BRB No. 11-0144 BLA

BERKLEY LEE RADABAUGH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 10/27/2011
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (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 appeals the Decision and Order – Awarding Benefits (09-BLA-5536) of Administrative Law Judge Michael P. Lesniak rendered on a miner's 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).[1] Upon stipulation of the parties, the administrative law judge credited claimant with thirty-four years of coal mine employment, and adjudicated this claim, filed on July 3, 2008, pursuant to the regulatory provisions at 20 C.F.R. Part 718. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge found the evidence sufficient to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and found invocation of the rebuttable presumption established.[2] The administrative law judge further determined that employer had successfully rebutted the presumption of clinical pneumoconiosis, but found that the medical opinion evidence was insufficient to rebut the presumptions that claimant had legal pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. Accordingly, benefits were awarded.

On appeal, employer challenges the applicability of Section 1556 of the Patient Protection and Affordable Care Act (PPACA) to this case. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)). Employer further contends that the administrative law judge failed to adequately explain his rationale in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption of legal pneumoconiosis. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited

[1] Congress recently enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to this living miner's claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and 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. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 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)).

[2] The amendments to the Act were enacted after the hearing was held on January 4, 2010. The administrative law judge granted employer's request to reopen the record to develop additional medical evidence in response to the change in the law. The administrative law judge granted "30 days to submit one supplemental medical report from any physician who prepared an affirmative medical report as defined at [20 C.F.R. §]725.414(a)(1), and/or deposition testimony as permitted by [20 C.F.R. §]725.457." Order dated May 13, 2010.

response, urging the Board to reject employer's arguments regarding the application of Section 1556 to this case. Employer has filed a reply brief in support of its position.[3]

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).

We first address employer's challenges to the application of Section 1556 to this case. Employer contends that because the PPACA has been declared unconstitutional by a federal district court judge, the administrative law judge's reliance on Section 1556 is contrary to law. Employer's Brief at 6, *citing Florida ex rel. Bondi v. U. S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011). Employer further contends that the administrative law judge erred in applying the rebuttable presumption at Section 411(c)(4) of the Act, as the plain language of 30 U.S.C. §921(c)(4) limits that presumption to only those cases brought against "the Secretary." Thus, employer asserts that the presumption does not apply in cases where an employer is liable for benefits.[5] Employer also contends that the administrative law judge erred in applying the regulatory provisions at 20 C.F.R. §718.305, as they are limited to claims filed before 1982, and by

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[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established thirty-four years of coal mine employment, and that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[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 West Virginia. Hearing Transcript at 12-13; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[5] Employer notes that the final sentence of amended Section 921(c)(4) provides that:

> The Secretary may rebut [the presumption provided herein] only by establishing 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), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

relying on the Fourth Circuit's decision in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), a case brought under 20 C.F.R. Part 727, rather than 20 C.F.R. Part 718. Employer's Brief at 6-9. Employer's arguments lack merit.

As the Director correctly notes, the decision cited by employer, declaring the individual mandate of the PPACA unconstitutional, has no effect on the instant case, as an order was issued staying that decision, pending appeal, and the United States Court of Appeals for the Eleventh Circuit severed the individual mandate from the remainder of the Act. *See Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011); *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011). Furthermore, the United States Court of Appeals for the Fourth Circuit, the jurisdiction within which this case arises, has not declared the PPACA to be unconstitutional. *See Liberty University Inc. v. Geithner*, F.3d , No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011); *Virginia ex. rel. Cuccinelli v. Sebelius*, F.3d , Nos. 11-1057, 11-1058, 2011 WL 3925617 (4th Cir. Sept. 8, 2011), *pet. for cert. filed*, 80 USLW 3221 (Sept. 30, 2011). We also find no merit to employer's contention that amended Section 411(c)(4), 30 U.S.C. 921(c)(4), may not be applied in cases brought against an employer. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 34-38 (1976)(Act does not restrict the evidence with which an operator may rebut the 411(c)(4) presumption); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011)(acknowledging that 30 U.S.C. §921(c)(4) (2010) is applicable to claims filed after January 1, 2005); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980)(applying Section 411(c)(4) presumption in an operator case). Additionally, as correctly noted by the Director, Section 921(c)(4), as amended, trumps any inconsistent regulation, *see* 20 C.F.R. §718.305(e), and the administrative law judge correctly stated the rebuttal standard in this case, notwithstanding his reference to a 20 C.F.R. Part 727 case. Accordingly, we affirm the administrative law judge's application of Section 1556 to this claim. We also affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 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 address employer's challenges to the administrative law judge's weighing of the medical opinions of record in finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis or that his respiratory impairment did not arise out of employment in a coal mine.[6]

[6] The administrative law judge's finding that the evidence was sufficient to rebut the Section 411(c)(4) presumption of clinical pneumoconiosis is affirmed, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 4-6; 8-9.

Employer maintains that the opinions of Drs. Saludes and Jaworski are equivocal and insufficient to support a finding of legal pneumoconiosis or disability due to pneumoconiosis. Employer also asserts that the administrative law judge's analysis fails to comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), because he failed to explain what weight he accorded to the opinion of Dr. Jaworski, and why he determined that the doctor's views detracted from the potential weight to be accorded to the opinions of Drs. Bellotte and Basheda, who found no pneumoconiosis or disability due to pneumoconiosis. Further, employer maintains that the administrative law judge failed to adequately explain why he found that Dr. Bellotte's opinion was conclusory and not well-reasoned, and that Dr. Basheda's conclusions were based on general assertions that were not particularized to claimant. Employer's Brief at 9-13. Some of employer's arguments have merit.

In evaluating the conflicting evidence relevant to rebuttal, the administrative law judge summarized the medical opinions of Drs. Saludes,[7] Jaworski,[8] Bellotte, and

[7] Dr. Saludes examined claimant and diagnosed "possible black lung disease and chronic obstructive pulmonary disease (COPD)." He noted claimant's history of significant coal dust exposure and pulmonary function study results showing a moderate obstruction consistent with COPD, with no significant bronchodilator response. Dr. Saludes acknowledged that claimant's x-ray was interpreted as negative for pneumoconiosis, and stated:

> [T]he patient does have chronic airflow obstruction consistent with COPD. This is more than likely secondary to cigarette smoking 35 pack years. However, his chronic exposure to coal dust could also be a contributing factor to the development of COPD.

Claimant's Exhibit 2.

[8] Dr. Jaworski performed the Department of Labor examination and diagnosed severe obstructive airway disease; moderate restrictive ventilatory defect due to air trapping secondary to airway obstruction; sub segmental atelectasis due to poor inspiration or prior infection; and anteroseptal wall myocardial infarction and multiple stent placement due to hypertension, hyperlipidemia, and smoking. He determined that claimant has a severe impairment that prevents him from performing his last coal mine employment, but that exercise gas exchange testing was contraindicated due to a prior history of myocardial infarction. He opined that the predominant cause of claimant's impairment is his obstructive disease due to smoking and coal dust exposure, but that there was contribution from claimant's post-surgery back pain, and an uncertain

Basheda, and determined that the opinions of Drs. Saludes and Jaworski "do not aid employer in rebutting the presumption," as Dr. Saludes stated that coal dust exposure could be a contributing factor in the development of claimant's chronic obstruction pulmonary disease (COPD), thus his opinion was equivocal, and Dr. Jaworski diagnosed legal pneumoconiosis. Decision and Order at 9; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011). The administrative law judge determined that Dr. Bellotte[9] found no pneumoconiosis and attributed claimant's disabling pulmonary impairment to multiple diagnosed medical conditions, including COPD with chronic bronchitis and emphysema caused by smoking; obesity; hyperlipidemia; hypertension; and coronary artery disease. However, the administrative law judge noted that "Dr. Jaworski explain[ed] that Claimant's multiple conditions cannot cause COPD and he sheds doubt on Dr. Bellotte's unequivocal opinion that coal dust exposure was not a significant cause of Claimant's impairment." *Id.* The administrative law judge also noted that "Dr. Jaworski states that it is impossible to separate the cause of COPD when an individual has significant coal dust exposure and smoking history." *Id.* Citing Dr. Bellotte's testimony that he based his opinion "primarily upon the fact that [claimant] has so many other reasons to have his pulmonary impairment. . . [and] [t]here was no history of any progressive problems where he's getting gradually more and more short of breath right there when he terminates his work....[n]ow, he's developing progressive shortness of breath, but it's for a lot of other reasons," *id.*, *citing* Employer's Exhibit 11 at 21, the administrative law judge indicated that "Claimant states that he terminated his work in the mines because he began to have difficulty breathing."[10] Decision and Order at 9, *citing* Hearing Transcript at 14. The administrative law judge concluded that Dr.

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contribution from claimant's cardiac function. Director's Exhibit 10; Employer's Exhibit 7.

[9] Dr. Bellotte examined claimant and concluded that there is insufficient objective evidence to justify a diagnosis of pneumoconiosis. He diagnosed a severe pulmonary impairment attributable to multiple diagnosed conditions, including COPD with chronic bronchitis and emphysema based on heavy tobacco abuse. He stated that claimant's obesity is causing some atelectasis, which can contribute to his hypoxemia. Dr. Bellotte testified that claimant's pulmonary impairment was most likely due to asthma, smoking, and heart disease, and that his heart condition is worse than his lung condition. Employer's Exhibit 11 at 22, 30. He concluded that claimant is totally disabled from performing his usual coal mine employment due to his multiple medical conditions, but that his disability is not caused by pneumoconiosis. Employer's Exhibits 1, 11.

[10] When asked why he ceased working for employer when he did, claimant stated, "Just couldn't go no more." He also stated that he currently has "quite a bit" of breathing problems. Hearing Transcript at 13-14.

Bellotte's opinion was conclusory, not well-reasoned, and insufficient to establish rebuttal. Similarly, the administrative law judge determined that the opinion of Dr. Basheda,[11] that claimant's COPD was due to smoking, and not pneumoconiosis, in light of claimant's significant loss of FEV_1, was insufficient to establish rebuttal, as he found that the doctor's explanation, that smoking causes a much greater loss of FEV_1 than does coal dust exposure, was a "general assertion and [was] in no way particularized to Claimant," and "does not account for the possibility that both Claimant's smoking and coal dust exposure caused Claimant's impairment." *Id.*

Because employer has the burden to affirmatively prove that claimant does not have legal pneumoconiosis, the administrative law judge correctly determined that the opinions of Drs. Saludes and Jaworski, that coal dust was, or could be, a contributing factor in claimant's COPD, do not aid employer in rebutting the presumption. Claimant's Exhibit 2; Director's Exhibit 10; Employer's Exhibit 7. The administrative law judge, however, accepted the conclusions of Dr. Jaworski as more credible than those of Dr. Bellotte, without explaining why he believes that Dr. Jaworski's opinion is entitled to greater weight and that Dr. Bellotte's opinion is conclusory and not well-reasoned. Director's Exhibit 10; Employer's Exhibits 1, 11. The administrative law judge also mischaracterized claimant's testimony, as claimant stated that he currently experiences breathing problems, but did not testify that he terminated his work in the mines because he had difficulty breathing. Decision and Order at 9; Hearing Transcript at 13-14. Further, in discrediting Dr. Basheda's conclusions, the administrative law judge appears to have selectively analyzed the opinion, as the doctor discussed claimant's loss of FEV_1 in terms specific to claimant's medical history, test results, and symptoms. The doctor also accounted for the possibility that both smoking and coal dust exposure caused claimant's impairment, but determined that the portion attributable to coal dust, if any, would not result in any significant pulmonary impairment. Employer's Exhibit 8. As the administrative law judge's analysis mischaracterizes relevant evidence and does not comport with the requirements of the APA, *see Wojtowicz v. Dusquesne Light Co.*, 12

[11] Dr. Basheda examined claimant, found no evidence of pneumoconiosis, and diagnosed severe COPD secondary to tobacco dependence, with a clinical history of an asthmatic component. In attributing claimant's COPD to smoking, rather than coal dust exposure, the doctor reviewed claimant's pre-bronchodilator and post-bronchodilator pulmonary function study results, considered claimant's significant loss of FEV_1 in light of his smoking history and coal dust exposure, and estimated the potential loss of FEV_1 attributable to each exposure. He also opined that the findings of hyperinflation and impaired diffusion were classic findings of emphysema secondary to smoking. Dr. Basheda concluded that claimant is totally disabled, but stated that, even if claimant did experience obstructive lung disease secondary to coal dust exposure, it would not result in significant pulmonary impairment or disability. Employer's Exhibit 8.

BLR 1-162, 1-165 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987), we vacate the administrative law judge's finding that employer failed to establish rebuttal of the presumption of total disability due to pneumoconiosis, and remand this case for further consideration. On remand, the administrative law judge is directed to reassess the conflicting evidence relevant to rebuttal under amended Section 411(c)(4), 30 U.S.C. §921(c)(4), and to provide a thorough analysis and explanation for his credibility determinations.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

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