BRB No. 12-0351 BLA

BEATRICE FLEMING (o/b/o DONALD R. FLEMING)	)	
Claimant-Respondent	)	
v.	)	
N.O.W. COAL COMPANY	)	DATE ISSUED: 05/06/2013
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 - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (2010-BLA-5037) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) rendered

on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited the miner with nineteen years of coal mine employment, of which at least fifteen years were spent underground; found that employer is the properly designated responsible operator herein; and adjudicated this subsequent claim, filed on October 22, 2008, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and determined that this claim is governed by the recent 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 at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner 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, 260 (2010). If the presumption is invoked, the burden of proof shifts 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. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis thereunder, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that employer failed to establish rebuttal by proving either that the miner did not have pneumoconiosis, or that the miner's disabling respiratory or

[1] Claimant is the widow of the miner, who died on December 14, 2010. The miner's initial claim, filed on November 8, 1993, was dismissed by Administrative Law Judge Robert S. Amery after the miner, or a representative, failed to attend the formal hearing or respond to Judge Amery's subsequent Order to Show Cause why the claim should not be dismissed for failure to attend the hearing. Director's Exhibit 1.

The miner's second claim was filed on September 14, 2001, and was denied by the district director on July 21, 2003, for failure to establish the existence of pneumoconiosis, or that the miner's totally disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 2. The miner filed the current claim on October 22, 2008, and claimant is pursuing the claim on his behalf. Director's Exhibit 4.

pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 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 to find a change in an applicable condition of entitlement established pursuant to Section 725.309(d). Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contentions regarding a change in an applicable condition of entitlement at Section 725.309(d), and its assertion that the administrative law judge erred in relying on the preamble to the revised regulations when assessing the credibility of the medical opinions.[2]

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).

In order to establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's prior claim was denied

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding regarding the length of the miner's coal mine employment; his finding that employer is the responsible operator; and his finding that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 2; Hearing Transcript at 11.

because he failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit evidence establishing the existence of pneumoconiosis or that the miner's total respiratory disability was due to pneumoconiosis in order to obtain review of the merits of this claim. 20 C.F.R. §725.309(d).

Employer initially contends that the administrative law judge's failure to apply the principle of finality to this subsequent claim deprives it of due process of law in violation of the Fifth Amendment to the United States Constitution. In this regard, employer asserts that because the miner's respiratory impairment was previously found to be due to obesity and heart disease, and because the miner did not return to work following the denial of his second claim, the principle of finality precludes entitlement. Employer argues that the administrative law judge erred in applying amended Section 411(c)(4) to this claim and in failing to conduct an analysis of the evidence pursuant to 20 C.F.R. §725.309(d) to determine whether claimant established a change in an applicable condition of entitlement. Employer's Brief at 4, 10-15. Employer's arguments lack merit.

Contrary to employer's contention, the principles of res judicata and finality do not apply in a subsequent claim where the issue is the miner's physical condition at a period of time entirely different from that previously adjudicated. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(en banc), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Moreover, the plain language of Section 1556(c) mandates the application of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). Consequently, we reject employer's contention that the application of amended Section 411(c)(4) to this claim constitutes a violation of employer's due process rights. *See Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-93, 1-200 (2010). In light of our affirmance of the administrative law judge's unchallenged findings that the miner had over fifteen years of underground coal mine employment and that new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge's application of amended Section 411(c)(4) to this case, and we affirm his finding that claimant is entitled to invocation of the rebuttable presumption pursuant to amended Section 411(c)(4). 30 U.S.C. §921(c)(4). Thus, contrary to employer's assertion, the administrative law judge implicitly found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d), because the miner is presumed to have had disabling pneumoconiosis at the time of his death through invocation of the amended Section 411(c)(4) presumption.

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Employer contends that the administrative law judge's resort to the preamble in assessing the conflicting medical opinions is a violation of 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), and 30 U.S.C. §932(a), and resulted in a denial of employer's due process right to a full and fair hearing. Employer argues that the administrative law judge erred in failing to give the parties notice of his intent to rely on the preamble, even though such notice was explicitly requested by employer. Employer also asserts that because the preamble is not of record, and because the administrative law judge did not notify the parties, until after the record was closed, of his reliance on such "extra-record evidence," employer was denied a meaningful opportunity to know the evidence and respond to it. Employer further alleges that, as applied by the administrative law judge, the preamble has been treated as a legislative rule although it was not subject to notice and comment. Lastly, employer asserts that the administrative law judge mischaracterized the discussion in the preamble, as the Department of Labor (DOL) did not find that coal dust exposure causes obstructive lung disease in every case. Employer's Brief at 15-21. Employer's arguments lack merit.

The preamble to the amended regulations sets forth how the DOL has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Thus, an administrative law judge may evaluate expert opinions in conjunction with DOL's discussion of sound medical science in the preamble to the amended regulations. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012). In addition, contrary to employer's suggestion, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Looney*, 678 F.3d at 316, 25 BLR at 2-132; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-12; *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Rather, the administrative law judge may, within his discretion, consult the preamble as an authoritative statement of medical principles accepted by DOL, and consider the preamble to the revised regulations in assessing the credibility of the medical experts' opinions. *Looney*, 678 F.3d at 314-16, 25 BLR at 2-130-32; *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-12; *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); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

Employer next argues that the administrative law judge erred in his consideration of Dr. Fino's opinion when weighing the medical opinion evidence relevant to rebuttal.

In this regard, employer asserts that the administrative law judge erroneously discredited Dr. Fino's opinion because he was the only physician to opine that the miner's impairment was restrictive in nature. Employer maintains that rejection of a minority opinion is an invalid method of resolving conflicts in the evidence and amounts to "nose-counting." Employer further argues that the administrative law judge erred in discrediting Dr. Fino's opinion on the basis that the physician relied on a diffusing capacity test without proper regulatory or legal authority for its use. Employer's Brief at 22-23. Employer's arguments lack merit.

In evaluating the evidence relevant to rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge considered the opinions of Drs. Alam, Fino, and Dahhan, as well as the miner's treatment notes and hospitalization records.[4] Dr. Alam opined that the miner had pneumoconiosis, and that his disabling combined restrictive and obstructive pulmonary impairment was due to tobacco abuse, coal dust exposure, obesity, coronary artery disease, and deconditioning. Director's Exhibit 12; Claimant's Exhibit 6. Dr. Dahhan also diagnosed a disabling restrictive and obstructive pulmonary impairment, but opined that the miner did not have pneumoconiosis and that the impairment resulted from obesity, cigarette smoking, and the miner's previous coronary bypass surgery. Employer's Exhibit 7. Dr. Fino opined that the miner did not have pneumoconiosis, but suffered a restrictive impairment without obstruction that was not caused by lung disease.[5] Employer's Exhibits 1, 13.

[4] In the admission record to Whitesburg-ARH Hospital dated January 18, 2010, the miner's admission diagnoses were listed as "respiratory failure, chronic obstructive pulmonary disease (COPD) exacerbation, and coal workers' pneumoconiosis." Claimant's Exhibit 1. The miner was admitted to Whitesburg-ARH Hospital on October 21, 2009, and was diagnosed and treated for "acute exacerbation of COPD, coronary artery disease, hyperkalemia, chronic kidney disease, insulin dependent diabetes mellitus, obesity, underlying tobacco abuse, hyperlipidemia, hypertension, hypothyroidism, osteoarthritis, and chronic pain syndrome." Claimant's Exhibit 2. On April 8, 2010, the miner was admitted to Wellmont Holston Valley Medical Center, and was treated by Dr. Patel for "sepsis, hypertension, pneumonia, acute COPD exacerbation, acute renal failure, hyperkalemia, morbid obesity, chronic anemia, and a history of COPD. Claimant's Exhibit 3. In treatment notes dated August 26, 2009, October 21, 2009, November 4, 2009, and January 18, 2010, Dr. Alam chronicled his treatment of the miner for coal workers' pneumoconiosis, emphysema, chronic bronchitis, anemia, COPD, dyspnea, renal insufficiency, diabetes, congestive heart failure, and hypoxemia. Claimant's Exhibit 5.

[5] Dr. Fino examined the miner on December 16, 2009 and was deposed on December 28, 2011. Dr. Fino concluded that, while the miner had significant reductions in FVC, FEV_1, and blood gasses, indicating a restrictive abnormality, the miner's

In assessing Dr. Dahhan's opinion, the administrative law judge noted that the physician's conclusion, that the miner's pulmonary impairment was not related to coal dust exposure, was based, in part, on the reversibility of the miner's impairment after bronchodilator administration. The administrative law judge found that Dr. Dahhan did not adequately discuss or explain why coal dust was not a cause of, or an aggravating factor to, the miner's residual impairment. Decision and Order at 11. Further, while Dr. Dahhan relied on an epidemiological study to support his opinion, that the miner's loss of more than 2000cc of his FEV_1 was an amount that could not be accounted for by the obstructive impact of coal dust on the respiratory system, the administrative law judge determined that the preamble discussed the study, which found a clear relationship between coal dust exposure and decline in pulmonary function. As the study concluded that the average loss of FEV_1 was 5-9 ml per year from coal dust exposure and 5 ml from smokers of one pack per day, the administrative law judge questioned Dr. Dahhan's logic in attributing the miner's impairment to smoking and not coal dust exposure. Decision and Order at 10. Noting that the miner smoked for approximately the same number of years as he worked in underground coal mine employment, the administrative law judge rationally discounted Dr. Dahhan's opinion as inconsistent with the preamble, which also recognizes that smokers who mine have an additive risk for developing significant obstruction.[6] *Id.*; *see* 65 Fed. Reg. 79,940-41 (Dec. 20, 2000).

Similarly, in finding Dr. Fino's opinion to be inconsistent with the preamble and insufficiently reasoned to support rebuttal, the administrative law judge determined that Dr. Fino, like Dr. Dahhan, "misused" the miner's FEV_1 values to rule out pneumoconiosis, and relied heavily on the fact that neither the x-ray evidence nor the CT scan readings evidenced a fibrotic lung disease. Decision and Order at 11-12; *see* 65 Fed. Reg. 79,938-41 (Dec. 20, 2000). Further, Drs. Dahhan and Alam diagnosed a mixed obstructive and restrictive impairment, as supported by the miner's treatment records showing numerous entries for testing and treatment of chronic obstructive pulmonary disease (COPD), whereas Dr. Fino diagnosed a purely restrictive disorder. Decision and Order at 7; Claimant's Exhibits 1-6. Dr. Fino stated that, because the miner's impairment was restrictive, he would expect the diffusing capacity test he conducted to produce abnormal results if caused by lung disease due to coal dust exposure, but that the miner's

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disabling medical condition was not due to lung disease. Rather, the miner's lungs were secondarily affected by obesity, an enlarged heart, an elevated diaphragm, and pleural fat. Employer's Exhibits 1, 13.

[6] We affirm the administrative law judge's determination to discredit the opinion of Dr. Dahhan, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

test, when considering alveolar volume, corrected to normal. The administrative law judge noted, however, that Dr. Alam questioned the validity of the test, and that Dr. Dahhan also obtained a diffusing capacity test but did not say that it corrected to normal and did not refer to the test when explaining why the miner's disabling impairment was not due to pneumoconiosis. Decision and Order at 11-12. Determining that the diffusing capacity test did not provide a valid basis for Dr. Fino to rule out pneumoconiosis as a cause of the miner's disability, the administrative law judge observed that there was no authority in the preamble or case law to support the use of the test for this purpose,[7] and that Dr. Fino did not lay a sufficient foundation for its use by providing medical literature in support of its validity. Decision and Order at 12-13. Consequently, the administrative law judge accorded Dr. Fino's opinion less weight, as he found that the physician's explanation for ruling out coal dust as a cause of the miner's impairment conflicted with that of Dr. Dahhan and raised questions as to the reliability of Dr. Fino's testing.

Initially, we agree with employer that it is error for an administrative law judge to mechanically discount a medical opinion solely on the basis that it expresses a minority view among the physicians. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 783, 18 BLR 2-384, 388 (7th Cir. 1994). In the instant case, however, contrary to employer's arguments, the administrative law judge acted within his discretion in finding that the opinion of Dr. Fino was entitled to little weight because it was inconsistent with the evidence in the record considered as a whole, which documented the presence of an obstructive impairment. Further, the administrative law judge rationally concluded that Dr. Fino's opinion was not well-reasoned or documented, as he did not lay a sufficient foundation for utilizing the diffusing capacity test to rule out a coal dust-related disease as a cause of the miner's disabling impairment. Decision and Order at 12-13; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The Board is required to defer to the administrative law judge's assessment of the physicians' credibility. *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). As substantial evidence supports the administrative law judge's weighing of the evidence, we affirm his finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by showing that the miner did not have pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *see also Rose v. Clinchfield Coal*

[7] Employer correctly notes that 20 C.F.R. §718.107(a) provides that "any medically acceptable test or procedure reported by a physician . . . may be submitted in connection with a claim and shall be given appropriate consideration." 20 C.F.R. §718.107.

Co., 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed.

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