Claimant. (DX 8) [The] District Director's Proposed Decision and Order of June 26, 2009 credited Claimant with 18 years coal mine employment. (DX 18) I find that the preponderance of the evidence supports crediting Claimant with 18 years coal mine employment.

[5] On the CM-911 form, claimant detailed coal mine employment from 1972 through 1989, which claimant totaled as fifteen years. Director's Exhibit 5. Claimant's narrative work history describes coal mine employment of varying periods with different employers from 1967 through 1990. Director's Exhibit 5. Claimant's CM-913 form describes the duties of his last coal mine employment, from November 1990 to December 1990. Director's Exhibit 6. The Social Security Administration (SSA) earnings records show claimant's first coal mine employment in the fourth quarter of 1967, and his final coal mine employment in 1990. Director's Exhibit 7. The district director's Coal Mine Employment Determination calculates claimant's length of coal mine employment as 18.01 years, based on W-2 forms, pay stubs, and SSA records. Director's Exhibit 8.

Decision and Order at 20.[6] Employer, however, argues that when the quarters of claimant's alleged coal mine employment are totaled in a manner that avoids double-counting those quarters in which claimant worked for more than one coal mine operator, claimant's coal mine employment totals, at most, 14.5 years. Employer's Brief at 7-13.

The administrative law judge is charged with determining the length of claimant's coal mine employment. In making this determination, the administrative law judge must explain what evidence he credits or rejects and why he does so. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *Fee v. Director, OWCP*, 6 BLR 1-11 (1984). Upon review of the administrative law judge's Decision and Order, the Board is unable to discern the administrative law judge's basis for finding at least fifteen years of qualifying coal mine employment established. Since the administrative law judge has not explained his crediting and weighing of the evidence, his length of coal mine employment finding does not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore, we must vacate the administrative law judge's finding of eighteen years of coal mine employment, and remand the case for the administrative law judge to reconsider the length of claimant's coal mine employment, and to explain fully his weighing and crediting of the evidence in making this finding.[7] *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Wojtowicz*, 12 BLR at 1-165.

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[6] Later in his decision, the administrative law judge specified that all of claimant's coal mine employment was underground. Decision and Order at 32.

[7] In holding that the administrative law judge did not adequately explain his length of coal mine employment finding, we do not agree with employer's position that the relevant evidence may be totaled only in a manner that establishes 14.5 years of underground coal mine employment. An administrative law judge may apply any reasonable method of calculation in determining the length of claimant's coal mine employment. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). Moreover, employer's analysis of the coal mine employment evidence, Employer's Brief at 7-13, omits at least one period of alleged coal mine employment listed in a narrative work history. Director's Exhibit 5 (alleging underground coal mine employment with Somet Solvay Allied Chemical Corporation from April 1970 through December 1971). Whether to credit claimant with that period of alleged coal mine employment, and any others, will be a determination for the administrative law judge, on remand, and will require him to explain the basis for his finding. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Because we have vacated the administrative law judge's finding as to the length of claimant's qualifying coal mine employment, we must also vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Therefore, we also vacate the administrative law judge's conclusion that claimant met his initial burden to demonstrate a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[8] In the interest of judicial economy, however, we will address employer's challenge to the administrative law judge's additional finding related to invocation, that the evidence established the existence of a totally disabling respiratory impairment.

Pursuant to 20 C.F.R. §718.204(b)(2)(i),(iii), the administrative law judge found that the three new pulmonary function studies were non-qualifying,[9] and that there was no evidence of cor pulmonale with right-sided congestive heart failure. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that three of the four new blood gas studies were qualifying, and established total disability by a preponderance of the evidence.[10] Additionally, the administrative law judge found that a preponderance of the new medical opinion evidence established that claimant lacks the respiratory or

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[8] Contrary to the administrative law judge's analysis, it was not necessary for claimant to prove directly the existence of pneumoconiosis in order to demonstrate a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Because claimant is presumed to be totally disabled due to pneumoconiosis if he invokes the presumption pursuant to amended Section 411(c)(4), claimant will have satisfied his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309. For that reason, we find it unnecessary, and premature at this point, to address employer's numerous challenges to the administrative law judge's finding that claimant established the existence of pneumoconiosis, by a preponderance of the new medical opinion evidence. Decision and Order at 23-28; Employer's Brief at 14-29.

[9] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i),(ii).

[10] The January 23, 2007 study has only resting values, which were qualifying. Claimant's Exhibit 2. The February 11, 2009 study yielded qualifying values both at rest and on exercise. Director's Exhibit 12. The September 16, 2009 study yielded non-qualifying values at rest, but qualifying values on exercise. Employer's Exhibit 3. Based on those values, the administrative law judge found the September 16, 2009 study to be "partially qualifying." Decision and Order at 29. Finally, the January 28, 2010 study yielded non-qualifying values both at rest and on exercise. Employer's Exhibit 5.

pulmonary capacity to perform the labor required by his job as a section foreman, pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge concluded that claimant "demonstrated through a preponderance of both arterial blood gas studies and medical opinion evidence that he suffers a total disability pursuant to [S]ection 718.204(b)(2)(i)-(iv) of the regulations." Decision and Order at 31.

Addressing the blood gas study evidence under 20 C.F.R. §718.204(b)(2)(ii), employer contends that, because the most recent blood gas study was non-qualifying, claimant's condition improved, "inconsistent with the permanent or progressively worsening presentation associated with coal workers' pneumoconiosis." Employer's Brief at 31. Employer argues that the administrative law judge therefore erred in failing to inquire whether claimant's disability is respiratory or pulmonary in nature. *Id*. Employer's contention lacks merit. The administrative law judge properly evaluated the blood gas study evidence as directed by 20 C.F.R. §718.204(b)(2)(ii), to determine whether the results of each study yielded qualifying values. 20 C.F.R. §718.204(b)(2)(ii). Therefore, we reject employer's allegation of error. As employer makes no other argument regarding the administrative law judge's finding that a preponderance of the blood gas study evidence demonstrates total disability, that finding is affirmed.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), employer argues that the administrative law judge erred by failing to evaluate the medical opinion evidence "in light of the work that [claimant] performed in his coal mining employment." Employer's Brief at 33. This argument lacks merit. The administrative law judge set forth, in detail, the lifting and carrying that claimant had to perform in his work as a section foreman. Decision and Order at 30-31 and n.19. The administrative law judge explained that, because claimant "consistently reported from his testimony and to all three physicians [that] he did whatever work his men did while he was foreman," his "supervisory work *did* involve general labor. . . ." Decision and Order at 31. Because of the significant labor required by claimant's usual coal mine employment, the administrative law judge explained that he was persuaded by the opinions of Drs. Rasmussen and Zaldivar, that claimant lacks the respiratory or pulmonary capacity to perform the heavy labor required by his job.[11] Thus, contrary to employer's assertion, the administrative law judge properly evaluated the medical opinion evidence in light of the work required by claimant's usual coal mine employment. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997). As substantial evidence supports the administrative law judge's determination, we affirm the administrative law judge's finding that the preponderance of the medical opinion evidence establishes total respiratory or pulmonary disability

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[11] The administrative law judge declined to credit Dr. Habre's opinion that claimant is not totally disabled by a mild pulmonary impairment, because his most recent blood gas study "is above the disability standard . . . ." Employer's Exhibit 5 at 3.

pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Taylor v. Evans & Gambrel Co.,* 12 BLR 1-83 (1988).

Further, after considering all of the relevant evidence at each subsection, both supportive of, and contrary to, a finding of total disability, the administrative law judge found that claimant established "that he suffers a total disability pursuant to [S]ection 718.204(b)(i)-(iv) of the regulations." Decision and Order at 31; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc). Therefore, we affirm the administrative law judge's finding that claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

In sum, we remand this case for the administrative law judge to determine whether claimant has established at least fifteen years of qualifying coal mine employment, and to explain his finding on that issue. Because we have affirmed the finding of total disability, if the administrative law judge, on remand, finds at least fifteen years of qualifying coal mine employment established, claimant will have invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and demonstrated a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d). The burden will then shift 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.[12] 30 U.S.C. §921(c)(4); *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). If the administrative law judge does not find at least fifteen years of qualifying coal mine employment established, claimant will not have invoked the Section 411(c)(4) presumption, and the administrative law judge should then address whether claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 725.309(d), and that pneumoconiosis is a substantially contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c).

[12] Because employer was provided with the opportunity to submit additional evidence to address the change in the law, n.2, *supra*, we deny its request to instruct the administrative law judge to reopen the record, on remand, for employer to submit additional evidence relevant to rebuttal of the Section 411(c)(4) presumption. Employer's Brief at 41-42.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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