BRB No. 11-0683 BLA

PAGE BENDER, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOGAN COALS, INCORPORATED	)	DATE ISSUED: 06/25/2012
	)	
and	)	
	)	
WEST VIRGINIA CWP 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Roger D. Foreman (The Law Office of Roger D. Foreman, L.C.), Charleston, West Virginia, for claimant.

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

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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Awarding Benefits (2010-BLA-5257) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered on a subsequent claim filed pursuant to the provisions of Title IV 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).[1] The administrative law judge credited claimant with 21 years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. He found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, determined that claimant invoked the rebuttable presumption that his total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Finally, the administrative law judge found that employer did not rebut the presumption. Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that claimant established every element of entitlement, based on the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the applicability of Section 1556 of the Patient Protection and Affordable Care Act (PPACA) to this case. Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of disability causation. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's constitutional and procedural arguments regarding the applicability of Section 1556 and employer's request to hold the case in abeyance.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the

[1] Claimant filed his first claim on March 26, 2002. Director's Exhibit 1. It was denied by the district director on June 18, 2003 because claimant failed to establish a totally disabling respiratory impairment. *Id*. This denial became final because claimant did not pursue the claim any further. Claimant filed this claim on February 18, 2009. Director's Exhibit 3.

[2] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibits 1, 4. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Act 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we will address employer's challenges to the administrative law judge's application of Section 1556 of the PPACA to this case. Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. Employer also 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 contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA, slip op. at 4 (Oct. 28, 2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision. *See also Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Further, employer contends that this case should be held in abeyance until new regulations are promulgated by the Department of Labor. Additionally, employer contends that this case should be held in abeyance pending the resolution of the constitutional challenges to the PPACA in federal court because, employer alleges, the amendments to the Act are not severable if all, or portions, of the PPACA are found to be unconstitutional. Consistent with our reasoning in *Mathews*, we reject employer's request that this case should be held in abeyance pending either the promulgation of new regulations or the resolution of the constitutional challenges to the PPACA in federal court. *See Mathews*, 24 BLR at 1-201; *see also West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2, BLR (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 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. 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), based on his unchallenged findings that claimant established more than fifteen years of qualifying coal mine employment and total respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, we affirm the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Furthermore, we affirm the administrative law judge's unchallenged finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

Next, we address employer's contention that the administrative law judge erred in finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of disability causation. In considering rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge noted that the burden shifted to employer to prove that claimant's disability did not arise out of coal mine employment. The administrative law judge stated that "[e]mployer's medical doctors [Drs. Caffrey, Tuteur, and Zaldivar] all state that [claimant's] disability is a result of his history of tobacco abuse, his lung cancer, and subsequent cancer treatment."[3] Decision and Order

[3] In a report dated November 4, 2009, Dr. Caffrey stated, "I do not believe the CWP identified in the sections from the upper lobe of the lung are such they would have caused [claimant] to have retired from the mines at age 45." Employer's Exhibit 3. Dr. Caffrey opined that claimant's pulmonary disability was due to the fact that he had his left upper lung lobe removed due to carcinoma of the lung. *Id*. Further, Dr. Caffrey stated that "[t]here is definitely no cause and effect relationship between the fact that [claimant] was a coal miner and has in my opinion simple CWP and carcinoma of the lung, in other words, coal dust does not cause carcinoma of the lung." *Id*.

In a report dated April 12, 2010, Dr. Tuteur opined that claimant's totally disabling respiratory impairment was not caused, in whole or in part, by coal workers' pneumoconiosis or any other chronic lung disease arising out of coal mine employment. Employer's Exhibit 10.

In a report dated July 7, 2009, Dr. Zaldivar opined that claimant was severely impaired from a pulmonary standpoint and that "[t]he breathing difficulties are the result of chronic obstructive pulmonary disease worsened by the removal of a portion of the lung (lobectomy) brought about by cancer." Director's Exhibit 31. Dr. Zaldivar further stated that "[claimant] also received chemotherapy which may have damaged the lungs

at 9. Nevertheless, the administrative law judge found that employer failed to prove that claimant's disability did not arise out of coal mine employment.

Employer asserts that the administrative law judge erred in summarily dismissing the opinions of Drs. Caffrey, Tuteur, and Zaldivar. Specifically, employer argues that "[the administrative law judge] failed to provide a 'detailed, scientifically-grounded explanation,' as to why he completely discredited all of the employer's medical experts who uniformly opined that [claimant's] total disability had absolutely nothing to do with coal dust exposure." Employer's Brief at 31.

The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge noted that, based on his review of a biopsy, Dr. Caffrey opined that lesions of coal workers' pneumoconiosis occupy less than 5% of claimant's lung tissue, and that claimant's coal workers' pneumoconiosis is too minimal to cause or contribute to his disability. After noting that Dr. Rasmussen explained, in a supplemental report that reviewed Dr. Caffrey's findings, that "[a] finding of limited pneumoconiosis certainly does not exclude [claimant's] coal mine dust exposure as a contributing cause of his disabling lung disease,"[4] Claimant's Exhibit 1, the administrative law judge found that Dr. Caffrey's opinion did not establish the absence of disability causation. Decision and Order at 9. Thus, contrary to employer's assertion, the administrative law judge reasonably found that Dr. Caffrey's opinion failed to prove that claimant's disability did not arise out of coal mine employment. *Wojtowicz*, 12 BLR at 1-165. Further, with regard to Dr. Tutuer's opinion, the administrative law judge stated that "Dr. Tuteur believes that [claimant's] disability is a result of his cigarette smoking and lung cancer treatment, explaining that chemotherapy causes both a restrictive and obstructive defect. However, he does not explain how he can determine that none of [claimant's] impairment is due to coal dust exposure." *Id*. The administrative law judge additionally stated that

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some more." *Id*.

During a deposition dated July 27, 2010, Dr. Zaldivar stated, "yes, I am able to say that zero percent of the abnormalities we now see are the result of his previous occupation." Employer's Exhibit 15 (Dr. Zaldivar's Depo. at 41).

[4] Dr. Rasmussen opined that claimant's coal mine dust exposure was a material contributing cause of his disabling chronic lung disease. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibit 8 (Dr. Rasmussen's Depo. at 25).

"Dr. Zaldivar states that [claimant's] spirometry results have worsened, but that it is a result of lung cancer treatment. He does not adequately explain why the worsened results could not also be due to coal workers' pneumoconiosis, which is a progressive disease." *Id*. Thus, contrary to employer's assertion, the administrative law judge properly discredited the opinions of Drs. Tuteur and Zaldivar because they were not sufficiently reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Consequently, we reject employer's assertion that the administrative law judge erred in summarily dismissing the opinions of Drs. Caffrey, Tuteur and Zaldivar. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's findings that employer failed to establish that claimant's total disability is not due to pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[5]

Furthermore, because we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing either that claimant does not have pneumoconiosis, or that claimant's total disability was not due to pneumoconiosis, we affirm the administrative law judge's award of benefits.

[5] Employer also contends that claimant has no proof that his disability arose from pneumoconiosis. 20 C.F.R. §718.204(c). Specifically, employer argues that Dr. Rasmussen's opinion is insufficient to establish that claimant's disability arose from pneumoconiosis. In light of our disposition of the case under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we need not address employer's contention that Dr. Rasmussen's opinion is insufficient to establish that claimant's disability arose from pneumoconiosis.

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