BRB No. 11-0103 BLA

CLARENCE E. NAUGLE	
Claimant-Respondent	
v.	
CALVERT COAL COMPANY	DATE ISSUED: 09/27/2011
and	
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 Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Clarence E. Naugle, Mount Hope, West Virginia, *pro se*.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Paul L. Edenfield (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05489) of Administrative Law Judge Adele Higgins Odegard, rendered on a miner's claim filed on July 15, 2008, 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 adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718 and the recent amendments to the Act.[1] He found that claimant established 15.6 years of underground coal mine employment and a totally disabling respiratory impairment and was, therefore, entitled to a rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4), of the Act, 30 U.S.C. §921(c)(4). The administrative law judge also found that employer failed to establish rebuttal of that presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in failing to find rebuttal of the presumption at amended Section 411(c)(4).[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the 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.[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).

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[1] On March 23, 2010, while this case was pending before the administrative law judge, amendments to the Act were enacted, affecting claims, such as this one, that were filed after January 1, 2005, and were pending on or after March 23, 2010. By Order dated May 13, 2010, the administrative law judge gave the parties the opportunity to submit additional evidence and argument as to the applicability of the amendments to this claim.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's determination that claimant established fifteen years of underground coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Decision and Order at 15; Director's Exhibit 3.

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). If the presumption is invoked, the burden of proof shifts to employer to establish either that the miner does not have either clinical or legal pneumoconiosis,[4] or that his disabling respiratory impairment "did not arise out of, or in connection with" coal mine employment. 30 U.S.C. §921(c)(4).

Employer previously conceded, and the administrative law judge found, that claimant is entitled to invocation of the amended Section 411(c)(4) presumption because he has fifteen years of underground coal mine employment and a totally disabling respiratory impairment. In this appeal, employer suggests that the administrative law judge may have erred in finding that claimant is totally disabled, but it does not adequately brief this issue. *See Sarf v. Director, OWCP,* 10 BLR 1-119 (1987). Because it is supported by substantial evidence, we affirm the administrative law judge's findings that claimant has a totally disabling respiratory impairment,[5] and is entitled to invocation of the presumption at amended Section 411(c)(4).

Relevant to the issue of rebuttal of the presumption, employer argues that the administrative law judge erred in finding that claimant has legal pneumoconiosis because "the record is devoid of any reasoned medical opinion" to establish that claimant's chronic obstructive pulmonary disease arose out of his coal mine employment. Employer's Brief at 12. Employer maintains that "the etiology of claimant's impairment has not been established with any reasonable medical probability" and that "Dr.

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[4] "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. 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. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] Dr. Porterfield conducted the Department of Labor-sponsored examination of claimant on July 30, 2008. Director's Exhibit 11. The pulmonary function study obtained by Dr. Porterfield was qualifying for total disability under the regulations, and Dr. Porterfield specifically opined that claimant is totally disabled from his usual coal mine employment. *Id.*

Porterfield did not provide any analysis whatsoever as to the contribution of [coal workers' pneumoconiosis] to claimant's impairment." *Id*. at 18. Employer's arguments are without merit.

Employer's assertion that Dr. Porterfield's opinion is not reasoned and documented to support a finding of either legal pneumoconiosis or disability causation misstates the burden of proof on rebuttal. It is employer's burden to provide *affirmative* evidence to establish that claimant does not have either clinical or legal pneumoconiosis[6] or that his disability "did not arise out of, or in connection with" coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011). As noted by the Director, the inadequacy of evidence developed by claimant, or on his behalf, to prove the existence of legal pneumoconiosis, is irrelevant, "as the disease is presumed unless the Employer comes forward with the preponderant evidence to affirmatively rebut the presumption." Director's Letter Brief at 4.

In this case, the administrative law judge properly found that employer did not submit any evidence to contradict the one medical opinion of record, by Dr. Porterfield, which concludes that claimant is totally disabled as a result of chronic obstructive pulmonary disease due, in part, to coal dust exposure. We, therefore, affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by proving either that claimant does not have legal pneumoconiosis or that his disability did not arise out of, or in connection with, his coal mine employment.[7] Thus, we affirm the administrative law judge's finding that claimant is entitled to benefits.

[6] The administrative law judge determined that claimant does not have clinical pneumoconiosis, based on the weight of the x-ray and CT scan evidence, which is negative. Thus, he found that employer's evidence rebutted the presumption at amended Section 411(c)(4), with regard to clinical pneumoconiosis. Decision and Order at 17.

[7] The administrative law judge correctly found that employer's radiological evidence, consisting of x-rays and CT scans, did not address the issue of legal pneumoconiosis. Decision and Order at 17.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge