BRB No. 11-0824 BLA

EDGAR ESTEP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/25/2012
	)	
ROYALTY SMOKELESS COAL COMPANY	)	
	)	
and	)	
	)	
A.T. MASSEY	)	
	)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jeffrey S. Goldberg (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/carrier (employer) appeals the Decision and Order Granting Benefits (09-BLA-5242) of Administrative Law Judge Pamela J. Lakes 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 subsequent claim filed on March 31, 2008.[1] Director's Exhibit 4.

In her decision, the administrative law judge 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 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 underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and establishes 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(a), 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 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 411(c)(4), the administrative law judge found that claimant established sixteen and one-half years of underground coal mine employment[2] and determined that new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant established a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d), and invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section

[1] Claimant filed three prior claims, all of which were finally denied. Director's Exhibits 1, 2. His most recent prior claim, filed on August 20, 2001, was denied by the district director on September 10, 2002, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 2.

[2] The record indicates that claimant's coal mine employment was in Virginia and West Virginia. Decision and Order at 4; Hearing Transcript at 34. 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).

411(c)(4). The administrative law judge further determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also asserts that the administrative law judge erred in weighing the medical opinion evidence when she found that employer did not rebut the presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's arguments that amended Section 411(c)(4) may not be applied to this case. Employer filed a reply brief, reiterating its contentions.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Application of Amended Section 411(c)(4)

Employer contends that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 13-22. Employer argues further that the administrative law judge erred in applying amended Section 411(c)(4), because its rebuttal provisions do not apply to claims brought against a responsible operator. Employer's Brief at 23-24. Employer's contentions are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that

[3] Employer does not challenge the administrative law judge's findings of sixteen and one-half years of underground coal mine employment, that claimant established total disability and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and invoked the Section 411(c)(4) presumption. Further, with respect to rebuttal of the presumption, employer does not challenge the administrative law judge's findings that the analog chest x-ray evidence is in equipoise as to the presence or absence of pneumoconiosis, and that employer did not establish that the digital x-ray readings, CT scan readings, and a PET scan reading were medically acceptable and relevant to refuting the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.107(b). Therefore, all of those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

decision.[4] Consequently, 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.

Rebuttal of the Section 411(c)(4) Presumption

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), she properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Therefore, we reject employer's argument that the administrative law judge failed to apply the proper rebuttal standard. Employer's Brief at 24-28.

The administrative law judge first considered whether employer disproved the existence of clinical pneumoconiosis.[5] After finding that the analog x-ray evidence did not disprove the existence of clinical pneumoconiosis, *see* n.3, *supra*, the administrative law judge found that the digital x-ray readings supported a finding of clinical pneumoconiosis, while the CT scan readings did not support a finding of clinical pneumoconiosis. The administrative law judge, however, found that "neither party . . . made a sufficient showing as to the reliability of either CT scans or digital x-rays in ruling out or establishing the existence of clinical pneumoconiosis." Decision and Order at 11; *see* 20 C.F.R. §718.107(b). The administrative law judge thus concluded that the other medical evidence, including the digital x-rays, CT, and PET scans, did "not resolve the issue of whether . . . [c]laimant suffers from" clinical pneumoconiosis. *Id*.

[4] Employer's request that this case be held in abeyance pending the United States Supreme Court's resolution of the petition for certiorari filed in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342), is denied. Additionally, employer's request that this case be held in abeyance pending the resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

[5] "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).

Turning to the medical opinion evidence, the administrative law judge considered the opinions of Drs. Castle, Fino, Al-Khasawneh, and Forehand. Drs. Castle and Fino opined that claimant does not have clinical pneumoconiosis, but suffers from hypoxemia due to obesity and an elevated left hemidiaphragm, unrelated to his coal mine dust exposure. Employer's Exhibit 1 at 6-8; Employer's Exhibit 2 at 15; Employer's Exhibit 9 at 13-17; Employer's Exhibit 15 at 2; Employer's Exhibit 17 at 11-14. Drs. Forehand and Al-Khasawneh opined that claimant has both clinical and legal pneumoconiosis. Director's Exhibit 12 at 4; Claimant's Exhibit 2 at 3-4; Claimant's Exhibit 3 at 4. The administrative law judge stated that when the medical opinions were considered "along with the other evidence of record," she "continue[d] to find the evidence in equipoise" as to the existence of clinical pneumoconiosis. Decision and Order at 11.

Employer argues that the administrative law judge erred because she failed to consider all of the relevant evidence together, and thus, failed to recognize that Drs. Castle and Fino based their medical opinions, that claimant does not have clinical pneumoconiosis, on integrated reviews of x-rays, CT scans, and a PET scan. Employer's Brief at 31-32. We disagree. The administrative law judge specifically stated that she considered the medical opinions "along with the other evidence of record. . . ." Decision and Order at 11. With respect to the other types of evidence, employer concedes that the analog x-ray interpretations are in equipoise, Employer's Brief at 31, and it does not challenge the administrative law judge's determination that the digital x-ray evidence, CT scan evidence, and PET scan evidence did not resolve whether claimant has clinical pneumoconiosis, because that evidence was not shown to be sufficiently reliable to either establish or exclude pneumoconiosis, pursuant to 20 C.F.R. §718.107(b). *See* n.3, *supra*. Therefore, the administrative law judge reasonably found that the medical opinions based on the same evidence were also in equipoise as to the existence of clinical pneumoconiosis. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000).

The administrative law judge's finding that employer did not disprove the existence of clinical pneumoconiosis because the evidence was in equipoise, is supported by substantial evidence. Therefore, we affirm the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we need not address employer's contention that the administrative law judge erred in her analysis of the medical opinion evidence when she found that employer did not disprove the existence of legal pneumoconiosis.

The administrative law judge next considered whether employer established that claimant's impairment did not arise out of, or in connection with, coal mine employment. The administrative law judge considered the opinions of Drs. Castle and Fino, that claimant is totally disabled by hypoxemia that is due to obesity and an elevated left hemidiaphragm.[6] The administrative law judge discounted these opinions, because she found that neither Dr. Castle nor Dr. Fino adequately explained how he eliminated claimant's sixteen and one-half years of underground coal mine employment as a contributing cause of his disabling impairment. Decision and Order at 11-12. Employer argues that the administrative law judge erred in discounting the opinions of Drs. Castle and Fino on this basis. Employer's Brief at 36. We disagree.

Employer was required to rule out a connection between claimant's disability and his coal mine employment. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. In light of that standard, the administrative law judge permissibly found that Drs. Castle and Fino did not adequately explain how they determined that claimant's sixteen and one-half years of coal mine dust exposure did not contribute to his disabling impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge therefore found, as was within her discretion, that Drs. Castle and Fino "did not provide a cogent rationale for excluding coal mine dust exposure as a factor" and that, therefore, their opinions "failed to establish that claimant's disabling lung disease was not caused at least in part by his coal mine employment." Decision and Order at 11-12; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Because substantial evidence supports the administrative law judge's credibility determination, we affirm her finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment.

Based on the foregoing discussion, we affirm the administrative law judge's determination that employer did not meet its burden to rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis.[7] Therefore, we affirm the administrative law judge's award of benefits. *See* 30 U.S.C. §921(c)(4).

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[6] After reviewing additional evidence, Dr. Fino added bullous emphysema, unrelated to coal mine dust exposure, as a cause of claimant's disabling blood gas impairment. Employer's Exhibit 15.

[7] Therefore, we need not address employer's arguments regarding the weight that the administrative law judge accorded the opinions of Drs. Forehand and Al-Khasawneh, submitted by claimant. Employer's Brief at 33-35.

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

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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REGINA C. McGRANERY
Administrative Appeals Judge