BRB No. 11-0551 BLA

CHARLES V. COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 05/17/2012
	)	
POWELL MOUNTAIN COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Second Decision and Order on Remand Awarding Benefits (06-BLA-6192) of Administrative Law Judge Linda S. Chapman 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). This case involves a claim filed on June 27, 2005, and is before the Board for the third time.[1] Director's Exhibit 2.

In her first Decision and Order on Remand, issued on February 5, 2009, the administrative law judge found that claimant did not establish the existence of clinical or legal pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a)(1), (4). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board, in a split decision, vacated the denial of benefits because the administrative law judge did not adequately explain her weighing of the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and did not consider the entirety of a physician's opinion that was submitted by claimant pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, the Board remanded the case to the administrative law judge for reconsideration of those issues.[3] *Coleman v. Powell Mountain Coal Co.*, BRB No. 09-0451 BLA, slip op. at 4-6 (Mar. 16, 2010)(unpub.)(Dolder, J., concurring and dissenting).

In her second decision on remand, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this 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 Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions

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[1] The full procedural history of this case is set forth in the Board's decisions in *Coleman v. Powell Mountain Coal Co.*, BRB No. 09-0451 BLA (Mar. 16, 2010)(unpub.)(Dolder, J., concurring and dissenting), and *C.V.C.* [*Coleman*] *v. Powell Mountain Coal Co.*, BRB No. 07-0985 BLA (Aug. 19, 2008)(unpub.).

[2] "Clinical pneumoconiosis" consists of "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. §718.202(a)(1). "Legal pneumoconiosis" includes "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).

[3] The dissenting member of the Board indicated that she would have affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), (4), and thus would have affirmed the denial of benefits. *Coleman*, BRB No. 09-0451 BLA, slip op. at 7-8 (Dolder, J., concurring and dissenting).

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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 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), the administrative law judge found that claimant established thirty years of underground coal mine employment[4] and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption. 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. Therefore, the administrative law judge found that employer failed to rebut the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also asserts that the administrative law judge erred by limiting the parties to one supplemental report by a physician of record, to address the new legal standard. Employer further asserts that the administrative law judge erred in her analysis of the medical opinion evidence when she found that employer did not rebut the presumption.[5] Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments that amended Section 411(c)(4) may not be applied to this case, and that the administrative law judge erred in limiting employer to one supplemental medical report on remand.

[4] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[5] Employer does not challenge the administrative law judge's findings of thirty years of underground coal mine employment, that claimant invoked the Section 411(c)(4) presumption, and that employer did not disprove the existence of clinical pneumoconiosis based on the x-ray evidence. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 19.

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).

Employer contends 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 10-18. Employer's contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), slip op. at 4, *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision.[6] Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

Employer also contends that the administrative law judge, on remand, erred in allowing it to submit only one supplemental medical report to address the change in law. Specifically, employer argues that the administrative law judge denied it the opportunity to present sufficient new evidence because she did not allow employer to "develop new objective evidence" to "replace [its] previously designated evidence. . . ." Employer's Brief at 18. Upon review of the record, we conclude that employer did not raise this evidentiary issue with the administrative law judge. Therefore, the issue is not properly before the Board on appeal. *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986).

[6] 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 6-10. We also deny employer's request to hold this case in abeyance until such time as the Department of Labor issues guidelines or promulgates new regulations implementing the statutory amendments. Employer's Brief at 6. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations. *See Mathews*, 24 BLR at 1-201.

After there has been a change in law, an administrative law judge must permit the parties to submit additional evidence in a manner consistent with the evidentiary limitations imposed by 20 C.F.R. §725.414. *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011). Generally, the Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007)(en banc); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 621, 23 BLR 2-345, 2-370-71 (4th Cir. 2006).

On remand, by Order dated November 4, 2010, the administrative law judge instructed the parties to file a position statement on whether amended Section 411(c)(4) affected this case. In light of the potential applicability of amended Section 411(c)(4), the administrative law judge also allowed the parties to submit one supplemental medical report from any physician who rendered an affirmative medical report.

Claimant and the Director filed responses addressing the applicability of Section 411(c)(4), but submitted no additional medical evidence. By letter dated November 19, 2010, employer responded that it would be premature to apply Section 411(c)(4) and, alternatively, requested an extension of time in which to file a supplemental report from Dr. Hippensteel. In its response letter, employer did not object to the administrative law judge's allowance of only one supplemental medical report, nor did it request permission to withdraw any of its formerly designated evidence and to substitute new evidence, based on the change in law. The administrative law judge granted employer's extension request, and later admitted Dr. Hippensteel's supplemental medical report into the record as Employer's Exhibit 7. Subsequently, in its closing brief filed with the administrative law judge, employer did not request leave to submit any additional evidence beyond Dr. Hippensteel's supplemental report, and argued that its medical evidence of record was sufficient to rebut the Section 411(c)(4) presumption. Employer's Closing Argument on Remand at 3-6.

On the above facts, we decline to address employer's argument on appeal. Before the administrative law judge, employer did not object to the limit of one supplemental medical report, nor did it request that the administrative law judge allow it "to submit new evidence addressing the presumption which would replace [its] previously designated evidence," as it now does in its brief to the Board. Employer's Brief at 18, 27. Employer's failure to request the administrative law judge for permission to submit more than one supplemental medical report precludes employer from challenging the administrative law judge's ruling before the Board for the first time on appeal. *See Kurcaba*, 9 BLR at 1-75. We therefore deny employer's request to remand this case to the administrative law judge for the admission of additional medical evidence. Accordingly, we turn to employer's contentions regarding rebuttal of the Section 411(c)(4) presumption.

In determining whether employer rebutted the amended Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Hippensteel, McSharry, Baker, and Molony. Drs. Hippensteel and McSharry opined that claimant does not have clinical or legal pneumoconiosis but, rather, suffers from emphysema related solely to smoking.[7] Director's Exhibit 11 at 5-6; Employer's Exhibits 3, 7; Employer's Exhibit 4 at 23; Employer's Exhibit 5 at 30-31. In contrast, Drs. Baker and Molony diagnosed claimant with clinical pneumoconiosis as well as legal pneumoconiosis. Director's Exhibits 10, 14; Claimant's Exhibit 2. With regard to legal pneumoconiosis, Drs. Baker and Molony diagnosed chronic obstructive pulmonary disease (COPD), chronic bronchitis, and hypoxemia, all related to both coal mine dust exposure and smoking. *Id*.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge discounted all four medical opinions. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Hippensteel and McSharry. Employer's Brief at 19-27. We disagree. The administrative law judge reasonably found that Dr. Hippensteel did not adequately explain why coal mine dust exposure was not a cause of claimant's impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Dr. Hippensteel acknowledged that coal mine dust exposure can cause a reduction in diffusing capacity such as that suffered by claimant, but stated only that when it does so, the impairment "usually" occurs in the presence of interstitial fibrosis and a pattern of opacities not seen on claimant's x-rays. Employer's Exhibit 5 at 26-27. Moreover, the administrative law judge reasonably discounted Dr. Hippensteel's opinion because he attempted to rule out coal mine dust exposure as a cause of claimant's impairment, based on the absence of x-ray findings of pneumoconiosis. *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); Director's Exhibit 11 at 5-6; Employer's Exhibit 5 at 26-27; Employer's Exhibit 7 at 1-2. Turning to Dr. McSharry's opinion, the administrative law judge reasonably found that he did not adequately explain why coal mine dust exposure, in addition to smoking, did not play a

[7] As observed by the administrative law judge, claimant "estimated that he had smoked for 40 years," and stated at the hearing that he continues to smoke a pack or less a day. 2007 Decision and Order at 3; Hearing Transcript at 28.

part in claimant's obstructive disease and impairment.[8] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Second Decision and Order on Remand at 6, 7-8; Employer's Exhibit 3 at 2; Employer's Exhibit 4 at 13-15, 18-19.

In determining that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment, the administrative law judge discounted the opinions of Drs. Hippensteel and McSharry for the same reasons she gave in her analysis of the legal pneumoconiosis issue. Second Decision and Order on Remand at 8. On appeal, employer makes the same arguments it made regarding the administrative law judge's finding that employer did not establish the absence of legal pneumoconiosis. As we have already rejected those arguments, we affirm the administrative law judge's finding that employer did not establish that claimant's impairment did not arise out of, or in connection with, coal mine employment.

Lastly, employer contends that the administrative law judge erred in requiring employer to meet a greater burden of proof than a preponderance of the evidence, in order to rebut the Section 411(c)(4) presumption. Employer's Brief at 26. We disagree. The administrative law judge correctly stated that employer bore the burden to establish "by a preponderance of the evidence" that claimant does not have pneumoconiosis or that his impairment did not arise out of, or in connection with, coal mine employment. Second Decision and Order on Remand at 3; *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).

Therefore, we affirm, as supported by substantial evidence, the administrative law judge's findings that employer failed to rebut the presumption at amended Section 411(c)(4) by establishing that claimant does not have pneumoconiosis, or that his impairment did not arise out of his coal mine employment. 30 U.S.C. §921(c)(4). Thus, we affirm the award of benefits.

[8] The administrative law judge found that Dr. McSharry stated that claimant's findings were "typical" of, or "customary" for, emphysema due to smoking, but did not sufficiently explain why claimant's "substantial exposure to coal mine dust did not play a part in his disabling oxygenation impairment," or explain how Dr. McSharry excluded it as a factor in claimant's emphysema. Second Decision and Order on Remand at 6.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge