BRB No. 10-0728 BLA

ROBERT JAMES NIPPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PANTHER BRANCH COAL COMPANY d/b/a LONG BRANCH ENERGY	)	DATE ISSUED: 09/29/2011
	)	
and	)	
	)	
BIG RIVER MINERALS CORPORATION	)	
	)	
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 Benefits of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05369) of Administrative Law Judge Janice K. Bullard rendered on a subsequent claim[1] 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). After crediting claimant with 32.51 years of underground coal mine employment, the administrative law judge found that the newly submitted evidence was sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d).

Considering this claim on its merits, the administrative law judge properly noted that Congress adopted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Decision and Order at 7. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 921(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 921(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, a rebuttable presumption is invoked that he or she is totally disabled due to pneumoconiosis. 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 the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 921(c)(4) to this miner's claim, the administrative law judge found that claimant established invocation of the rebuttable presumption, based upon her finding, at 20 C.F.R. §718.204(b)(2), that claimant suffers from a totally disabling respiratory or pulmonary impairment. The administrative law judge also found that employer failed to prove 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. The administrative law judge determined, therefore, that employer failed to rebut the Section 921(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant's first claim, filed on December 16, 1993, was denied on June 1, 1994, because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no further action until filing this claim on May 22, 2008. Director's Exhibit 3.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), thereby establishing a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Employer also challenges the application of the recent amendments to this case. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, disagreeing with employer's arguments regarding the recent amendments and noting that the Board has previously considered and rejected the arguments employer has raised on appeal.[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 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis and that he was totally disabled. Director's Exhibits 1. Consequently, claimant had to submit new evidence establishing either applicable condition of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established 32.51 years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4-7.

[3] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, the Board will apply the law 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*).

Relevant to 20 C.F.R. §718.204(b)(2)(iv),[4] the administrative law judge considered five newly submitted medical opinions. Drs. Rosenberg[5] and Hippensteel[6] opined that claimant retains the pulmonary capacity to continue his previous coal mine employment.[7] Employer's Exhibits 2, 4, 5, 6. In contrast, Drs. Forehand,[8] Baker[9] and

[4] The administrative law judge found that the new medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 13-15.

[5] Dr. Rosenberg examined claimant on October 21, 2008 and determined that, although claimant's pulmonary function study showed a moderate airflow obstruction, claimant is not disabled from a respiratory standpoint, but is disabled due to his chronic atrial fibrillation and chronic congestive heart failure. Employer's Exhibit 2.

[6] Dr. Hippensteel reviewed the medical records and in a report, dated February 26, 2009, opined that, while claimant has pneumoconiosis, he does not have a significant impairment from it. Employer's Exhibit 4. In a supplemental report dated December 3, 2009, Dr. Hippensteel reviewed additional evidence and again opined that he did not believe claimant's pneumoconiosis was disabling, but that he might be disabled due to other problems. Employer's Exhibit 5. In a second supplemental report dated June 17, 2010, Dr. Hippensteel reiterated his opinion that claimant has mild simple pneumoconiosis, but that he also has multiple diseases unrelated to coal dust exposure, and that claimant does not have sufficient pulmonary impairment from these diseases to preclude performing his previous coal mine employment. Employer's Exhibit 6.

[7] The administrative law judge found that claimant last worked in coal mine employment as a shuttle car driver, but that the job also involved dragging cables, some weighing over one hundred pounds, and other hard labor. Decision and Order at 4; Hearing Transcript at 16-17. We affirm this finding as it is unchallenged on appeal. *See Skrack,* 6 BLR at 1-711.

[8] Dr. Forehand examined claimant on June 18, 2008, and determined that claimant has a significant respiratory impairment with insufficient gas exchange to return to work in a coal mine and that he is totally disabled, based on a pulmonary function study that showed an obstructive ventilatory pattern and a blood gas study that showed exercise-induced arterial hypoxemia. Director's Exhibit 12.

[9] Dr. Baker examined claimant on March 28, 2009, and determined that claimant is totally disabled based on a pulmonary function study that showed a moderate obstruction and blood gas studies that showed mild resting arterial hypoxemia that worsened to moderate hypoxemia with exercise. Claimant's Exhibit 1.

Agarwal[10] opined that, based on claimant's abnormal pulmonary function study and/or blood gas study results, he lacks the pulmonary capacity to perform his coal mine employment. Director's Exhibit 1; Claimant's Exhibits 1, 2. The administrative law judge found that all of the medical opinions were documented, but that only the opinions of Drs. Baker and Agarwal were well-reasoned. Decision and Order at 16. The administrative law judge accorded "some weight" to Dr. Forehand's opinion because it was based "on his reasonable observations of [c]laimant's physical limitations." *Id*. The administrative law judge determined that this provided a valid basis for Dr. Forehand's conclusion that claimant is disabled, notwithstanding Dr. Forehand's lesser qualifications[11] and his reliance on his own test results, which the administrative law judge found were not indicative of claimant's full pulmonary capacity, as higher values were recorded in later objective studies conducted by other physicians. *Id*.

The administrative law judge determined that Dr. Baker's diagnosis of a totally disabling impairment was "well-reasoned and well-documented and entitled to weight." Decision and Order at 16. In support of his finding, the administrative law judge noted that Dr. Baker is "highly qualified and personally examined [c]laimant." *Id*. The administrative law judge further noted that Dr. Baker based his opinion on objective testing, his examination and claimant's medical and work histories. *Id*. In her consideration of Dr. Baker's opinion, the administrative law judge also noted that claimant's treatment records indicate that he has been prescribed medication and oxygen to alleviate his pulmonary impairment. *Id*.

Similarly, the administrative law judge credited Dr. Agarwal's diagnosis of a totally disabling pulmonary impairment. Decision and Order at 16. The administrative law judge acknowledged Dr. Agarwal's status as a Board-certified pulmonologist and determined that his opinion was well-documented and well-reasoned, as it was based on his examination of claimant, claimant's medical history and test results, and his observation that claimant is unable to walk more than relatively short distances without shortness of breath. *Id*. The administrative law judge also found that Dr. Agarwal's

[10] Dr. Agarwal examined claimant on June 2, 2009, and determined that claimant has a severe respiratory impairment and is totally disabled based on a pulmonary function study showing a moderate obstructive ventilatory defect, with no significant improvement after administration of a bronchodilator, and a blood gas study that showed a mildly reduced PO_2 with exercise. Claimant's Exhibit 2.

[11] Drs. Rosenberg, Hippensteel, Baker and Agarwal are Board-certified pulmonologists. Claimant's Exhibits 1, 2; Employer's Exhibits 2, 4. Dr. Forehand is Board-certified in pediatrics and allergy and immunology. Director's Exhibit 12.

opinion was in accord with the treatment records and the credible physicians' opinions of record. *Id*.

In contrast, while acknowledging that Dr. Rosenberg is highly qualified, and that his report was well-documented, the administrative law judge found that his opinion, that claimant is not disabled, was not well-reasoned. Decision and Order at 16. The administrative law judge determined that Dr. Rosenberg "did not address [c]laimant's inability to exert himself for more than a relatively small amount [of time]," and failed to address claimant's treatment for a pulmonary condition. *Id*. Thus, the administrative law judge found that Dr. Rosenberg's opinion was not entitled to weight, as it was "not entirely consistent" with the preponderance of the evidence. *Id*.

With respect to Dr. Hippensteel's opinion, the administrative law judge acknowledged his qualifications as a Board-certified pulmonologist and noted that he was the only physician who did not examine claimant. Decision and Order at 16. The administrative law judge found that Dr. Hippensteel's opinion, that claimant was not disabled, was unreasoned in light of claimant's testimony that he could not walk more than 150 yards on level ground without experiencing shortness of breath and because claimant's usual coal mine employment as a shuttle car driver involved "considerable physical labor." *Id*. at 17. The administrative law judge also noted that Dr. Hippensteel's review of evidence that is not in the record detracted from his opinion. *Id*.

Lastly, the administrative law judge observed that claimant's hospitalization records, which showed he had serious cardiac and pulmonary illnesses, supported the determination that claimant is disabled. Decision and Order at 17. Weighing the conflicting opinions, the administrative law judge, concluded:

> [W]hile the objective testing does not support a conclusion that [c]laimant is disabled, his medical history and the opinions of physicians entitled to weight indicate that [c]laimant could not return to his last coal mine employment job. Claimant is unable to walk relatively short distances or engage in the heavy physical labor that his coal mine employment required. Accordingly, I find that [c]laimant has established that he has a total respiratory disability.

Id.

Employer argues that the administrative law judge erred in crediting the medical opinions in which Drs. Forehand, Baker and Agarwal diagnosed a totally disabling respiratory impairment, over the contrary opinions of Drs. Hippensteel and Rosenberg. Employer maintains that the administrative law judge applied an incorrect standard in her evaluation of the evidence by "fail[ing] to limit 'disability' to a pulmonary or respiratory impairment, but rather considered disability as impairment of the whole person."

Employer's Brief at 5. Employer also asserts that the administrative law judge selectively analyzed the evidence, improperly rejected the opinion of Dr. Hippensteel because he did not examine claimant, and failed to explain how the opinions of Drs. Forehand, Baker and Agarwal were documented and reasoned.

We consider employer's assertions of error to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). In this case, the administrative law judge properly considered the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

Contrary to employer's assertion, the administrative law judge acted within her discretion in finding that, as claimant's last coal mine employment involved heavy manual labor, Drs. Forehand, Baker and Agarwal provided reasoned and documented opinions diagnosing a totally disabling pulmonary or pulmonary impairment. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127. The administrative law judge also rationally determined that Dr. Rosenberg's opinion was entitled to less weight because, although he reviewed claimant's medical records, he did not address the significance of claimant's treatment for a pulmonary condition. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127. Similarly, the administrative law judge acted within her discretion in according less weight to Dr. Hippensteel's opinion, as it conflicts with claimant's credible testimony that he could not walk more than 150 yards on level ground without experiencing shortness of breath and Dr. Hippensteel relied, in part, upon evidence that was not admitted into the record. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co*., 23 BLR 1-47, 1-66-67 (2004)(*en banc*); *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127.

Because the administrative law judge's credibility determinations at 20 C.F.R. §718.204(b)(2)(iv) are supported by substantial evidence, they are affirmed. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326. Accordingly, we affirm the administrative law judge's findings that claimant established total disability under 20 C.F.R.

§718.204(b)(2)(iv) and that the medical evidence, when considered as a whole, was sufficient to establish that claimant is suffering from a totally disabling pulmonary impairment under 20 C.F.R. §718.204(b)(2). As substantial evidence supports the administrative law judge's finding under 20 C.F.R. §718.204(b)(2), we affirm her finding that the new medical opinions established a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). We also affirm the administrative law judge's finding, on the merits, that claimant was entitled to the benefit of the presumption set forth in amended Section 921(c)(4), because claimant established more than fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4); Decision and Order at 19-20.

Regarding rebuttal of the presumption, the administrative law judge found that the opinions of Drs. Rosenberg and Hippensteel were insufficient to satisfy employer's burden to establish that claimant's total disability did not arise out of, or in connection with, employment in a coal mine.[12] 30 U.S.C. §921(c)(4); Decision and Order at 20. The administrative law judge discredited Dr. Rosenberg's opinion because, contrary to the administrative law judge's finding, Dr. Rosenberg determined that claimant does not have a totally disabling respiratory or pulmonary impairment. *Id*. The administrative law judge found that Dr. Hippensteel's opinion did not establish rebuttal, as Dr. Hippensteel "does not rule out pneumoconiosis as a potential cause of disability, which is what the law requires." *Id*. We affirm the administrative law judge's determinations with respect to the opinions of Drs. Rosenberg and Hippensteel, as they represent a reasonable exercise of her discretion as fact-finder. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. We also affirm, therefore, the administrative law judge's finding that employer did not rebut the presumption set forth in amended Section 921(c)(4).

Finally, we reject employer's arguments regarding the administrative law judge's application of Section 1556 to this claim. Employer asserts that retroactive application of the 2010 amendments to the Act 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. 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), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.). We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-

[12] We affirm the administrative law judge's finding that employer did not affirmatively establish that claimant is not suffering from pneumoconiosis pursuant to 20 C.F.R. §718.202(a), as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19.

198-200; *see Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). 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. Because claimant established invocation of the amended Section 921(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer has not rebutted the presumption, we affirm the award of benefits.

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