BRB Nos. 11-0804 BLA
and 12-0086 BLA

ODAS C. ADDINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/19/2012
	)	
GREATER WISE, INCORPORATED	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order and Attorney Fee Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John A. Martin (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrer.

Richard A. Seid (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/carrier (employer) appeals the Decision and Order awarding benefits and the Attorney Fee Order (2008-BLA-5629) of Administrative Law Judge Theresa C. Timlin, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's claim filed on July 27, 2007.

In her Decision and Order, the administrative law judge properly 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 the present claim, Section 1556 of Public Law No. 111-148 reinstated the Section 411(c)(4) rebuttable presumption. 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), amended by Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (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 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 credited claimant with 29.31 years of coal mine employment,[1] of which 20.4 years were performed underground, and further found that claimant established 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 Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. The administrative law judge further 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, she found that employer did not rebut the 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

[1] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 4. 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 (1989) (en banc).

law judge erred in finding that employer failed to rebut the presumption that claimant is totally disabled due to pneumoconiosis.[2] Finally, employer contests the administrative law judge's award of an attorney's fee to claimant's counsel. Claimant responds, urging affirmance of the award of benefits and fee award. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, 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. 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).

Application of the Section 411(c)(4) Presumption

Employer contends that 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.[3] Employer's Brief at 18-24. Employer's contentions are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision.

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. Because we have affirmed the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment, we further affirm the

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 29.31 years of coal mine employment, with 20.4 years underground, and that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); Employer's Brief at 12-17.

administrative law judge's determination that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

Rebuttal of the Section 411(c)(4) Presumption

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); *see Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980).

The administrative law judge considered the medical opinions of Drs. Rosenberg, Hippensteel, Agarwal, and Baker in determining whether employer disproved the existence of legal pneumoconiosis.[4] Drs. Rosenberg and Hippensteel opined that claimant's respiratory impairment is unrelated to his coal dust exposure. Specifically, Dr. Rosenberg opined that claimant has a moderate to severe obstructive impairment that is attributable to his smoking history. Employer's Exhibit 1. Similarly, Dr. Hippensteel opined that claimant's airflow obstruction is a result of his "long smoking history," and not his coal mine employment, noting that a pulmonary impairment related to coal dust exposure "should subside within a period of several months after leaving work in the mines . . . ." Employer's Exhibit 2 at 8, 14. In contrast, Drs. Agarwal and Baker diagnosed claimant with legal pneumoconiosis, in the form of an obstructive impairment related to both his smoking history and coal mine dust exposure. Director's Exhibit 9; Claimant's Exhibits 1, 2.

The administrative law judge discredited the opinions of Drs. Rosenberg and Hippensteel, that claimant does not suffer from legal pneumoconiosis, because she found that neither physician adequately explained how he determined that claimant's nearly thirty years of coal mine dust exposure did not contribute to or aggravate his disabling obstructive impairment. Decision and Order at 23-24. Further, the administrative law judge found that Dr. Hippensteel's reasoning, that any impairment related to coal mine dust exposure would be resolved in the months after a miner left the mines, was inconsistent with the regulations, which recognize that pneumoconiosis may be latent and

[4] 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).

progressive. *Id.* at 24, *citing* 20 C.F.R. §718.201(c). 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. Rosenberg and Hippensteel. We disagree. Contrary to employer's assertion, the administrative law judge adequately considered the opinions of Drs. Rosenberg and Hippensteel, and permissibly found that neither physician sufficiently explained how he eliminated claimant's coal mine dust exposure as a factor that contributed to or aggravated claimant's pulmonary impairment. *See Barber*, 43 F.3d at 900, 19 BLR at 2-65; *Rose*, 614 F.2d at 939, 2 BLR at 2-43. Further, the administrative law judge rationally discounted Dr. Hippensteel's reasoning, that an impairment related to coal dust exposure should have subsided once claimant left the mines, as contrary to the regulations. *See* 20 C.F.R. §718.201(c)(recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure").

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Rosenberg and Hippensteel, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.[5]

Employer next argues that the administrative law judge erred in finding that it failed to establish rebuttal by showing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). Employer's Brief at 10-12. Employer's argument lacks merit. The administrative law judge permissibly concluded that the same reasons for which she discredited the opinions of Drs. Rosenberg and Hippensteel, on the issue of legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 28. Because the opinions of Drs. Rosenberg and Hippensteel are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the

[5] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *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 need not address employer's contention that the administrative law judge erred in her analysis of the biopsy evidence in finding that employer did not disprove the existence of clinical pneumoconiosis. Employer's Brief at 4.

administrative law judge's finding that employer failed to meet its burden to establish rebuttal.[6] *See Barber*, 43 F.3d at 900, 19 BLR at 2-65; *Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). Therefore, we affirm the award of benefits. 30 U.S.C. §921(c)(4).

Appeal of the Administrative Law Judge's Attorney Fee Order

Claimant's counsel filed a fee petition requesting a total fee in the amount of $12,793.50, for 28.50 hours of work Mr. Wolfe performed at a rate of $300.00 an hour ($8,550.00), 1.75 hours of work Ryan C. Gilligan performed at a rate of $225.00 an hour ($393.75), 6.50 hours of work W. Andrew Delph performed at a rate of $200.00 an hour ($1,300.00), and 24.50 hours of work counsel's legal assistants performed at a rate of $100.00 an hour ($2,550.00).[7] Employer did not oppose claimant's counsel's fee petition while it was pending before the administrative law judge. The administrative law judge determined "that the fee requested is reasonable and is commensurate with the necessary work performed," in accordance with 20 C.F.R. §725.366(b). Accordingly, the administrative law judge approved the requested fee in an Attorney Fee Order issued on October 3, 2011.

On appeal, employer argues that the administrative law judge's fee award is excessive, and specifically challenges the number of hours claimed, the rate requested for work performed by claimant's counsel's legal assistants, and counsel's use of quarter-hour billing increments. Claimant's counsel responds in support of the fee award. The Director has not filed a brief in this appeal.

The amount of an award of an attorney's fee by the administrative law judge is discretionary and will be upheld unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). If a party fails

[6] In light of our holding that the administrative law judge permissibly discredited the only medical opinions supportive of a finding that employer rebutted the amended Section 411(c)(4) presumption, we need not address employer's contentions that the administrative law judge erred in the weight she accorded the opinions of Drs. Agarwal and Baker, and erred in her consideration of claimant's medical treatment records and in determining the length of his smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] The amount of 24.50 hours listed on the fee petition appears to be a typographical error, as the total fee requested for the legal assistants is for 25.50 hours of work.

to raise objections to a fee petition when filed, the party cannot subsequently contest the award on appeal. *Abbott*, 13 BLR at 1-16.

In this case, employer did not raise, before the administrative law judge, the objections to the fee petition that it now raises on appeal, despite having had the opportunity to do so. Therefore, employer has waived its right to object to the administrative law judge's fee award on appeal.[8] *Abbott*, 13 BLR at 1-16. Thus, we decline to address employer's contentions on appeal, and the fee award is affirmed.

Accordingly, the administrative law judge's Decision and Order awarding benefits and Attorney Fee Order are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[8] Although employer could have sought reconsideration of the administrative law judge's attorney fee award pursuant to 20 C.F.R. §725.366(d), there is no evidence of record indicating that employer made such a request.