BRB No. 11-0530 BLA

ROY P. RAMAGE, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 05/22/2012
	)	
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.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Paul L. Edenfield (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: SMITH, MCGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5469) of Administrative Law Judge Joseph E. Kane, with respect to a claim filed on March 1, 2007, 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 administrative law judge credited the miner with

twenty-eight years of coal mine employment, based upon the stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. With respect to the applicability of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge determined that claimant's twenty-eight years of coal mine employment consisted of aboveground work at an underground coal mine and found that he established total disability at 20 C.F.R. §718.204(b)(2). The administrative law judge determined, therefore, that claimant invoked the presumption set forth in amended Section 411(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying amended Section 411(c)(4), as set forth in Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), as doing so violated several principles of constitutional law. Employer also asserts that the rebuttal methods set forth in amended Section 411(c)(4) are not applicable to responsible operators and that the amendments cannot be applied until the Department of Labor (DOL) has promulgated implementing regulations. Employer further argues that the administrative law judge did not properly assess whether claimant's aboveground work conditions were substantially similar to underground conditions. In addition, employer asserts that the administrative law judge did not properly weigh the medical opinion evidence in determining that employer failed to establish that claimant does not have pneumoconiosis or is not totally disabled due to pneumoconiosis at 20 C.F.R. §§718.202(a), 718.204(c).

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief in which he urges the Board to hold that employer's constitutional arguments have no merit.[2]

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[1] On March 23, 2010, Congress adopted amendments to the Act, that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010). In pertinent part, the amendments reinstated Section 411(c)(4), 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[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).

I. Constitutionality of the Amendments and Application to Employer

Upon review of the parties' arguments on appeal, we reject, as without merit, employer's constitutional challenges to the application of amended Section 411(c)(4) in this case. To the extent employer requests that this case be held in abeyance pending the resolution of the legal challenges to the PPACA, its request is denied. *See West Virginia CWP Fund v. Stacy*, 671 F.3d 378 (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). Because employer's arguments concerning the constitutionality of the amendments are virtually identical to those that the Board rejected in *Mathews*, we reject them here for the reasons set forth in that decision. *Mathews*, 24 BLR at 1-197-200; *see also Stacy*, 24 BLR at 1-214. In addition, employer's allegations regarding the application of amended Section 411(c)(4) to responsible operators, are identical to those that the Board rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA, slip op. at 4 (Oct. 28, 2011), appeal docketed No. 11-0154 BLA (4th Cir. Dec. 29, 2011). Therefore, we reject them here for the reasons set forth in that decision. Further, as we did in *Mathews*, we reject employer's argument that the presumption at amended Section 411(c)(4) does not apply until such time as the DOL issues guidelines or promulgates new regulations implementing the statutory amendments. *Mathews*, 24 BLR at 1-201.

II. Qualifying Coal Mine Employment

The administrative law judge noted that, according to claimant's testimony at the hearing and his employment records, he initially worked for five years underground and then moved aboveground, where he continued to work for employer. Decision and Order at 17. The administrative law judge determined that there was no evidence that claimant ever worked for a surface mining operation. *Id.* Relying on the Board's holding in *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1987), that "the type of

[3] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

mine (underground or surface), rather than the location of the particular worker (surface or below ground), is the element that determines whether a claimant is required to show comparability of conditions," the administrative law judge found that a showing of equivalency was not required. *Id*., *quoting Alexander*, 2 BLR at 1-501. The administrative law judge, therefore, credited claimant with twenty-eight years of qualifying coal mine employment as an aboveground worker at an underground mining operation. Decision and Order at 17.

Employer challenges the administrative law judge's finding that the evidence is sufficient to establish that claimant was employed for at least fifteen years in qualifying coal mine employment. Employer argues that the administrative law judge erred in finding that claimant did not have to show that the dust exposure at his job on the surface was equivalent to the dust exposure in an underground mining position. We disagree.

The administrative law judge permissibly determined that claimant was employed as an aboveground worker at an underground coal mine, based on his testimony at the hearing, his employment records, and the absence of evidence to the contrary. *See* Hearing Transcript at 13, 15; Director's Exhibit 6. Consequently, claimant is not required to show comparability of environmental conditions in order to qualify for the Section 411(c)(4) presumption and, therefore, we affirm the administrative law judge finding that claimant established twenty-eight years of qualifying coal mine employment. *Muncy v. Elkay Mining Co.*, BLR , BRB No. 11-0187 BLA, slip op. at 7-8 (Nov. 30, 2011), *citing Alexander*, 2 BLR at 1-504. Based on the administrative law judge's unchallenged determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4).

III. Rebuttal of the Presumption

A. Existence of Pneumoconiosis

As an initial matter, the administrative law judge determined that employer rebutted the presumption that claimant suffers from clinical pneumoconiosis, as all of the x-rays of record were interpreted as negative for coal workers' pneumoconiosis.[4]

[4] Clinical pneumoconiosis is defined as "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).

Decision and Order at 22. Regarding the existence of legal pneumoconiosis, the administrative law judge found that the record evidence establishes that claimant has chronic obstructive pulmonary disease (COPD) in the form of emphysema and asthma but the physicians have offered conflicting opinions concerning the etiology of the disease.[5] *Id*. The administrative law judge concluded, based on the reasoned and documented opinions of Drs. Simpao and Rasmussen, as corroborated by the opinion of Dr. Houser, that coal dust exposure was a significant contributing cause of claimant's emphysema. *Id*. at 27. The administrative law judge determined that the contrary opinions of Drs. Repsher and Selby were entitled to less weight, as their conclusions were neither well-reasoned nor well-documented. *Id*. at 22-25, 27. Thus, the administrative law judge found that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *Id*. at 27.

Employer asserts that the administrative law judge erred in weighing the medical opinions of Drs. Repsher and Selby by ignoring their superior qualifications and by erroneously finding that Dr. Repsher diagnosed legal pneumoconiosis. Employer also argues that the administrative law judge's erred in discrediting Dr. Selby's opinion as being at odds with the preamble to the revised regulations. Employer asserts that, contrary to the administrative law judge's finding, Dr. Selby's opinion, concerning the cause of claimant's emphysema, was not based on the absence of radiographic evidence for clinical pneumoconiosis and he did not exclude coal dust exposure, as a causal factor for claimant's emphysema, based solely on the fact that claimant's emphysema is of the bullous type. Employer maintains that because Dr. Selby additionally relied on claimant's smoking history, which he found was significant enough to cause two major cancers, the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), by not considering Dr. Selby's complete opinion. Further, employer contends that the preamble to the revised regulations cannot support the administrative law judge's finding of legal pneumoconiosis, as it does not have the force of law and cannot control the resolution of scientific questions. Employer also states that the revisions to the regulatory definition of legal pneumoconiosis cannot be applied to create a presumption that a miner's obstructive pulmonary disease is caused, or contributed to, by coal dust.

Additionally, employer asserts that the administrative law judge erred in crediting Dr. Simpao's opinion regarding whether coal dust exposure contributed to claimant's

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

impairment, as it was equivocal. Employer contends that the administrative law judge's reliance on the decision of the United States Court of Appeals for the Sixth Circuit in *Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) is misplaced, as it does not stand for the proposition that the opinions of all physicians who cannot distinguish between the effects of coal dust and smoking, are credible. Instead, employer states that the administrative law judge should have followed the guidance of *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995) and *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009), in which the court held that an administrative law judge could discredit, as equivocal, an opinion in which the physician identified both smoking and coal dust as causes of the miner's respiratory impairment. Employer argues that the opinions of Drs. Simpao and Rasmussen are vague and equivocal, based on their inability to differentiate between the effects of cigarette smoking and coal dust on claimant's impairment. Employer also contends that by giving more weight to the opinions of Drs. Simpao and Rasmussen, with little explanation, the administrative law judge engaged in a selective analysis of the evidence.

Employer's allegations of error are without merit. Contrary to employer's contention, the administrative considered the qualifications of the physicians when assessing their opinions and permissibly determined that the opinions of Drs. Selby and Repsher were entitled to less weight than the opinions of Drs. Simpao and Rasmussen, despite their superior qualifications, based on flaws in their reasoning. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005). The administrative law judge also considered Dr. Selby's opinion as a whole, including his statement that claimant's smoking history was significant enough to cause throat and bladder cancer, but permissibly determined that he was more persuaded by the detailed opinion of Dr. Houser, that being a susceptible host for these cancers does not mean that he was susceptible to smoking-induced emphysema. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 23.

We also reject employer's arguments concerning the administrative law judge's reliance on the preamble. The preamble to the amended regulations sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Consequently, the administrative law judge acted within his discretion in giving less weight to Dr.

Selby's opinion because he excluded coal dust exposure as a contributing factor based, in part, on the fact that claimant has bullous emphysema, contrary to the findings in the preamble. *See* 65 Fed. Reg. at 79,939 (Dec. 20, 2000); *Obush*, 24 BLR at 1-125-26.

We agree with employer that the administrative law judge erred in giving less weight to Dr. Repsher's opinion on the basis that his opinion concerning the existence of legal pneumoconiosis was equivocal, as Dr. Repsher consistently testified that any contribution to claimant's impairment from coal dust was de minimus. *See* Employer's Exhibits 14 at 23, 31-34; 19. However, the administrative law judge gave an additional reason for discrediting Dr. Repsher's opinion: Dr. Repsher specifically stated that "to an overwhelming statistical probability, any individually measurable reduction in FEV1 would be due to cigarette smoking, asthma, bronchiectasis, or some other inherited or acquired obstructive lung disease, other than legal coal workers['] pneumoconiosis." Decision and Order at 24, *quoting* Employer's Exhibit 1. Therefore, the administrative law judge rationally assigned less weight to Dr. Repsher's opinion, based on his belief that coal dust exposure does not cause a clinically significant decline in FEV1 in most miners, which is contrary to the findings of the DOL in the preamble to the revised regulations. *See* 65 Fed. Reg. at 79,940-1, 79,943; *Barrett*, 478 F.3d at 355; 23 BLR at 2-482; *Obush*, 24 BLR at 1-125-26; Decision and Order at 24.

We also reject employer's contention that the administrative law judge erred in failing to find the opinions of Drs. Simpao and Rasmussen to be vague and equivocal because they identified both smoking and coal dust exposure as causes of the miner's respiratory impairment. The administrative law judge properly applied *Cornett* and determined that the opinions of Drs. Simpao and Rasmussen were reasoned and not equivocal or entitled to less weight on this basis. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Cornett*, 227 F.3d at 576, 22 BLR at 2-120-21; *Gross v. Dominion Coal Corp*., 23 BLR 1-8 (2003); Decision and Order at 25-26. Additionally, we reject employer's reliance on the Sixth Circuit's holdings in *Griffith* and *Greene* to argue that the administrative law judge erroneously applied *Cornett*. In this case, the administrative law judge permissibly credited the opinions of Drs. Simpao and Rasmussen, as to the cause of claimant's emphysema and COPD, as he found that they specifically attributed claimant's respiratory impairment to both coal dust exposure and cigarette smoking and explained the bases for their findings. *See Greene*, 575 F.3d at 635-36, 24 BLR at 2-211; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Cornett*, 227 F.3d at 576, 22 BLR at 2-120-21; Decision and Order at 27; Director's Exhibit 12; Claimant's Exhibit 3.

We affirm, therefore, the administrative law judge's determination that claimant has a respiratory condition that satisfies the legal definition of pneumoconiosis at 20 C.F.R. §7218.201. Consequently, we affirm the administrative law judge's conclusion that employer failed to rebut the amended Section 411(c)(4) presumption by proving that claimant does not suffer from pneumoconiosis.

B. Total Disability Causation

The administrative law judge noted that the issue of whether claimant's disabling respiratory impairment arose out of, or in connection with, his coal mine employment "is essentially the same as the issue of whether [claimant] suffers from legal pneumoconiosis." Decision and Order at 28. Therefore, the administrative law judge again gave greater weight to the opinions of Drs. Simpao and Rasmussen over the contrary opinions of Drs. Selby and Repsher. He also specifically determined that the opinions of Drs. Selby and Repsher were entitled to less weight on the issue of disability causation since they did not diagnose pneumoconiosis, contrary to the administrative law judge's findings. *Id*. Thus, the administrative law judge determined that employer did not rebut the presumption that claimant's disabling respiratory impairment was due to pneumoconiosis and awarded benefits. *Id*. at 28-29.

Employer asserts that the administrative law judge's disability causation determination is flawed and incomplete because he merely cited to his prior analysis concerning legal pneumoconiosis. Employer maintains that the establishment of legal pneumoconiosis and total disability causation are separate elements, which must be considered separately. Employer further contends that the administrative law judge's failure to do so leaves the Board "to speculate why the [administrative law judge] did what he did." Employer's Brief at 16, *citing Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

Regarding the administrative law judge's findings on the issue of total disability causation, employer is correct that the administrative law judge's explanation of his finding, that employer failed to prove that claimant's totally disabling impairment is unrelated to his coal mine employment, is brief. However, contrary to employer's contention, the Board is not "left to speculate why the [administrative law judge] did what he did." Employer's Brief at 16, *citing Lockhart*, 137 F.3d at 803, 21 BLR at 2-311. The administrative law judge permissibly determined that the opinions of Drs. Selby and Repsher were entitled to less weight, as they did not diagnose clinically significant legal pneumoconiosis, contrary to the administrative law judge's findings. *See Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). In addition, as the administrative law judge noted, there is considerable overlap between the issues of the existence of legal pneumoconiosis and total disability due pneumoconiosis, as both concern an inquiry into whether a causal relationship exists between coal dust exposure and the miner's impairment. 20 C.F.R. §§718.201(b)(2), 718.202(a)(4), 718.204; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Consequently, based on our affirmance of the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis, we also affirm the administrative law judge's finding that employer did not rebut the presumption that the miner's disability was due to pneumoconiosis.

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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BETTY JEAN HALL
Administrative Appeals Judge