BRB No. 11-0544 BLA

JAMES E. SIZEMORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 05/24/2012
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner ((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 (2009-BLA-5851) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed

on October 8, 2008,[1] 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). In considering this claim, the administrative law judge noted that 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), Public Law No. 111-148 (2010). 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). Under amended Section 411(c)(4), 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.S.C. §921(c)(4)).

The administrative law judge found that claimant worked for at least twenty-seven years in underground coal mine work or in conditions substantially similar to those of an underground mine. Because the administrative law judge also determined that claimant has a totally disabling respiratory impairment, he found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut that presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that retroactive application of amended Section 411(c)(4) is unconstitutional because it denies substantive due process and constitutes an unlawful taking of private property under the Fifth Amendment. Employer maintains that the rebuttal provisions of amended Section 411(c)(4) do not apply to coal mine operators. Employer also contends that the administrative law judge erred in relieving claimant of his burden to affirmatively prove that he suffers from legal pneumoconiosis, and in relying on the preamble to the regulations to assess the credibility of the medical opinions, relevant to the cause of claimant's disabling obstructive respiratory disease. Employer further argues that the administrative law judge failed to explain the basis for

[1] Claimant filed three prior claims, each of which was denied. Director's Exhibits 1-3. The last claim, filed on July 17, 1997, was denied by Administrative Law Judge Richard T. Stansell-Gamm, on February 10, 2000, on the grounds that, while claimant established total disability, he failed to prove the existence of pneumoconiosis. Director's Exhibit 3. Claimant took no further action with regard to the denial, until he filed the current subsequent claim. Director's Exhibit 4.

his credibility findings in accordance with the Administrative Procedure Act (APA).[2] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter brief, urging the Board to reject employer's constitutional challenges to the applicability of amended Section 411(c)(4).

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).

Initially, we reject employer's assertion that, if any portion of the PPACA is declared unconstitutional, the amendments to the Black Lung Benefits Act contained therein, including amended Section 411(c)(4), must also be declared invalid. *See West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011); Employer's Brief in Support of Petition for Review at 22-27. We also reject employer's contention that retroactive application of amended Section 411(c)(4), to claims filed after January 1, 2005, constitutes a violation of its due process rights and an unconstitutional taking of property, as the Board has rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); Employer's Brief in Support of Petition for Review at 27-34.

Furthermore, we reject employer's contention that the provisions of amended Section 411(c)(4) do not apply in cases where an employer is liable for benefits, as the plain language of 30 U.S.C. §921(c)(4) provides limitations on rebuttal evidence which apply only to claims brought against "the Secretary." Employer's Brief in Support of Petition for Review at 35. The Board rejected an identical argument in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), *appeal docketed*,

[2] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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) and 30 U.S.C. §932(a).

[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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the reasons set forth in that decision.

Because this subsequent claim was filed after January 1, 2005, and was pending on March 23, 2010, the administrative law judge correctly found that the amendments are applicable. Based on the administrative law judge's unchallenged findings that claimant established more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4).[4] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 24.

With respect to rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge found that employer was required to establish either that claimant does not have pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection, with coal mine employment. Decision and Order at 23-24. In considering whether claimant suffers from legal pneumoconiosis,[5] the administrative law judge found that the physicians are in agreement that claimant suffers from disabling bullous emphysema, but disagree as to the etiology of that condition. Decision and Order at 19. He noted that Dr. Rasmussen attributed claimant's chronic obstructive pulmonary disease (COPD)/emphysema to a combination of smoking and coal dust exposure, while Drs. Zaldivar and Hippensteel opined that claimant's emphysema is due entirely to smoking. *Id*. The administrative law judge gave little weight to the opinions of Drs. Zaldivar and Hippensteel because he found that "their explanations for dismissing [claimant]'s thirty-seven year coal mine employment as a possible cause of his COPD/emphysema [were] not persuasive." *Id*. at 20.

[4] Since claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), we also affirm the administrative law judge's finding that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 15.

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

A substantial portion of employer's brief is devoted to its argument that, because Dr. Rasmussen stated that he was unable to distinguish between the effects of coal dust exposure and smoking, his opinion is insufficient to satisfy claimant's burden to establish the existence of legal pneumoconiosis. Employer's Brief in Support of Petition for Review at 5-12. The proper inquiry on rebuttal, however, is the sufficiency of employer's evidence, as employer bears the burden to affirmatively show that the miner does not suffer from pneumoconiosis or that his disabling respiratory disease is unrelated to coal mine work. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011). Thus, we focus our review on the administrative law judge's credibility findings with regard to the opinions of Drs. Zaldivar and Hippensteel.

We reject employer's argument that the administrative law judge has failed to explain the basis for his credibility findings, in accordance with the APA, as the administrative law judge specifically rejected the opinions of employer's experts on the ground that they expressed views that were in conflict with the science underlying the regulations. *See* Decision and Order at 20; Employer's Brief at 15-16. The administrative law judge found that, as the basis for excluding coal dust exposure as a causative factor for claimant's disabling bullous emphysema, Drs. Zaldivar and Hippensteel cited to the "lack of significant radiographic changes" and their belief that bullous emphysema is caused by smoking and is not associated with coal dust exposure.[6] Decision and Order at 20; *see* Employer's Exhibits 2, 4. The administrative law judge properly noted, however, that the Department of Labor (DOL) has found that coal dust-induced and smoke-induced emphysema occur through similar mechanisms and that "obstructive lung disease occurs in coal miners even without radiographic changes." Decision and Order at 20, *citing* 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000). The administrative law judge concluded that the findings of the DOL in the preamble, "undercut[] the opinions of Drs. Zaldivar and Hippensteel that claimant's bullous emphysema could not have been contributed to by his exposure to coal dust." Decision and Order 20. Insofar as the administrative law judge determined that the opinions of Drs. Zaldivar and Hippensteel were not credible on the issue of the existence of legal pneumoconiosis, he also found that their opinions "can carry little weight" on the issue of disability causation. *Id*. at 25. Thus, the administrative law judge found that employer

[6] In his examination report dated June 12, 2009, Dr. Zaldivar specifically stated that "[b]ullous emphysema is not a disease related to mining," and "is not found in simple pneumoconiosis." Employer's Exhibit 2. In his report dated October 16, 2009, Dr. Hippensteel reviewed medical records, including Dr. Zaldivar's report, and noted his agreement with Dr. Zaldivar's statement that bullous emphysema "is not expected to be associated with simple coal workers' pneumoconiosis but is associated with cigarette smoking." Employer's Exhibit 4.

failed to establish that claimant's disability did not arise out of, or in connection with, his coal mine employment.[7] *Id*.

We also reject employer's assertion that the administrative law judge erred in relying on the preamble to discredit the opinions of Drs. Zaldivar and Hippensteel, relevant to the issue of whether claimant has a respiratory condition that satisfies the definition of legal pneumoconiosis. *Id*. at 16. The administrative law judge acted within his discretion in consulting the preamble as it sets forth the medical and scientific premises relied upon by DOL. *Harman Mining Co. v. Director, OWCP* [*Looney*], F.3d , Nos. 05-1620, 11-1450, 2012 WL 1680838 (4th Cir. May 15, 2012); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004); *see also J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). The administrative law judge reasonably found that Drs. Zaldivar and Hippensteel did not adequately explain their rationales in light of the preamble. *See Looney*, F.3d , Nos. 05-1620, 11-1450, 2012 WL 1680838 at *8.

We consider employer's assertions of error in this appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because credibility determinations are within the sound discretion of the trier-of-fact, we affirm the administrative law judge's findings that the opinions of Drs. Zaldivar and Hippensteel are insufficient to affirmatively prove either that claimant does not have legal pneumoconiosis or that his respiratory disability did not arise out of, or in connection, with coal mine employment. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 25. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the presumption at amended Section 411(c)(4).

[7] Based on the facts of this case, the issue of etiology of claimant's respiratory disability is subsumed in the analysis of whether he has legal pneumoconiosis.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge