BRB No. 12-0126 BLA

HASKELL SWINEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/28/2012
	)	
WESTMORELAND COAL COMPANY	)	
	)	
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.[1]

Maia S. Fisher (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:

[1] By letter dated July 12, 2012, Paul E. Frampton, of Bowles, Rice, McDavid, Graff & Love, in Charleston, West Virginia, notified the Board that he is employer's new counsel.

Employer appeals the Decision and Order–Award of Benefits (10-BLA-5446) of Administrative Law Judge Richard T. Stansell-Gamm 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 June 30, 2009. Director's Exhibit 2.

In his decision, 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 substantially similar to those in an underground mine, and establishes 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 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 26.5 years of underground coal mine employment[2] and determined that the evidence established 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, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). The administrative law judge further determined that employer did not rebut the presumption. 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 in weighing the medical opinion evidence when he found that claimant invoked the Section 411(c)(4) presumption and that employer did not rebut it.[3] Claimant

[2] The record indicates that 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).

[3] Employer does not challenge the administrative law judge's findings of 26.5 years of underground coal mine employment, and that the blood gas study evidence

did not file a response brief. The Director, Office of Workers' Compensation Programs, 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. 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 Amended Section 411(c)(4) Presumption

Employer contends that the retroactive application of amended Section 411(c)(4) constitutes a due process violation and an unconstitutional taking of private property, and that its rebuttal provisions do not apply to claims brought against a responsible operator. Employer's Brief at 13-14 n.2. Employer's contentions are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision. Further, we reject employer's argument that the application of amended Section 411(c)(4) to this case is premature for lack of implementing regulations. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing.[4] *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). 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.

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establishes total disability under 20 C.F.R. §718.204(b)(2)(ii). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Additionally, to the extent employer requests that this case be held in abeyance pending the resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, its request is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); Employer's Brief at 13-14 n.2.

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

In evaluating the evidence pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge initially found that the two pulmonary function studies did not establish total disability, as neither study was qualifying,[5] and found that there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii). The administrative law judge further determined that the blood gas study conducted by Dr. Alam on July 30, 2009 produced qualifying results at rest and during exercise, and that the June 16, 2010 blood gas study conducted by Dr. McSharry produced non-qualifying results at rest and qualifying results during exercise. The administrative law judge found that, when considered together, the preponderance of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii) established total disability.

In addressing whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge focused on the opinions of Drs. Alam, McSharry, and Spagnolo.[6] The administrative law judge noted that Dr. Alam opined that claimant is totally disabled by a respiratory impairment because his blood gas study reflects desaturation with exercise, Director's Exhibit 11, while Drs. McSharry and Spagnolo opined that claimant does not have a totally disabling respiratory impairment, as his exercise blood gas study results are essentially normal for a man of eighty-one years of age. Employer's Exhibit 5 at 30; Employer's Exhibit 6 at 15. The administrative law judge found that Dr. Alam's diagnosis of total disability was supported by claimant's July 30, 2009 blood gas study, which was qualifying both at rest and during exercise. The administrative law judge discounted the opinions of Drs. McSharry and Spagnolo, that claimant's qualifying blood gas studies are essentially normal for a man of his age, because he found that they did not cite "medical documentation, scientific source, or data" to support their conclusion that claimant's blood gas study results are normal. Decision and Order at 9. Noting that claimant's usual coal mine employment as a preparation plant operator required him to perform "moderate manual labor," the administrative law judge found that Dr. Alam's medical

[5] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). A "non-qualifying" study exceeds those values.

[6] The administrative law judge observed that a medical treatment record from Dr. Habre did not address whether claimant is totally disabled, and found that a medical opinion from Dr. Shamiyeh, stating that claimant is totally disabled, lacked probative value because it was unexplained. Decision and Order at 8.

opinion, as supported by the preponderance of the blood gas study evidence, established total disability. Decision and Order at 8-9.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. McSharry and Spagnolo solely because they considered claimant's age in assessing the results of his blood gas studies. Employer's Brief at 13-16. Review of the record reveals, however, that the administrative law judge did not discount the opinions of Drs. McSharry and Spagnolo on that basis.

Contrary to employer's characterization of the administrative law judge's analysis, the administrative law judge acknowledged that a physician may consider a miner's age in interpreting blood gas study results. Decision and Order at 8, *discussing Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986).[7] The administrative law judge, however, permissibly found that Drs. McSharry and Spagnolo did not adequately explain the bases for their opinion that claimant's blood gas study results are normal for his age, despite their qualifying values. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530-31, 21 BLR 2-323, 2-330-32 (4th Cir. 1998); *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1056 n.4, 13 BLR 2-372, 2-378-80 n.4 (10th Cir. 1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Substantial evidence supports the administrative law judge's credibility determination. Employer's Exhibit 3 at 2; Employer's Exhibit 4 at 6; Employer's Exhibit 5 at 26-27. Therefore, we reject employer's allegation of error, and affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

As employer raises no other arguments regarding total disability, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). In light of our affirmance of the administrative law judge's additional finding of 26.5 years of underground coal mine employment, we affirm his determination that claimant invoked the amended Section 411(c)(4) presumption.

[7] In *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986), the Board held that an administrative law judge erred in rejecting medical opinions solely because the physicians stated that the miner's blood gas studies were normal for his age. The Board noted that, contrary to the administrative law judge's analysis, the comments to Appendix C of 20 C.F.R. Part 718 "do not prohibit consideration of a miner's age in the interpretation of blood gas studies, but merely note that age was not used in formulating the table[s]" of qualifying values, because the Department of Labor concluded that adjusting the tables for age would have made them "'increasingly complicated.'" *Hucker*, 9 BLR at 1-141 (citation omitted).

Rebuttal of the Amended 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), he noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); *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).

The administrative law judge initially found that, based upon CT scan evidence, employer proved that claimant does not suffer from clinical pneumoconiosis.[8] The administrative law judge then considered whether the medical opinions of Drs. McSharry and Spagnolo disproved the existence of legal pneumoconiosis.[9] Dr. McSharry concluded that claimant does not have legal pneumoconiosis, and is disabled due to age, deconditioning, and medication usage, and not due to any respiratory or pulmonary impairment. Employer's Exhibit 3 at 2; Employer's Exhibit 6 at 15-16. Dr. Spagnolo attributed claimant's pulmonary impairment to asthma, unrelated to coal mine employment, and concluded that claimant is disabled by non-respiratory factors, including age, deconditioning, and medication usage. Employer's Exhibit 4 at 6.

Regarding Dr. McSharry's opinion, the administrative law judge reiterated that he did not credit Dr. McSharry's conclusion that claimant does not have a respiratory impairment because it was premised on a determination that claimant's blood gas studies are normal for his age, which Dr. McSharry failed to substantiate. The administrative law judge therefore found that, since Dr. McSharry "did not believe [claimant] had a respiratory impairment, his opinion regarding the cause of any such impairment has little probative value." Decision and Order at 22. The administrative law judge discounted Dr. Spagnolo's opinion, that claimant does not have legal pneumoconiosis, because he

[8] Clinical pneumoconiosis is defined as "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).

[9] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

found that the doctor's opinion, that claimant suffers from asthma, was not well-supported by the blood gas and pulmonary function study evidence. *Id*. at 22. The administrative law judge therefore concluded that employer failed to disprove the existence of legal pneumoconiosis and, thus, failed to rebut the presumption that claimant has pneumoconiosis.

The administrative law judge further found that, for the same reasons he discounted the opinions of Drs. McSharry and Spagnolo regarding the existence of legal pneumoconiosis, their opinions did not establish that claimant's impairment did not arise out of, or in connection with, coal mine employment.

Employer argues that the administrative law judge erred in discounting Dr. Spagnolo's opinion[10] as to the existence of legal pneumoconiosis and the cause of total disability. Employer maintains that, contrary to the administrative law judge's determination, the physician adequately reconciled his diagnosis of asthma, unrelated to coal mine employment, with the results of claimant's blood gas studies and post-bronchodilator pulmonary function studies. Employer's Brief at 16-19.

We disagree. The administrative law judge permissibly discounted Dr. Spagnolo's opinion because he found that Dr. Spagnolo did not adequately explain his opinion, that the results of claimant's post-bronchodilator pulmonary function studies indicated a reversible disease unrelated to coal mine employment, in light of post-bronchodilator pulmonary function studies that Dr. Spagnolo reviewed, in which claimant's impairment did not respond to bronchodilators. *See Hicks*, 138 F.3d at 530-31, 21 BLR at 2-330-32; *Clark*, 12 BLR at 1-155; Employer's Exhibit 4 at 5-6; Employer's Exhibit 5 at 15. Further, the administrative law judge acted within his discretion in finding that Dr. Spagnolo, in opining that claimant's blood oxygenation impairment is variable and thus inconsistent with a fixed impairment such as pneumoconiosis, did not adequately explain his reasoning in light of the fact that both of claimant's exercise blood gas study results were qualifying for total disability, suggesting that claimant has a permanent impairment in his blood oxygenation with exercise. *See Hicks*, 138 F.3d at 530-31, 21 BLR at 2-330-32; *Clark*, 12 BLR at 1-155. Therefore, we reject employer's arguments, and affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4)

[10] Employer does not raise any additional argument regarding the administrative law judge's discounting of Dr. McSharry's opinion at rebuttal. As we have already rejected employer's argument at invocation that the administrative law judge erred in discounting Dr. McSharry's opinion that claimant's blood gas studies are normal for a man of his age, we affirm the administrative law judge's determination to discount Dr. McSharry's opinion at rebuttal on the same basis.

presumption by disproving the existence of legal pneumoconiosis or by establishing that claimant's disability did not arise out of his coal mine employment.

Based on the foregoing, we affirm the administrative law judge's determination that employer did not meet its burden to rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis. Therefore, we affirm the award of benefits. *See* 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order–Award of 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