BRB No. 12-0059 BLA

LARRY D. HALSTEAD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ESSENTIAL FUELS, INCORPORATED	)	DATE ISSUED: 11/28/2012
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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/carrier (employer) appeals the Decision and Order Awarding Living Miner's Benefits (2010-BLA-5382) of Associate Chief Administrative Law Judge William S. Colwell 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 subsequent claim filed on June 22, 2009.[1] After crediting claimant with twenty-one years of underground coal mine employment, and finding that a totally disabling respiratory impairment was established pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[2] 30 U.S.C. §921(c)(4). *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In addition, the administrative law judge found that employer failed to rebut the presumption by disproving the existence of pneumoconiosis or establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[3] 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge found that claimant was entitled to benefits pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4).

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[1] Claimant's most recent prior claim was filed on March 8, 2005. The claim was denied by Administrative Law Judge Jeffrey Tureck in a Decision and Order issued on December 17, 2007, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 3. No further action was taken until claimant filed the current claim. Director's Exhibit 5.

[2] 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. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment (i.e., coal mine employment in underground mining or in substantially similar conditions) and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. 30 U.S.C. §921(c)(4).

[3] The administrative law judge also found that the medical evidence established the existence of clinical pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), as well as legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c).

On appeal, employer challenges the constitutionality of the PPACA. Employer also argues that the application of amended Section 411(c)(4) to this case is premature because of the absence of implementing regulations, and that the application of amended Section 411(c)(4) constitutes a denial of due process and an unconstitutional taking of private property. Additionally, employer contends that the rebuttal provisions at amended Section 411(c)(4) apply to the Secretary of Labor, and not to responsible operators.

Regarding the merits of entitlement under amended Section 411(c)(4), employer contends that the administrative law judge erred in finding the presumption invoked by finding a total respiratory disability established pursuant to Section 718.204(b)[4] and that he erred in finding that the presumption was not rebutted. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges that the Board reject both employer's constitutional challenges to the PPACA and its challenge to the administrative law judge's application of amended Section 411(c)(4) 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).

As an initial matter, we reject employer's constitutional arguments. Subsequent to the filing of employer's brief, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected employer's argument that retroactive application of the amendments contained in Section 1556 of the PPACA to

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established at least twenty-one years of underground coal mine employment, as well as his findings that the evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 37-38, 44-45.

[5] The record reflects that claimant's coal mining employment was in West Virginia. Director's Exhibit 6. 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).

claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

We also reject employer's allegation that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. The courts have consistently ruled that Section 411(c)(4), including the language pertaining to rebuttal, applies to operators, despite the reference to "the Secretary." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1975); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *see Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011).

Further, we reject employer's assertion that it was premature for the administrative law judge to award benefits pursuant to the recent amendments to the Act, because the Department of Labor has yet to promulgate regulations implementing the rebuttable presumption at amended Section 411(c)(4). Employer's Brief at 49-51. The mandatory language of the recent amendments to the Act supports the conclusion that these provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *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 the present claim pursuant to amended Section 411(c)(4).

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

Employer argues that the administrative law judge erred in finding the Section 411(c)(4) presumption of total disability due to pneumoconiosis invoked, by finding that the arterial blood gas study and medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(ii), (iv). Employer also contends that the administrative law judge failed to properly weigh together all of the medical evidence relevant to the issue of total respiratory disability, both like and unlike, before finding that a totally disabling respiratory impairment was established.

In finding that the medical evidence established a totally disabling respiratory impairment, the administrative law judge found that the weight of the qualifying blood gas study evidence established total respiratory disability pursuant to Section 718.204(b)(2)(ii). Decision and Order at 39, 40. Regarding the medical opinion

evidence, the administrative law judge found that the opinions of Drs. Rasmussen, Al-Khasawneh and Habre, that claimant is totally disabled from a respiratory standpoint, are reasoned and documented and outweigh the contrary opinions of Drs. Repsher and Hippensteel, that claimant's disability is cardiac in nature. *Id*. at 41-42. The administrative law judge, therefore, found that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv).

Weighing the relevant evidence together, the administrative law judge found that the non-qualifying pulmonary function studies did not outweigh the preponderantly qualifying blood gas studies, as pulmonary function testing and blood gas testing measure different types of respiratory disability. Thus, the administrative law judge concluded that the preponderantly qualifying blood gas study evidence, along with the reasoned and documented opinions of Drs. Rasmussen, Al-Khasawneh and Habre, established total respiratory disability pursuant to Section 718.204(b) overall. Consequently, because the blood gas study and medical opinion evidence established total respiratory disability, and because at least fifteen years of underground coal mine employment were established, the administrative law judge found the Section 411(c)(4) presumption of total disability due to pneumoconiosis invoked. 30 U.S.C. §921(c)(4).

Employer contends, however, that the administrative law judge erred in finding that the blood gas study and medical opinion evidence established total respiratory disability and in not weighing together all of the medical evidence relevant to the issue of total respiratory disability. In particular, employer contends that the administrative law judge failed to weigh the non-qualifying pulmonary function studies, which he found insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i), with the blood gas study and medical opinion evidence. Employer's Brief at 51. Further, employer contends that the administrative law judge erred in his weighing of the medical opinion evidence because he mischaracterized the opinions of Drs. Rasmussen, Al-Khasawneh and Habre, when he found their opinions supported a finding of total respiratory disability. Employer also contends that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Repsher and Hippensteel, as employer argues that these opinions are based on a review of claimant's entire medical file and are better supported by the underlying evidence than the opinions of Drs. Rasmussen, Al-Khasawneh and Habre. *Id*. at 55-56.

In this case, the record contains five blood gas studies conducted on August 24, 2009, May 13, 2010, June 1, 2010, June 2, 2010 and September 8, 2010. The resting blood gas studies conducted on August 24, 2009, May 13, 2010, June 1, 2010 and June 2, 2010, produced qualifying values, while the resting blood gas study conducted on

September 8, 2010, produced non-qualifying values.[6] Director's Exhibit 15; Claimant's Exhibits 2, 3; Employer's Exhibits 2, 9. Additionally, the August 24, 2009 and June 2, 2010 blood gas studies included post-exercise testing, which produced qualifying values. Director's Exhibit 15; Employer's Exhibit 2. The administrative law judge found that, because claimant's coal mine employment required heavy manual labor, the qualifying post-exercise studies were "the most probative" of claimant's ability to perform his usual coal mine employment. Decision and Order at 39.

Contrary to employer's argument, based on the qualifying nature of claimant's August 24, 2009 and June 2, 2010 post-exercise blood gas studies, and the fact that four out of the five resting blood gas studies produced qualifying values, the administrative law judge properly concluded that the blood gas study evidence established total respiratory disability pursuant to Section 718.204(b)(2)(ii). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); Decision and Order at 39.

Regarding the medical opinion evidence, contrary to employer's argument, the administrative law judge properly credited the opinions of Drs. Rasmussen, Al-Khasawneh and Habre, that claimant is totally disabled due to a respiratory impairment, over the contrary opinions of Drs. Repsher and Hippensteel, that claimant is totally disabled due to cardiac disease alone. In doing so, the administrative law judge properly concluded that the opinions of Drs. Rasmussen, Al-Khasawneh and Habre, diagnosing a total *respiratory* disability, were more credible than the contrary opinions of Drs. Repsher and Hippensteel, as they were supported by their findings on physical examination of claimant, their knowledge of the exertional requirements of claimant's usual coal mine employment, and the blood gas study evidence, establishing a total *respiratory* disability. Decision and Order at 42. The administrative law judge permissibly found the opinions of Drs. Repsher and Hippensteel were compromised because they "premis[ed] their opinions on views that the blood gas testing reflected only cardiac impairment."[7]

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[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, i.e. Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

[7] In contrast, the administrative law judge stated:

> Dr. Rasmussen noted that the miner 'always had a normal anaerobic threshold, which is an indicator of cardiac output.' Said differently, [Dr. Rasmussen] found that the miner's 'heart is pumping a normal amount of blood to the exercising muscle.' Dr. Rasmussen stated that, if the miner suffered from a 'poorly functioning left ventricle, the anaerobic threshold would occur prematurely' and, in this particular case, the miner did not

Decision and Order at 41; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Contrary to employer's argument, therefore, the administrative law judge reasonably concluded that the medical opinion evidence established a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv).

Employer next contends that the administrative law judge erred in not weighing all of the relevant evidence together, both like and unlike, to find a total respiratory disability established pursuant to 20 C.F.R. §718.204(b). However, because pulmonary function studies and blood gas studies measure different types of respiratory disability, the administrative law judge reasonably found that the non-qualifying pulmonary function study evidence did not call into question the credibility of the qualifying blood gas study evidence, or the opinions of Drs. Rasmussen, Al-Khasawneh and Habre. *See Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984); Decision and Order at 42. Consequently, as the administrative law judge properly weighed all the relevant evidence together in finding that claimant established a total respiratory disability pursuant to Section 718.204(b)(2), the finding is affirmed. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc).

In light of our affirmance of the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment pursuant to Section 718.204(b)(2), we affirm the administrative law judge's finding that the Section 411(c)(4) presumption of total disability due to pneumoconiosis was invoked. 30 U.S.C. §921(c)(4).

> achieve his anaerobic threshold-prematurely or otherwise. Dr. Rasmussen also persuasively explains that the miner's peripheral vascular disease and coronary artery disease did not affect the blood gas testing results. He noted that such disease would affect a person's anaerobic threshold but, as previously noted, the miner never reached this threshold during exercise testing…. Dr. Al-Khasawneh agrees with Dr. Rasmussen that the miner's heart disease did not adversely affect his blood gas testing results. He noted that the miner exhibited no chest pain or other heart abnormalities during blood gas testing such that the results of the testing was 'oxygen not being able to cross' as opposed to cardiac disease. This tribunal is more persuaded by the opinions offered by Drs. Rasmussen and Al-Khasawneh, which are documented and well-reasoned.

Decision and Order at 40.

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

Addressing rebuttal of the Section 411(c)(4) presumption, the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by proving that claimant does not have pneumoconiosis, or that his disability did not arise out of 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*, 614 F.2d at 939, 2 BLR at 2-43; *accord Morrison*, 644 F.2d at 480, 25 BLR at 2-9. Weighing the relevant medical evidence, the administrative law judge found that employer failed to rebut the presumption under either method.

In finding that employer failed to disprove the existence of pneumoconiosis, the administrative law judge properly found that the weight of the analog x-ray evidence was positive for clinical pneumoconiosis,[8] and was more reliable than the negative digital x-ray and CT scan. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order at 36. Additionally, contrary to employer's contention, the administrative law judge permissibly found that the x-ray interpretations in the miner's treatment records were inconclusive on the issue because they were silent as to the presence or absence of pneumoconiosis. *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984); Decision and Order at 46-47. Consequently, in light

[8] Specifically, the administrative law judge found that the August 24, 2009 x-ray was positive for pneumoconiosis because the positive readings of that x-ray by Dr. Alexander, who is Board-certified in radiology and a B reader, and Dr. Rasmussen, who is a B reader, outweigh the sole negative reading of that x-ray by Dr. Wheeler, who is Board-certified in radiology and a B reader. Decision and Order at 47; Director's Exhibits 15, 22, 25. The administrative law judge then found that the May 13, 2010 and June 1, 2010 x-rays were in equipoise because they were read as positive by Dr. DePonte, who is Board-certified in radiology and a B reader, but as negative by Dr. Meyer, who is Board-certified in radiology and a B reader. Decision and Order at 47; Claimant's Exhibits 2, 3; Employer's Exhibits 19, 20. Lastly, the administrative law judge found that while the September 8, 2010 x-ray, was read as positive for pneumoconiosis by Dr. Alexander, who is Board-certified in radiology and a B reader, and as negative by Dr. Meyer, who is Board-certified in radiology and a B reader, Decision and Order at 47; Claimant's Exhibit 5; Employer's Exhibit 18, it was read as positive by Dr. Repsher, a B reader. The administrative law judge therefore found that the September 8, 2010 x-ray was positive for pneumoconiosis.

of his finding that the weight of the x-ray evidence was positive for pneumoconiosis,[9] the administrative law judge rationally found that employer failed to rebut the presumption by disproving the existence of pneumoconiosis. *See* 30 U.S.C. §921(c)(4).

Moreover, we affirm the administrative law judge's finding that employer failed to rebut the presumption by showing that claimant's total respiratory disability did not arise out of, or in connection with, coal mine employment. Specifically, the administrative law judge credited the opinions of Drs. Rasmussen, Al-Khasawneh and Habre because he found them more persuasive in explaining why claimant's total respiratory disability arose out of, or in connection with, coal mine employment, than the opinions of Drs. Hippensteel and Repsher attributing claimant's disability to heart disease alone. *See Lucostic*, 8 BLR at 1-47; Decision and Order at 46. The administrative law judge properly found that the opinions of Drs. Hippensteel and Repsher, that claimant's disability was due to cardiac disease, and not coal mine employment, are not reasoned and documented, as they are contrary to the credible evidence establishing both the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grds*, 14 BLR 1-37 (1990)(en banc). Therefore, the administrative law judge properly found that employer failed to rebut the Section 411(c)(4) presumption by showing that claimant's total respiratory disability did not arise out of, or in connection with, coal mine employment. Consequently, we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption.[10]

[9] Employer argues that the administrative law judge should not have considered Dr. Repsher's positive reading of the September 8, 2010 x-ray, because employer did not submit it as part of its affirmative case. However, excluding this reading, employer could not rebut the presumption as the negative and positive readings of the September 8, 2010 x-ray by equally-qualified physicians would be in equipoise, and the August 24, 2009 x-ray would be positive for the existence of pneumoconiosis. Decision and Order at 47.

[10] Because we affirm the administrative law judge's award of benefits pursuant to Section 411(c)(4) of the Act, 33 U.S.C. §921(c)(4), we need not consider employer's arguments pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Additionally, because we affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, we need not consider the argument of the Director, Office of Workers' Compensation Programs, that the administrative law judge erred in relying on the preamble to the regulations in considering whether the medical opinion evidence established the existence of legal pneumoconiosis. *Id.*; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's 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