BRB No. 10-0726 BLA

MIKE J. ZABOREK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 10/05/2011
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly and Wendy G. Adkins (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (09-BLA-5312) of Administrative Law Judge Daniel L. Leland rendered on a subsequent claim[1] filed

[1] Claimant's first claim for benefits, filed on August 19, 1983, was denied on December 22, 1983 by the district director for failure to establish total disability due to pneumoconiosis. Director's Exhibit 1. His second application, filed on January 25, 1988, was denied on April 12, 1988 by the district director for failure to establish total disability due to pneumoconiosis. Director's Exhibit 2. Claimant filed this claim on January 28, 2008. Director's Exhibit 4.

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). The administrative law judge credited claimant with thirty years and seven months of coal mine employment.[2] The administrative law judge found that the new evidence established the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, he found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge considered the claim pursuant to the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and found that the evidence invoked the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that the evidence established the existence of legal pneumoconiosis,[3] and that it did not establish that the miner's total disability was not due to pneumoconiosis. Therefore, the administrative law judge found that employer did not rebut this presumption, and he awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer further asserts that the administrative law judge erred by limiting the parties to one supplemental report by a physician of record, to address the new legal standard. Employer also argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief, reiterating its allegations of error. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.[4]

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

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[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Ohio. *See* Director's Exhibits 7, 8; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[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).

[4] We affirm the administrative law judge's findings that claimant has a totally disabling respiratory or pulmonary impairment and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, his finding of thirty years and seven months of coal mine employment, and his finding that the evidence established the existence of legal pneumoconiosis, as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

Employer initially contests the administrative law judge's application of amended Section 411(c)(4) to this case. Employer asserts that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's right to due process and constitutes an unlawful taking of employer's property in violation of the Fifth Amendment to the United States Constitution. Further, employer argues that it was premature for the administrative law judge to apply amended Section 411(c)(4), because there is litigation in the federal courts over the constitutionality of Public Law No. 111-148, and because there are no regulations implementing amended Section 411(c)(4) that would give the parties notice of the standard to be applied to determine whether employer rebutted the presumption. Employer also maintains that the plain language of Section 411(c)(4) limits its application to claims brought against the Secretary and that, therefore, the administrative law judge erred in applying amended Section 411(c)(4) to employer.

Employer's arguments regarding the constitutionality of the application of Section 411(c)(4) are substantially similar to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), appeal docketed, No. 11-1620 (4th Cir. June 13, 2011) (unpub.). Therefore, we reject them here for the reasons set forth in that decision. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *Keene v. Consolidation Coal Co*., 645 F.3d 844, BLR (7th Cir. 2011). We also reject employer's argument that it is premature to apply the recent amendments to the Act pending a resolution of the legal challenges to Public Law No. 111-148. *See Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011).

We reject employer's assertion that the administrative law judge's application of amended Section 411(c)(4) was premature. Contrary to employer's assertion, the mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. Therefore, there was no need to hold this case in abeyance pending the promulgation of new regulations, *see, e.g., 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); *Gholston v. Hous. Auth. of Montgomery*, 818 F.2d 776, 784-87 (11th

Cir. 1987), and it was not premature for the administrative law judge to consider the case under amended Section 411(c)(4).

Further, we find no merit in employer's assertion that amended Section 411(c)(4) applies only in a claim brought against the Secretary, not one against an employer. Recently, in a case involving a claim against an employer, the United States Court of Appeals for the Sixth Circuit held that amended Section 411(c)(4) applied to the employer therein, referred to by the court as "TCCC":

> Under the PPACA,[5] which revives the 15-year presumption, the burden of production and persuasion lies on *the employer*, TCCC, to rebut the presumption of disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); *see also Blakley v. Amax Coal Co*., 54 F.3d 1313, 1320 (7th Cir. 1995)("The burden of proof lies on the employer to rebut the presumption."). To do so, TCCC must establish that: "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Morrison v. Tenn. Consol. Coal Co., 644 F.3d 473, 479, BLR (6th Cir. 2011)(emphasis added). Because the court concluded that amended Section 411(c)(4) could affect the outcome of the miner's claim, it "remand[ed] to the [administrative law judge] *for application of the presumption* in consideration of the evidence." *Id.* at 480 (emphasis added). In view of the court's holding in *Morrison*, we reject employer's allegation that amended Section 411(c)(4) does not apply to an employer.

Further, we note that the administrative law judge accurately set forth the standard for establishing invocation and rebuttal of the Section 411(c)(4) presumption, in two post-hearing orders, and again, in his decision. *See* May 17, 2010 Order; June 25, 2010 Order Denying Employer's Motion for Reconsideration; Decision and Order at 8.[6] Therefore, we reject employer's assertion that, absent an implementing regulation, employer lacked notice of what standard it had to meet to establish rebuttal under amended Section 411(c)(4).

Employer also asserts that the administrative law judge placed arbitrary limits on the evidence it could develop following the recent amendments to the Act which, it

[5] The name of Public Law No. 111-148, abbreviated in the above quote, is the "Patient Protection and Affordable Care Act."

[6] In addition, we note that employer has not alleged that there is any other appropriate method of establishing rebuttal.

argues, constituted a denial of its right to due process, and violated the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer alleges that it was denied the opportunity to implement a different litigation strategy in view of the changes in the law. Given the facts of this case, we disagree.

After the hearing, on May 12, 2010, employer filed a Motion to Reopen the Record and Redesignate Evidence, in view of the enactment of the recent changes to the Act. On May 17, 2010, the administrative law judge issued an Order Granting Motion to Reopen the Record. In view of the reinstatement of the Section 411(c)(4) presumption, he allowed the parties thirty days to submit a supplemental report by one of the physicians who previously filed a report in this case. Employer filed a Motion for Reconsideration, submitted two new medical reports from physicians who did not have reports in the record, and argued that it should be allowed to redesignate its evidence. In an Order Denying Employer's Motion for Reconsideration issued on June 25, 2010, the administrative law judge rejected employer's assertion that the APA allows the parties "[U]nfettered control over the submission of evidence." Order Denying Employer's Motion for Reconsideration at 2. The administrative law judge allowed the parties an additional twenty days to file a supplemental report by one of the physicians whose affirmative medical report the party had already submitted into evidence, and provided thirty days after that for the parties to submit briefs. By letter to the administrative law judge dated July 14, 2010, employer stated that it would not submit a supplemental report from its original physicians whose opinions were already of record.

Employer argues that the administrative law judge arbitrarily limited the submission of evidence in response to the recent changes to the Act, and thereby denied employer the opportunity to fully defend this claim. Because the administrative law judge is given broad discretion in resolving procedural matters, including evidentiary issues, *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986), a party seeking to overturn an administrative law judge's evidentiary ruling must prove that the administrative law judge's action represented an abuse of his or her discretion. *See Clark*, 12 BLR at 1-153; 20 C.F.R. §725.455(c). In this case, while employer's argument is not without merit, we conclude that, on the facts presented, employer has not demonstrated that the administrative law judge's approach denied it the opportunity to submit evidence directed at the new legal standard.

After there has been a change in law, an administrative law judge must "permit the parties to submit additional evidence," in a manner "consistent with the evidentiary limitations imposed by 20 C.F.R. §725.414." *Morrison*, 644 F.3d at 480. Here, after the change in law, employer requested that it be allowed to withdraw its two original medical reports developed under the former law, and to substitute two new medical reports from

consulting physicians who would address the medical evidence in light of the new standard. Review of the record reveals no objection by either claimant or the Director to employer's request, and employer's proposed evidentiary development appears consistent with the limitations of Section 725.414. It is, therefore, unclear from the administrative law judge's orders why he determined that the parties should be limited to one supplemental medical report to address the new legal standard.[7] With that said, however, we note that the administrative law judge afforded the parties the opportunity to supplement the record with proof directed at the new standard, via a supplemental report from one of the party's two physicians whose opinions were originally submitted under Section 725.414. However, employer declined the opportunity to submit any new evidence that complied with the administrative law judge's limit. On appeal, employer does not explain why it could not obtain a supplemental report from one of its two original physicians. Under these circumstances, where employer chose not to submit any new evidence, we reject its assertion that the administrative law judge's limitation on the amount of additional evidence deprived employer of the opportunity to respond to the change in the law. *See Clark*, 12 BLR at 1-153. Therefore, we also hold that employer has not demonstrated that the limitation the administrative law judge placed on the development of additional evidence violated employer's right to due process.

In light of the foregoing discussion, 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. We also affirm the administrative law judge's determination that claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), 30 U.S.C. §921(c)(4), based on the administrative law judge's unchallenged findings that claimant established more than fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment.

We next turn to employer's contentions regarding rebuttal of the Section 411(c)(4) presumption. Employer asserts that the administrative law judge erred by failing to provide an analysis of the issue of disability causation.

[7] The administrative law judge stated that the parties lack an "unfettered" right to submit evidence, and he stated further that the Sixth Circuit case providing for the submission of proof directed at a new legal standard, *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), did not specify the amount of additional evidence that could be submitted, or address whether a party could substitute evidence. Order Denying Employer's Motion for Reconsideration at 2. These statements, however, do not clearly explain why employer could not redesignate and submit medical report evidence consistent with the applicable evidentiary limitations of 20 C.F.R. §725.414, where its request to do so was unopposed.

In finding that the evidence did not establish rebuttal of the Section 411(c)(4) presumption, the administrative law judge found that the evidence established that the miner did not have clinical pneumoconiosis, but that it established the existence of legal pneumoconiosis.[8] The administrative law judge also found that employer did not rebut the presumption that the miner is totally disabled due to pneumoconiosis. Decision and Order at 11.

In analyzing the medical opinions,[9] the administrative law judge found as follows:

> Dr. Saludes concluded that the miner's COPD (chronic obstructive pulmonary disease) could be due to coal dust exposure as well as cigarette smoking, Dr. Schaaf determined that the miner's pulmonary dysfunction is

[8] Employer does not challenge the finding that claimant has legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711. Therefore, there is no dispute that employer did not rebut the presumption by proving the absence of pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, BLR (6th Cir. 2011).

[9] The administrative law judge considered the four medical opinions of record. Dr. Schaaf diagnosed clinical and legal pneumoconiosis, in the form of chronic bronchitis due to coal mine dust exposure, and stated that claimant was incapable of performing his coal mine job. He opined that claimant's coal workers' pneumoconiosis and cigarette smoking contributed to his pulmonary dysfunction. Director's Exhibit 25; Claimant's Exhibits 2, 3, 5. Dr. Saludes diagnosed clinical pneumoconiosis and legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due to coal dust and tobacco exposures. He opined that claimant did not have the lung capacity to perform his previous coal mine work, based on his pulmonary function impairment, his age, and other medical problems. Director's Exhibit 14. Dr. Altmeyer diagnosed "an abnormality of lung function" which he described as a "mild to moderate degree of airways obstruction." He opined that both cigarette smoking and coal dust exposure caused claimant's airways obstruction, but that claimant's smoking "caused more of the reduction from expected in spirometric values than did his coal dust exposure." Employer's Exhibits 12, 20 at 36. Dr. Altmeyer also stated that claimant had legal pneumoconiosis with a minimal impairment due to it, and that claimant was not disabled from a pulmonary standpoint. Employer's Exhibit 20 at 29, 36. Dr. Fino opined that claimant did not have pneumoconiosis, and diagnosed a pulmonary disability due solely to claimant's smoking history. Dr. Fino explained that claimant was not exposed to coal mine dust after 1981, but that claimant had an additional twenty-two years of cigarette smoking after he ceased mining. Dr. Fino observed that "there was no reduction in lung function in the first decade or so after he left the mines," but "he continued to smoke, and because of the smoking, he developed a disabling respiratory condition." Employer's Exhibit 13.

> due to coal dust exposure and that cigarette smoking may be a contributing factor, and Dr. Altmeyer stated that the miner has airway obstruction caused by coal dust exposure as well as cigarette smoking and that he has legal pneumoconiosis. Dr. Fino opined that the miner has an FEV1 abnormality that can be attributed to coal dust inhalation but also stated that from a blood gas standpoint the miner is disabled because his blood gases were significantly low during the 1990s due to emphysema from his continued cigarette smoking. Dr. Fino's opinion is contradictory and inadequately explained and he is the only physician to suggest that the miner's pulmonary impairment did not arise out of, or in connection with, coal mine employment. I conclude a preponderance of the medical opinions demonstrates that the miner has legal pneumoconiosis and that the employer has not rebutted the presumption that the miner is totally disabled due to pneumoconiosis.

Decision and Order at 11.

We reject employer's assertion that the administrative law judge erred by failing to consider the issue of disability causation. The administrative law judge considered the relevant medical evidence and found that Dr. Fino's opinion was not adequately reasoned. Employer, in its brief, does not specifically challenge this credibility determination by the administrative law judge. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge, as the finder-of-fact, permissibly determined that Dr. Fino did not adequately explain his opinion that claimant's disability is due solely to his cigarette smoking. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155. Therefore, since the administrative law judge found that the only medical opinion supportive of employer's burden, of establishing that claimant's disability was not due to his coal mine employment, is not adequately reasoned, we affirm his finding that employer has not rebutted this presumption by establishing that claimant's respiratory impairment did not arise out of, or in connection with his coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479. Consequently, we affirm the administrative law judge's finding that employer has not rebutted the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), and we affirm his award of benefits.

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