BRB No. 11-0134 BLA

ARDIS J. GUMP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DANIEL BOONE COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 10/26/2011
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS 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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Ann Marie Scarpino (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 appeals the Decision and Order (09-BLA-5209) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed 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). This case involves a subsequent claim filed on February 27, 2008.[1] After crediting claimant with thirty-four years of coal mine employment,[2] at least fifteen years of which were underground, the administrative law judge found that the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 2008 claim on the merits.

In considering the merits of claimant's 2008 claim, 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 this living 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 qualifying coal mine employment, 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, 124 Stat. 119 (2010) (to be 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

[1] Claimant filed five previous claims on December 6, 1982, May 11, 1998, December 19, 2000, July 10, 2003, and January 26, 2006. Director's Exhibits 1-5. Each of these claims was finally denied because claimant did not establish that he was totally disabled due to pneumoconiosis. *Id.*

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 8. 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*).

with," coal mine employment.[3] 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found invocation of the rebuttable presumption established. The administrative law judge also 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, and, therefore, he found that employer failed to rebut this presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4). Employer also argues that the amended Section 411(c)(4) presumption does not apply to coal mine operators. Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting, *inter alia*, that the Board reject employer's contention that the amended Section 411(c)(4) presumption does not apply to coal mine operators.[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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

[3] In a March 30, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements. Claimant, employer, and the Director, Office of Workers' Compensation Programs, each submitted position statements.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least fifteen years of underground coal mine employment, and his findings pursuant to 20 C.F.R. §§725.309 and 718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer initially contends that the amended Section 411(c)(4) presumption applies only to claims brought against the Secretary of Labor, not to claims brought against coal mine operators. Employer's Brief at 5-6. We disagree. In a recent case, the United States Court of Appeals for the Sixth Circuit applied the amended Section 411(c)(4) presumption to an employer:

> Under the PPACA,[5] which revives the 15-year presumption, the burden of production and persuasion lies on *the employer* . . . 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, [the employer] 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 the amended Section 411(c)(4) presumption could affect the outcome of the miner's claim, it remanded the case 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 the amended Section 411(c)(4) presumption does not apply to claims brought against employers.

Employer next asserts that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 26-33. The arguments made by employer 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) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, 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, 24 BLR 2-385 (7th Cir. 2011).

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

We further reject employer's contention that the administrative law judge should not have adjudicated the claim until the Department of Labor issues guidelines or promulgates regulations implementing amended Section 411(c)(4). Employer's Brief at 6-7, 10. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing, and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201. Consequently, we affirm the administrative law judge's application of Section 1556 to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

In light of our affirmance of the administrative law judge's findings that claimant established fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4).

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly 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); Decision and Order at 14. The administrative law judge found that employer failed to establish either method of rebuttal. *Id.* at 12-19.

Employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.[6] The administrative law judge considered the medical opinions of Drs. Martin, Saludes, Renn, and Bellotte.[7] Drs. Martin and Saludes diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 18; Claimant's Exhibit 3 at 37. Although Drs. Renn and Bellotte also diagnosed COPD, Dr. Renn opined that the disease was due entirely to

[6] "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).

[7] In light of the applicability of amended Section 411(c)(4), the administrative law judge reopened the record, and allowed the parties an opportunity to submit additional evidence. In response, employer submitted supplemental reports from Drs. Bellotte and Renn, which the administrative law judge admitted into evidence. Decision and Order at 3; Employer's Exhibits 25, 26.

claimant's cigarette smoking, while Dr. Bellotte opined that the disease was due entirely to cigarette smoking and asthma. Employer's Exhibits 25, 26.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge accorded less weight to the opinions of Drs. Renn and Bellotte, that claimant does not suffer from legal pneumoconiosis, because he found that the doctors failed to adequately explain how they "disassociated" claimant's thirty-four years of coal mine dust exposure as a contributor to claimant's disabling obstructive impairment. Decision and Order at 19-20. 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 his consideration of the opinions of Drs. Renn and Bellotte. We disagree. The administrative law judge noted that Drs. Renn and Bellotte relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment.[8] Decision and Order at 19-20. The administrative law judge found, as was within his discretion, that Drs. Renn and Bellotte did not adequately explain why the irreversible portion of claimant's pulmonary impairment[9] was not due, in part, to coal mine dust exposure or why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20

[8] Dr. Renn opined that coal mine dust exposure, unlike smoking and asthma, does not cause a significantly reversible obstructive ventilatory defect. Employer's Exhibit 26. Dr. Bellotte opined that a coal mine dust-induced pulmonary impairment "should not be reversible with bronchodilator medications." Employer's Exhibit 25.

[9] Dr. Renn interpreted claimant's December 17, 2008 pulmonary function study as showing significant improvement after the administration of a bronchodilator. Employer's Exhibits 6, 23 at 24. Dr. Bellotte noted that claimant's February 8, 2001 pulmonary function study "showed a mild reversible obstructive ventilatory impairment responsive to bronchodilator medication and consistent with a diagnosis of asthma." Employer's Exhibit 25. The administrative law judge found that while claimant's most recent pulmonary function study, a study conducted on April 15, 2009, showed partial reversibility, the post-bronchodilator results also showed "a fixed and disabling degree of obstructive [impairment.]" Decision and Order at 19; Claimant's Exhibit 1. The administrative law judge accurately noted that the post-bronchodilator results from the April 15, 2009 study meet the disability standards set forth at Appendix B of Part 718. *Id.* at 5. The administrative law judge further noted that claimant's 2007 pulmonary function study also "showed no significant bronchodilator response." *Id.* at 19; Director's Exhibit 19.

C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 19-20. As the administrative law judge's basis for discrediting the opinions of Drs. Renn and Bellotte is rational and supported by substantial evidence, this finding is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Moreover, the administrative law judge permissibly accorded less weight to Dr. Bellotte's opinion, because the doctor provided no support for his position that a diagnosis of coal mine dust-induced COPD/emphysema is dependent upon the existence of clinical pneumoconiosis.[10] *See* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation in life and emphysema at autopsy, and this may occur independently of CWP [clinical pneumoconiosis.]"); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); Decision and Order at 19-20.

Because the opinions of Drs. Renn and Bellotte are 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 disprove the existence of legal pneumoconiosis. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that the miner did 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).

Employer next argues that the administrative law judge erred in finding that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4). Employer's argument lacks merit. The administrative law judge accurately noted that all of the physicians agree that claimant's pulmonary disability was due to his obstructive lung disease. Decision and Order at 21. The same reasons for which the administrative law judge discredited the opinions of Drs. Renn and Bellotte, that claimant does not suffer from 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); *Trujillo v. Kaiser Steel Corp.*, 8

[10] Dr. Bellotte indicated that he would "be more inclined" to believe that claimant's chronic obstructive pulmonary disease was related, in part, to his coal mine dust exposure if claimant suffered from clinical pneumoconiosis. Employer's Exhibit 22 at 52-53.

BLR 1-472 (1986); Decision and Order at 24. Because the opinions of Drs. Renn and Bellotte 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 administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988), *aff'd sub nom., Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989) (unpub.); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988).

Accordingly, the administrative law judge's Decision and Order awarding 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