BRB No. 10-0571 BLA

FRANKLIN L. FARMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARLAN CUMBERLAND COAL COMPANY, LLC	)	DATE ISSUED: 07/12/2011
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

H. Kent Hendrickson (Rice, Hendrickson & Williams), Harlan, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5815) of Administrative Law Judge Larry S. Merck awarding benefits 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 September 7, 2007.[1] After crediting

[1] Claimant's previous claim for benefits, filed on April 2, 2001, was denied by an administrative law judge on June 8, 2004, because claimant did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1. The Board subsequently affirmed the administrative law judge's denial of benefits. *Farmer v. Harlan Cumberland Coal Co.*,

claimant with twenty-seven years of coal mine employment,[2] at least fifteen years of which were underground, the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus, established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge properly 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 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), *amended by* Pub L. No. 111-148, §1556, 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 claimant'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 invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish 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, and, therefore, he found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of the recent Section 1556 amendment to this case. Employer also argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

BRB No. 04-0837 BLA (Apr. 29, 2005) (unpub.). There is no indication that claimant took any further action in regard to his 2001 claim.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established twenty-seven years of coal mine employment, with at least fifteen years underground, and that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R.

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).

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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer initially contests the administrative law judge's application of Section 1556 to this case. Employer specifically argues that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's due process rights, as set forth in the Fifth Amendment to the United States Constitution. Employer's Brief at 7. This argument made by employer is substantially similar to the one 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) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject it here for the reasons set forth in that case.[4] *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106, at *5 (7th Cir. 2011).

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§718.204(b)(2), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's findings, on the merits, that claimant established the existence of a totally disabling respiratory impairment, and, thus, established invocation of the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711.

[4] Employer further argues that "the lack of adequate notice" of the reinstatement of the Section 411(c)(4) presumption violates its due process rights. Employer's Brief at 7. In an April 2, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. Although the administrative law judge set a schedule for the parties to submit additional evidence and argument, employer did not file any response. Consequently, although employer was provided with an opportunity to address the impact on this case of amended Section 411(c)(4), it chose not to do so.

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. We further affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 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.

We next address employer's contention that the administrative law judge erred in his evaluation of the medical opinion evidence in finding the existence of legal pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4). Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical opinions of Drs. Rasmussen and Dahhan.[5] Dr. Rasmussen diagnosed legal pneumoconiosis, opining that claimant suffers from a severe, disabling lung disease caused by both his coal mine dust exposure, and the effects of a paralyzed left hemidiaphragm. Director's Exhibit 12. Although Dr. Dahhan diagnosed a moderate restrictive ventilatory impairment, he opined that it was due to obesity, sleep apnea, and an abnormal left hemidiaphragm, and was not due to claimant's coal mine dust exposure. Director's Exhibit 15.

In evaluating the conflicting evidence, the administrative law judge found that Dr. Rasmussen's opinion was well-reasoned. Decision and Order at 18. Conversely, the administrative law judge accorded less weight to Dr. Dahhan's opinion, because found that it was "inadequately reasoned." *Id.* at 20. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). As a result, the administrative law judge found that employer failed to establish that claimant does not have pneumoconiosis. *Id.* at 23.

Employer contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion to support a finding of legal pneumoconiosis. We disagree. The administrative law judge found that Dr. Rasmussen "fully explained how the medical evidence support[ed] his opinion that [c]laimant's diaphragmatic abnormality was not the

[5] The administrative law judge noted that the record also contains medical opinion evidence submitted in connection with claimant's 2001 claim. However, the administrative law judge reasonably relied upon the more recent medical opinions, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 22.

sole cause of his respiratory pulmonary impairment."[6] Decision and Order at 18. Because the administrative law judge specifically found that Dr. Rasmussen set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's lung disease was due to both coal mine dust exposure and the effects of a paralyzed left hemidiaphragm,[7] we affirm the administrative law judge's permissible finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis is "well-reasoned." *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 18.

Employer further contends that Dr. Rasmussen's opinion is not definitive enough to support a finding of legal pneumoconiosis, because the doctor opined only that claimant's coal mine dust exposure *could* be considered a cause of his disabling lung disease. Employer's Brief at 6-7. Employer mischaracterizes Dr. Rasmussen's opinion. While Dr. Rasmussen initially identified two possible contributors to claimant's pulmonary impairment (coal mine dust exposure and a paralyzed left hemidiaphragm), he ultimately concluded, without equivocation, that claimant's "coal mine dust [exposure] is clearly a major contributing factor to his disabling lung disease." Director's Exhibit 12.

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[6] Dr. Rasmussen explained that claimant's paralyzed left hemidiaphragm was not a major contributor to his disabling lung disease:

> [Claimant] exhibits some features consistent with [a] paralyzed hemidiaphragm including fairly normal forced vital capacity with severe intolerance to exercise with an excessive heart rate. However, he does not exhibit [an] increase in VE/VO2, which would clearly be expected, and he exhibits much greater hypoxia than would be expected during exercise. In addition, [claimant] had an apparently [sic] plication of the left diaphragm surgically, which basically stretches the diaphragm and usually corrects much of the abnormality. His current radiograph shows only mild elevation of the lateral aspect of the left diaphragm. No significant volume of lung loss. It seems unlikely his diaphragmatic abnormality would be a major contributing cause of his lung disease.

Director's Exhibit 12.

[7] Dr. Rasmussen explained that coal mine dust is a known potent cause of lung tissue destruction and "can frequently have a pattern of significant impairment in oxygen transfer in excess of or in the absence of ventilatory impairment that [is seen] in [claimant]." Director's Exhibit 12.

Therefore, we reject employer's contention that Dr. Rasmussen's opinion is too equivocal to support a finding of legal pneumoconiosis.

Employer also contends that the administrative law judge erred in his consideration of Dr. Dahhan's opinion. Employer's contention lacks merit. The administrative law judge permissibly questioned Dr. Dahhan's opinion that claimant's disabling lung disease is due solely to obesity, sleep apnea, and an abnormal left hemidiaphragm, because Dr. Dahhan did not adequately explain how he eliminated claimant's twenty-seven years of coal mine dust exposure as a source of his disabling lung disease. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 20. The administrative law judge, therefore, permissibly found that Dr. Dahhan's opinion was not well-reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Further, we reject employer's contention that the administrative law judge erred in failing to accord greater weight to Dr. Dahhan's opinion based upon his status as claimant's treating physician. Section 718.104(d) provides that the weight given to the opinion of a treating physician shall "be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003) (holding that the "case law and applicable regulatory scheme clearly provide that the [administrative law judge] must evaluate treating physicians just as they consider other experts."). In this case, the administrative law judge permissibly accorded less weight to Dr. Dahhan's opinion because he found that it was not sufficiently reasoned. *Id.*

Because substantial evidence supports the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we affirm that finding. Consequently, we affirm the administrative law judge's determination that employer failed to meet its burden to disprove the existence of pneumoconiosis. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *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 (1988).

Employer next argues that the administrative law judge erred in finding that employer failed 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 discounted Dr. Dahhan's opinion because Dr. Dahhan did not diagnose legal pneumoconiosis. *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); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 24. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Rasmussen to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Rasmussen's opinion supports a finding that claimant is totally disabled due to legal pneumoconiosis. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge's finding, that the evidence established that claimant's total disability is due to legal pneumoconiosis, is therefore affirmed. Consequently, we affirm the administrative law judge's finding that employer failed to meet its burden to establish that claimant's respiratory impairment did not arise out of, or in connection with, employment in a coal mine. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *Alexander*, 12 BLR at 1-47; *Defore*, 12 BLR at 1-29.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's 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