BRB No. 11-0128 BLA

BERNARD A. BAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MUD LICK MINING CORPORATION	)	DATE ISSUED: 10/26/2011
	)	
and	)	
	)	
TRAVELERS INDEMNITY COMPANY OF ILLINOIS	)	
	)	
	)	
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 Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Helen H. Cox (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 Subsequent Claim (2009-BLA-05343) of Administrative Law Judge Christine L. Kirby on a subsequent claim filed on December 18, 2007, 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 27.9 years of underground coal mine employment and found that the medical evidence, submitted since the prior denial of benefits, established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against claimant.[1] The administrative law judge, therefore, found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Then, considering all the evidence of record, the administrative law judge found total disability established pursuant to Section 718.204(b). Based on her findings regarding the length of coal mine employment and total disability, the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis.[2] 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut this presumption. Benefits were, accordingly, awarded.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) on constitutional grounds. Employer also argues that the administrative law judge erred in finding that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b) and, therefore, erred in finding the Section 411(c)(4) presumption invoked.[3] Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section

[1] Claimant's initial claim, filed on July 3, 2002, was denied on July 11, 2003, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) provides, in pertinent part, that, if a miner establishes at least fifteen years of qualifying coal mine employment and, if the evidence establishes the presence of 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, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[3] As employer does not challenge the administrative law judge's finding that claimant had 27.9 years of underground coal mine employment, that finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging that the Board reject employer's challenge to the application of Section 411(c)(4) on constitutional grounds. Further, claimant and the Director urge affirmance of the administrative law judge's award of benefits.

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.[4] 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 initially contests the administrative law judge's consideration of this case under Section 411(c)(4) on constitutional grounds. Employer asserts that the 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.

Employer's arguments regarding the constitutionality of the application of amended 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), and we affirm the administrative law judge's consideration of this case under Section 411(c)(4).

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

Employer next contends that the administrative law judge erred in finding that the pulmonary function study evidence and the medical opinion evidence established a totally disabling respiratory impairment pursuant to Section 718.204(b).[5] Specifically,

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

[5] Employer agrees with the administrative law judge that the non-qualifying blood gas study evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

employer contends that "given that all testing was performed within a six month period, the [administrative law judge] erred in failing to assess whether the claimant's non-qualifying testing established that the claimant [is] not totally disabled[.]" Employer's Brief at 12. Further, employer contends that the administrative law judge erred in crediting the opinion of Dr. Agarwal that claimant is totally disabled. Employer contends that Dr. Agarwal's opinion should not have been credited because it was based solely on Dr. Agarwal's review of the pulmonary function studies administered during his examination and Dr. Agarwal did not address subsequent non-qualifying pulmonary function studies. Employer also argues that the administrative law judge erred in failing to consider that Dr. Agarwal did not address the exertional requirements of claimant's usual coal mine employment. In addition, employer argues that the administrative law judge erred in rejecting the opinion of Dr. Hippensteel, who opined that claimant's qualifying pulmonary function studies did not reflect claimant's true pulmonary capacity. Employer's Brief at 12.

The administrative law judge correctly found that, of the four new pulmonary function studies, only the pulmonary function study of July 25, 2008, administered by Dr. Baker, was non-qualifying, while the April 15, 2008 study, administered by Dr. Agarwal, the October 15, 2008 study, administered by Dr. Hippensteel, and the March 24, 2009 study, administered by Dr. Castle, were qualifying.[6] Decision and Order at 6-7; Director's Exhibits 12, 28; Employer's Exhibit 2. Contrary to employer's argument, therefore, the administrative law judge permissibly found that the pulmonary function study evidence established total disability at Section 718.204(b)(2)(i), based on the preponderance of qualifying pulmonary function studies.[7] Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence

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Employer also agrees with the administrative law judge's decision not to credit the opinion of Dr. Baker, finding total disability at 20 C.F.R. §718.204(b)(2)(iv), because it was unreasoned. Decision and Order at 7, 8; Employer's Brief at 11 n.4. These findings are affirmed, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[6] Although the administrative law judge found that both Drs. Hippensteel and Castle questioned the validity of their pulmonary function studies, she nevertheless, permissibly found that their tests were qualifying because the discussion of Dr. Hippensteel and the discussion of Castle regarding the validity of the studies was incomplete. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[7] While employer states generally "that all the testing was performed within a six-month period," Employer's Brief at 12, it does not argue how this fact would affect the administrative law judge's finding that the preponderance of the testing was qualifying. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

established total disability pursuant to Section 718.204(b)(2)(i). *See* 20 C.F.R. §718.204(b)(2)(i); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

Turning to the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), contrary to employer's argument, the administrative law judge rationally credited Dr. Agarwal's opinion, that claimant is totally disabled, over the contrary opinion of Dr. Hippensteel, because it was supported by claimant's qualifying pulmonary function study. *See Clark*, 12 BLR at 1-155; *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 8; Director's Exhibit 12. Contrary to employer's contention, the administrative law judge was not required to accord less weight to Dr. Agarwal's opinion because he was unaware of Dr. Baker's subsequent non-qualifying pulmonary function study.[8] *See Clark*, 12 BLR at 1-155. Further, contrary to employer's argument, the administrative law judge permissibly credited Dr. Agarwal's opinion because the doctor's description of claimant's coal mine employment was consistent with that found by the administrative law judge. *See Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Stanley v. Eastern Assoc. Coal Corp.*, 6 BLR 1-1157 (1984); Decision and Order at 3. Regarding Dr. Hippensteel's opinion, contrary to employer's argument, the administrative law judge reasonably accorded it less weight, as Dr. Hippensteel failed to adequately explain his finding, that claimant was "not impaired enough from a pulmonary standpoint," in light of the preponderance of the qualifying pulmonary function studies, including his own. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Clark*, 12 BLR at 1-155; Decision and Order at 8; Employer's Exhibits 1, 7.

In conclusion, we affirm the administrative law judge's finding that total disability was established by the medical opinion evidence pursuant to Section 718.204(b)(2)(iv),[9] and her finding that total disability was established at Section 718.204(b), overall. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). Moreover, because we affirm the administrative law judge's finding of total disability pursuant to Section 718.204(b)(2),[10] and employer has not challenged the administrative law judge's finding

[8] Employer does not acknowledge that at least two other subsequent pulmonary function studies, administered by Drs. Hippensteel and Castle, were qualifying. *See* Decision and Order at 6; Employer's Brief at 12.

[9] Employer does not challenge the administrative law judge's finding that Dr. Castle's opinion establishes a totally disabling respiratory impairment. Decision and Order at 8. That finding is, therefore, affirmed. *See Skrack*, 6 BLR at 1-711.

[10] The administrative law judge noted that, in addition to considering the new evidence on disability, she also considered the evidence from claimant's prior claim. Because the evidence from the prior claim dates from 2002 and earlier, the administrative

of 27.9 years of underground coal mine employment, we affirm the administrative law judge's finding that claimant is entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis. 30 U.S.C. §921(c)(4).

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

In order to rebut the Section 411(c)(4) presumption, employer must show that the miner did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). Employer contends that the administrative law judge erred in finding that claimant has coal workers' pneumoconiosis and, that his respiratory impairment arose out of, or in connection with, coal mine employment. Employer contends, therefore, that the administrative law judge erred in finding that the Section 411(c)(4) presumption was not rebutted. Specifically, employer contends that the administrative law judge erred in finding that the x-ray evidence was in equipoise on the issue of pneumoconiosis, instead of crediting the numerical superiority of the negative x-ray readings. Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Agarwal, that claimant's respiratory impairment is due to his coal mine employment, over the contrary opinion of Dr. Hippensteel.

Contrary to employer's argument, the administrative law judge permissibly found the x-ray evidence to be in equipoise, as the April 15, 2008 x-ray was read as negative by two dually-qualified radiologists, and as positive by one dually-qualified radiologist, and the July 25, 2008 x-ray was read as positive by a B reader and as negative by a dually-qualified radiologist. *See Clark*, 12 BLR at 1-154. Contrary to employer's argument, the administrative law judge is not required to accord greater weight to the numerical superiority of the negative x-ray readings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark*, 12 BLR at 1-154. In this case, the administrative law judge noted that the physicians discussed problems with the quality of the x-ray films. Based on the mixed x-ray readings, and the problems noted with the film quality, the administrative law judge permissibly found that the x-ray evidence was inconclusive on the issue of pneumoconiosis and that employer failed to meet its burden of proving that claimant does not have pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Further, contrary to employer's contention, an administrative law judge is not required to determine the relative contributions of smoking and coal mine employment to

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law judge permissibly gave greater weight to the new evidence. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).

claimant's respiratory impairment in order to credit a physician's opinion that claimant's chronic obstructive pulmonary disease is due to both smoking and coal mine employment. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). The administrative law judge, therefore, permissibly credited the opinion of Dr. Agarwal, who found that both smoking and coal mine employment contributed to claimant's respiratory impairment. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Gross*, 23 BLR at 1-18.

Additionally, contrary to employer's argument, the administrative law judge reasonably determined that the opinion of Dr. Hippensteel, who found that claimant does not have a respiratory impairment due to coal mine employment, was entitled to little weight because the physician failed to adequately explain how the underlying documentation supported his conclusions. *See Clark*, 12 BLR at 1-155; Decision and Order at 18-21. Further, contrary to employer's argument, the administrative law judge acted within her discretion in finding that Dr. Hippensteel's opinion was entitled to less weight, because the doctor opined that claimant does not have "'industrial bronchitis' because [claimant's] symptoms continued after leaving work in the mines, and if they were due to coal dust exposure, would have subsided several months after [c]laimant left the mines." *See* 20 C.F.R. §718.201; Decision and Order at 18; Employer's Exhibit 7. Finally, contrary to employer's argument, the administrative law judge permissibly accorded less weight to Dr. Hippensteel's opinion because the doctor, in finding that claimant's respiratory impairment did not arise out of coal mine employment, relied on the fact that claimant's respiratory impairment was "variable and partly reversible" and the doctor found that claimant would have had emphysema if his respiratory impairment arose out of coal mine employment. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

We conclude, therefore, that the administrative law judge reasonably found that employer did not meet its burden of showing that claimant does not have pneumoconiosis or that his respiratory impairment did not arise out of, or in connection with coal mine employment.[11] The administrative law judge, therefore, properly found that employer did not rebut the Section 411(c)(4) presumption of totally disabling pneumoconiosis. 30 U.S.C. §921(c)(4).

[11] Further, contrary to employer's argument, the administrative law judge considered the evidence relevant to establishing pneumoconiosis at 20 C.F.R. §718.107 and properly found that it failed to establish the existence of pneumoconiosis. Decision and Order at 24.

Accordingly, the administrative law judge's Decision and Order – Awarding Subsequent Claim 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