BRB No. 11-0588 BLA

EDWARD L. STIDHAM	)	
	)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

George E. Roeder, III (Jackson Kelly PLCC), 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2009-BLA-05117) of Administrative Law Judge Pamela J. Lakes 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). Claimant filed this miner's claim on January 7, 2008. Director's Exhibit 2. The administrative law judge held a hearing on June 24, 2009.

In March 2010, while the case was still before the administrative law judge, Congress enacted amendments to the Act, affecting pending 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 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),[1] the administrative law judge credited claimant with more than fifteen years of underground coal mine employment, and found that claimant established the existence of a totally disabling respiratory 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 further found that, although employer disproved the existence of clinical pneumoconiosis,[2] it failed to disprove the existence of legal pneumoconiosis.[3] Additionally, the

[1] In view of the potential applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), by Order dated July 2, 2010, the administrative law judge directed the parties to file position statements addressing the effect of amended Section 411(c)(4) on this case. After receiving briefs from the Director, Office of Workers' Compensation Programs, and employer, the administrative law judge reopened the record on September 20, 2010, to allow the parties to submit evidence relevant to the issues raised by the reinstatement of the Section 411(c)(4) presumption.

[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. §718.201(a)(1). Because the administrative law judge found that employer disproved the existence of clinical pneumoconiosis by a preponderance of the CT scan and medical opinion evidence, Decision and Order at 21, we need not address employer's argument that she erred in finding the analog chest x-ray evidence to be in equipoise for the existence of clinical pneumoconiosis. Employer's Brief at 50-55.

[3] "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).

administrative law judge found that employer failed to establish that claimant's 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 employer failed to rebut the presumption that claimant is totally disabled due to pneumoconiosis.[4] Claimant has not filed 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.

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.[5] 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 first requests that this case be held in abeyance pending the resolution of the legal challenges to Public Law No. 111-148. Employer's Brief at 7-15. We deny employer's request. *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 contends that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as a taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 15-24. Further, employer argues that the Section

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[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has more than fifteen years of underground coal mine employment, suffers from a totally disabling respiratory or pulmonary impairment, and established invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Claimant's coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

411(c)(4) presumption does not apply to a claim brought against a responsible operator. Employer's Brief at 28-29. 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), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision.

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 29-31. We reject this argument. As we noted in *Mathews*, 24 BLR at 1-201, the mandatory language of the recent amendments to the Act supports the conclusion that these provisions are self-executing. *See also Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Ala. Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

Employer also contends that it should be dismissed from the case, and that the Black Lung Disability Trust Fund should be responsible for payment of any benefits awarded, because the administrative law judge failed to issue her decision in a timely manner. Specifically, employer points to 20 C.F.R. §725.476, which directs that "the administrative law judge shall issue a decision and order with respect to the claim" within twenty days after the hearing is officially terminated. Employer argues that it was prejudiced by the delay because Congress reinstated the Section 411(c)(4) presumption in the interim. Therefore, employer maintains, it should be absolved of responsibility for benefits awarded to claimant. Employer's Brief at 25-27.

The Director responds, arguing that the twenty-day language at 20 C.F.R. §725.476 "is directory, not mandatory or jurisdictional," and that the administrative law judge's failure to comply with the directive, therefore, does not relieve employer of liability in this claim. Director's Brief at 8-9, *quoting Md. Cas. Co. v. Cardillo*, 99 F.2d 432, 434 (D.C. Cir. 1938). The Director further contends that, even if compliance with 20 C.F.R. §725.476 were mandatory, employer waived this argument, because it failed to raise the twenty-day requirement before the administrative law judge. Director's Brief at 9 n.2.

We agree with the Director that the issue is waived because employer failed to raise it before the administrative law judge. *See Perry v. Director, OWCP*, 9 BLR 1-1, 1-3 (1986) (en banc); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). Therefore we decline to address employer's argument under 20 C.F.R. §725.476.

Turning to the merits of the Decision and Order, employer raises three challenges to the administrative law judge's finding that employer failed to rebut the Section

411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis. Employer first contends that the administrative law judge erred by requiring employer to disprove the existence of legal pneumoconiosis. Employer maintains that invocation of the Section 411(c)(4) presumption does not establish the existence of legal pneumoconiosis, or relieve claimant of the burden of establishing legal pneumoconiosis under 20 C.F.R. §718.201(a)(2) by proving that his impairment arose out of coal mine employment. Employer's Brief at 31-37. This argument lacks merit. Because claimant invoked the Section 411(c)(4) presumption, it is presumed that he suffers from "pneumoconiosis," a term that, when used in the Act, incorporates both clinical and legal pneumoconiosis. 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Therefore, the administrative law judge properly required employer to disprove the existence of legal pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-65-66.

Employer argues that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis. Specifically, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Hippensteel and Rosenberg, that claimant does not have pneumoconiosis, but suffers from lung disease that is due to smoking. Employer's Brief at 37-50; Director's Exhibit 11; Employer's Exhibits 1 at 6; 6 at 4-5; 7 at 15, 19, 23-24; 8 at 27. We disagree. The administrative law judge correctly noted that the definition of legal pneumoconiosis includes respiratory or pulmonary impairments that are significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2), (b). The administrative law judge permissibly found that, even if claimant's smoking was the primary cause of his disabling impairment, Drs. Hippensteel and Rosenberg did not adequately explain how they determined that claimant's years of coal mine dust exposure did not substantially aggravate, or significantly contribute to, his impairment. *See 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); Decision and Order at 22-23. The administrative law judge therefore found, as was within her discretion, that Drs. Hippensteel and Rosenberg "did not articulate a cogent basis for excluding coal mine dust exposure as a causative agent, and [therefore] did not refute the existence of legal pneumoconiosis." Decision and Order at 23; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Barber*, 43 F.3d at 901, 19 BLR at 2-65-66. Because substantial evidence supports the administrative law judge's credibility determination, we affirm her

finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis.[6]

Finally, employer argues that it rebutted the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of his coal mine employment. Employer contends that the administrative law judge's findings regarding the cause of claimant's disability "are flawed for the same reasons as her findings concerning the existence of legal pneumoconiosis." Employer's Brief at 36. Because we have already rejected those arguments, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, his coal mine employment.

Claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption. Therefore, we affirm the award of benefits.

[6] Because we hold that the administrative law judge permissibly found that Drs. Hippensteel and Rosenberg did not adequately explain how they eliminated coal mine dust exposure as a cause of claimant's impairment, we need not address employer's argument that the administrative law judge erred in crediting claimant's testimony that he has a fifteen pack-year smoking history. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009)(holding that the party alleging error must explain how the error to which he points could have made any difference); Employer's Brief at 56-58; Decision and Order at 4.

Accordingly, the administrative law judge's Decision and Order Granting 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