BRB No. 11-0183 BLA

ROBERT JOSEPH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL COAL COMPANY, LLC c/o UNDERWRITERS SAFETY AND CLAIMS	)	DATE ISSUED: 10/28/2011
	)	
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 - Award of Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Jonathan Rolfe (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, HALL and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order - Award of Benefits in an Initial Claim (2009-BLA-5283) of Administrative Law Judge Larry S. Merck rendered 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 miner's claim filed on February 28, 2008. After crediting claimant with "about" twenty-eight years of underground coal mine employment, the administrative law judge found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 4. Based on this determination, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer rebutted the presumption that claimant has clinical pneumoconiosis, but did not rebut the presumption that claimant has legal pneumoconiosis.[1] The administrative law judge also determined that employer did not prove that claimant's total disability was not due to pneumoconiosis. Therefore, the administrative law judge found that employer did not rebut the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in failing to remand the case to the district director to provide employer with an opportunity to develop evidence relevant to the change in the law resulting from the amendments to the Act. Additionally, employer argues that the administrative law judge erred in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in which he urges the Board to affirm the administrative law judge's denial of employer's request that the case be

[1] "Clinical pneumoconiosis" consists of 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. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1). "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). "Arising out of coal mine employment" refers to "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

remanded to the district director. In a reply brief, employer reiterates its previous contentions regarding the administrative law judge's weighing of the medical opinion evidence.[2]

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.[3] 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).

I. Due Process Issues

A. The Constitutionality of Applying Amended Section 411(c)(4)

Employer asserts that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's right to due process. 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. 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 Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, BLR (6th Cir. 2011); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). We also reject employer's argument that it is premature to apply the recent amendments to the Act, pending resolution of the legal challenges to Public Law No. 111-148.

B. Denial of Employer's Remand Request

[2] Because employer does not challenge the administrative law judge's findings regarding the length of claimant's coal mine employment and that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3-8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Decision and Order at 4.

Employer maintains that the administrative law judge's denial of its request to remand the claim to the district director for the development of evidence relevant to amended Section 411(c)(4) constituted a denial of its right to due process, and violated the Administrative Procedure Act, 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). We disagree.

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). Accordingly, 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* 20 C.F.R. §725.455(c); *Clark*, 12 BLR at 1-153. Based on the facts presented in this case, we hold that employer has not demonstrated that the administrative law judge's action denied it the opportunity to submit evidence relevant to the new legal standard. *See Dempsey*, 23 BLR at 1-62.

Prior to the scheduled hearing, the administrative law judge issued a Notice to the Parties Regarding Potential Applicability of 15-Year Rebuttable Presumption in which he advised the parties that this claim met the preliminary requirements of amended Section 411(c)(4). The administrative law judge further stated "that the evidentiary limitations at 20 C.F.R. §725.414 continue to apply to this claim and medical evidence should be developed accordingly." Notice to the Parties at 2. In response, employer submitted a Motion to Remand Claim to District Director and Cancel Formal Hearing (Motion to Remand), "so that it may respond to the changes in law with proof." Employer's Motion to Remand at 1-2. The Director opposed employer's request and maintained that "[r]emand is simply not necessary for employer to respond to changes in the law." Director's Response Letter dated June 3, 2010. The Director further asserted that employer could develop the record it deemed necessary before the administrative law judge. *Id*.

The administrative law judge subsequently issued an Order Denying Motion for Remand and Order Denying Request to Cancel Hearing in which he stated:

> I am not persuaded that remand to the [d]istrict [d]irector is necessary in this case. The [e]mployer has the opportunity to make additional arguments and develop any necessary evidence before the undersigned. . . . Because I have the authority to conduct a *de novo* review of the evidence, there is no need for the [d]istrict [d]irector to make additional findings of fact in this claim.

Order Denying Motion for Remand and Order Denying Request to Cancel Hearing at 2. The administrative law judge then held a hearing at which employer was represented by counsel. The record does not reflect that employer proffered any additional evidence prior to, or at, the hearing.[4]

An administrative law judge is generally required to allow the parties to develop additional evidence to address changes in the law. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). In this case, the administrative law judge acted in accordance with this principle by informing employer that it could "make additional arguments and develop any necessary evidence" regarding the application of Section 411(c)(4), while the case was before the administrative law judge. Order Denying Motion for Remand and Order Denying Request to Cancel Hearing at 2. Employer did not avail itself of either of these options. Under these circumstances, we agree with the Director that employer's "claim that it was denied the opportunity to develop evidence is without merit as a factual matter." Director's Brief at 2. Accordingly, we hold that the administrative law judge did not err in denying employer's Motion to Remand. *See* 20 C.F.R. §725.463; *Dempsey*, 23 BLR at 1-62.

Because we have rejected employer's constitutional arguments, and its allegations regarding remand of this case to the district director, 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.

II. Rebuttal of the Presumption

A. Legal Pneumoconiosis

In order to establish rebuttal of the amended Section 411(c)(4) presumption, employer must prove, by a preponderance of the evidence, that claimant does not have either clinical or legal pneumoconiosis, or that claimant's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal

[4] The record also does not reflect any request by employer for a continuance to allow for the development of additional evidence, including the opportunity to re-examine claimant.

mine. 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 479, BLR at . In the present case, the administrative law judge initially determined, based on his consideration of the medical opinions of Drs. Agarwal, Al-Khasawneh and Dahhan pursuant to 20 C.F.R. §718.202(a)(4), that employer did not establish the absence of legal pneumoconiosis.[5] Decision and Order at 21. Employer argues that the administrative law judge erred in discrediting the opinion in which Dr. Dahhan ruled out any causal connection between coal dust exposure and claimant's chronic obstructive pulmonary disease.[6]

This contention is without merit, as the administrative law judge acted within his discretion as fact-finder in determining that the rationales that Dr. Dahhan set forth in support of his opinion were not persuasive. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); Decision and Order at 17-18. The administrative law judge rationally found that Dr. Dahhan's statement, that the amount of loss in claimant's FEV1 was too great to be "accounted for by the obstructive impact of coal dust on the respiratory system," Director's Exhibit 13, did not exclude the possibility that claimant's obstructive impairment was significantly related to, or substantially aggravated by, coal dust exposure. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 17, *citing* 20 C.F.R. §718.201(b). The administrative law judge also rationally found that Dr. Dahhan did not adequately explain why claimant's treatment with a bronchodilator precluded a diagnosis of legal pneumoconiosis, as Dr. Dahhan did not address "the etiology of the fixed portion of [c]laimant's impairment that does not benefit from bronchodilator treatment." Decision and Order at 18; *see Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Clark*, 12 BLR at 1-155.

The administrative law judge permissibly found, therefore, that Dr. Dahhan's opinion regarding the existence of legal pneumoconiosis "was not well-reasoned" and, therefore, accorded it "little probative weight on the issue." Decision and Order at 18; *see Morrison*, 644 F.3d at 479, BLR ; *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*, 12 BLR 1-27, 1-29

[5] Drs. Agarwal and Al-Khasawneh diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due to coal mine dust exposure. Director's Exhibit 11; Claimant's Exhibit 2.

[6] Dr. Dahhan diagnosed a totally disabling obstructive impairment caused by bronchial asthma, which he identified as a disease of the general public that is not related to coal dust exposure. Director's Exhibit 13.

(1988). In light of this determination, the administrative law judge acted within his discretion in finding that employer did rebut the amended Section 411(c)(4) presumption by proving that claimant does not have legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Morrison*, 644 F.3d at 479, BLR ; *Alexander*, 12 BLR at 1-47; Decision and Order at 21.

B. The Cause of Claimant's Totally Disabling Impairment

Employer also argues that the administrative law judge erred in finding that Dr. Dahhan's opinion was insufficient to establish that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment. We disagree. The administrative law judge rationally found that Dr. Dahhan's opinion regarding the etiology of claimant's totally disabling respiratory impairment was entitled to little weight at 20 C.F.R. §718.204(c), as "Dr. Dahhan found that [c]laimant did not suffer [from] legal pneumoconiosis, contrary to my findings." Decision and Order at 22; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). Consequently, we affirm the administrative law judge's finding that employer failed meet its burden to establish that claimant's respiratory impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. 921(c)(4); *see Morrison*, 644 F.3d at 479, BLR ; *Alexander*, 12 BLR at 1-47; *Defore*, 12 BLR at 1-29; Decision and Order at 22. We therefore affirm the administrative law judge's finding that employer did not establish rebuttal of the amended Section 411(c)(4) presumption and that claimant is entitled to benefits.

Accordingly, the administrative law judge's the Decision and Order - Award of Benefits in an Initial Claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

Boggs, Administrative Appeals Judge, concurring:

I concur in result only because I respectfully disagree with my colleagues as to the applicable law. The United States Supreme Court specifically stated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 35-37, 3 BLR 2-36, 2-56-59 (1975) that the limitation on rebuttal provisions, which are set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), are applicable only to the Secretary of Labor and not an employer.[7] *Id*. Since there is no regulation in force that applies the limitation on rebuttal provisions of amended Section 411(c)(4) to employers, the statements in the majority opinion do not correctly represent the requirements for rebuttal of the presumption by an employer.

JUDITH S. BOGGS
Administrative Appeals Judge

[7] The limitation on rebuttal provisions state:

> The *Secretary* may rebut such presumption 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) (emphasis added).