

BRB No. 12-0265 BLA

KENNETH D. CANADY)
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 Claimant-Respondent)
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 v.)
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 MOUNTAIN LAUREL RESOURCES) DATE ISSUED: 09/27/2012
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 Employer-Petitioner)
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 and)
)
 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 Lesniak, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Henry C. Bowen (Pullin, Fowler, Flanagan, Brown & Poe PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (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-5880) of Administrative Law Judge Michael Lesniak rendered on a subsequent claim filed on

October 8, 2008,¹ 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).² The administrative law judge acknowledged the parties' stipulation that claimant worked for 22.8 years in underground coal mine employment. The administrative law judge determined that the newly submitted evidence established total disability and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on his consideration of all the record evidence, the administrative law judge found that claimant had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. The administrative law judge, therefore, found that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Because the administrative law judge found that the evidence did not establish an onset date of total disability due to pneumoconiosis, he awarded benefits commencing as of July 1, 2009, which he believed to be the first day of the month in which the subsequent claim was filed.

On appeal, employer asserts that the administrative law judge erred in crediting Dr. Rasmussen's opinion and in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not file a substantive response to employer's appeal, unless specifically requested to do so by the Board.

¹ Claimant filed two prior claims, each of which was denied. Director's Exhibits 1, 2. The more recent claim, filed on January 24, 2005, was denied by the district director on the grounds that claimant failed to establish any of the elements of entitlement. Director's Exhibit 2. Claimant took no action with regard to the denial until he filed the current subsequent claim. Director's Exhibit 22.

² On March 23, 2010, Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010). 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 amended 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), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

However, the Director states that if the Board affirms the award of benefits, the Board should modify the commencement date for benefits to reflect the correct month and year in which the pending claim was filed, October 2008. Alternatively, if the award is vacated, the Director contends that the Board should also vacate the administrative law judge's commencement date determination and direct the administrative law judge to use the correct filing date if benefits are awarded on remand.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).⁴

When 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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (en banc), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

In considering whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge required employer to prove either that claimant does not have pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 9. The administrative law judge determined that employer did not rebut the presumption of clinical pneumoconiosis because the x-ray evidence was in equipoise, with an equal number of positive and negative readings for the disease. The administrative law judge indicated that employer's experts, Drs. Zaldivar and Kinder,

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).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had 22.8 years of underground coal mine employment and established total disability pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that he invoked the rebuttable presumption that his total disability is due to pneumoconiosis at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

relied, in part, on their negative x-ray readings in reaching their conclusion that claimant's respiratory disability was unrelated to coal dust exposure and was due entirely to smoking. Decision and Order at 10. The administrative law judge specifically rejected Dr. Kinder's explanation that claimant's symptoms of daily cough and allergies were indicative of a smoke-induced lung disease because he did not explain why a coal dust-induced impairment would not cause similar symptoms. Decision and Order at 9. The administrative law judge concluded that the opinions of Drs. Zaldivar and Kinder were insufficient to establish either that the miner did not have clinical pneumoconiosis or that his disability did not arise out of coal mine employment. The administrative law judge credited Dr. Rasmussen's documented and reasoned opinion that claimant is disabled due to both his lengthy smoking history and his twenty-two years of coal dust exposure. Thus, the administrative law judge found that employer did not establish rebuttal of the amended Section 411(c)(4) presumption.

A large portion of employer's brief is devoted to arguing that claimant has not satisfied his burden of proof. Employer, however, bears the burden to rebut the amended Section 411(c)(4) presumption and must *affirmatively* establish that claimant does not have either clinical or legal pneumoconiosis or establish that claimant's respiratory disability did not arise out of, or in connection with, his coal mine coal mine employment. See 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

The administrative law judge reviewed nine readings of six x-rays dated October 8, 2001, March 25, 2005, January 5, 2009, April 1, 2009, February 22, 2010 and August 24, 2010. Decision and Order at 3, 7, 10. The administrative law judge found that the October 8, 2001 x-ray was positive for pneumoconiosis, the March 25, 2005 x-ray was negative, the January 5, 2009 x-ray was positive, the April 1, 2009 x-ray was negative, the February 22, 2010 x-ray was positive and the August 24, 2010 x-ray was negative. The administrative law judge concluded that “[o]verall the record contains an equal number of positive and negative x-ray readings, which does not aid [e]mployer in establishing that the miner does not have pneumoconiosis.” Decision and Order at 10. Although employer asserts that the negative readings by Dr. Leef are the most credible,⁵ employer does not assign any specific error to the manner in which the administrative law judge weighed the x-ray evidence. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Employer's assertion that claimant did not satisfy his burden to establish the existence of clinical pneumoconiosis based on the x-ray evidence, misstates the burden of proof on rebuttal. See *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65

⁵ Dr. Leef, who is a Board-certified radiologist, read the x-rays dated October 8, 2001 and August 24, 2010 as negative. Employer's Exhibits 4, 5.

(4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980); *see also Morrison*, 644 F.3d at 480. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the x-ray evidence is in equipoise. Accordingly, we affirm the administrative law judge's finding that employer did not rebut the amended Section 411(c) presumption by disproving the existence of clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Employer also contends that the administrative law judge erred in finding the opinions of Drs. Zaldivar and Kinder to be insufficient to establish that claimant's respiratory disability did not arise out of, or in connection with, his coal mine employment. Employer specifically contends that the administrative law judge erred in finding that Drs. Zaldivar and Kinder made different assessments of claimant's disability. We disagree. The administrative law judge gave Dr. Zaldivar's opinion less weight because he determined that it was contradicted by the opinion of Dr. Kinder, as to whether claimant has an obstructive respiratory impairment. Decision and Order at 9. Dr. Zaldivar opined that claimant has "minimal irreversible airway obstruction," based on the results of his pulmonary function tests dated January 5, 2009 and April 1, 2009. Employer's Exhibit 1. Dr. Zaldivar specifically explained that none of claimant's disability is related to that obstruction. *Id.* Dr. Zaldivar opined that claimant is totally disabled as the result of a diffusion capacity impairment, which interferes with gas exchange. *Id.* Dr. Kinder, however, opined that claimant is totally disabled by both a *mild* respiratory impairment and a moderate diffusion capacity impairment demonstrated on the June 4, 2010 pulmonary function testing. Employer's Exhibit 2, 6. Thus, employer's argument that the administrative law judge mischaracterized the opinions of its medical experts is rejected.⁶ *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

⁶ Dr. Zaldivar opined that coal dust exposure did not contribute to claimant's disability, in part, because there was no radiographic evidence of coal workers' pneumoconiosis. The administrative law judge determined that the x-ray evidence was in equipoise and therefore found that employer failed to disprove the existence of clinical pneumoconiosis. Based on the fact that claimant is presumed to have clinical pneumoconiosis, Dr. Zaldivar's opinion can carry little, if any weight, on the issue of disability causation. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

Regarding Dr. Kinder's opinion, the administrative law judge noted that he excluded coal dust exposure as a cause of claimant's respiratory disability, based on negative x-rays readings and claimant's symptoms, which he attributed to smoking. Decision and Order at 9; Employer's Exhibit 2. The administrative law judge permissibly found that Dr. Kinder's opinion was less credible given that "he only reviewed the x-rays read by Dr. Leef and not all of the x-rays of record, several of which were read as positive for clinical pneumoconiosis." Decision and Order at 9; *see Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge also rationally found that Dr. Kinder did not explain why a coal dust-induced respiratory condition would not cause the same symptoms as smoking, i.e., a cough that is worse in the morning and reactions/sensitivity to fragrant potpourri and cleaners. Decision and Order at 9; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Furthermore, contrary to employer's assertion, the administrative law judge permissibly determined that Dr. Rasmussen's opinion was more persuasive because he "explains in great detail that the lung disease process caused by both coal dust and smoking are identical." *See Clark*, 12 BLR at 1-155.

Because the credibility of the medical experts is a matter within the purview of the administrative law judge, and the administrative law judge, within a proper exercise of his discretion assessed the credibility of Drs. Zaldivar and Kinder, we affirm the administrative law judge's findings that the opinions of Drs. Zaldivar and Kinder are insufficient to affirmatively prove that claimant's respiratory disability did not arise out of, or in connection, with coal mine employment. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997). Thus, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and we affirm the award of benefits.

Additionally, since the administrative law judge determined that the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, benefits are payable from the month in which he filed his subsequent claim. 20 C.F.R. §725.503(b). We agree with the Director that the administrative law judge erred in finding that claimant is entitled to benefits "as of July 1, 2009, the first day of the month in which this subsequent claim was filed." Decision and Order at 11. This subsequent claim was filed in October 2008, not July 2009. Director's Exhibit 22. Therefore, we affirm the administrative law judge's determination that claimant is entitled to benefits as of the month in which claimant filed his subsequent claim, but we modify his order to reflect that benefits commence as of October 2008.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed, but modified to reflect that payment of benefits commence as of October 2008.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge