

BRB No. 11-0558 BLA

CARLES DYKES)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 05/17/2012
)	
ISLAND CREEK COAL COMPANY)	
)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (09-BLA-5174) of Administrative Law Judge Pamela J. Lakes rendered on a subsequent claim,¹ filed on November 20, 2007, 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). In her Decision and Order, dated April 27, 2011, the administrative law judge credited claimant with at least thirty years of coal mine employment,² of which “well over” fifteen years were underground, and found that claimant is “essentially a lifelong non-smoker.” Decision and Order at 4, 10. The administrative law judge then found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge properly found that this claim is governed by the recently enacted amendments to the Act, affecting claims that are filed after January 1, 2005, that are pending on or after March 23, 2010. Decision and Order at 18.

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)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption.³ 30 U.S.C. §921(c)(4).

¹ The current claim is claimant’s fourth. Claimant’s third claim, filed on March 14, 2005, was finally denied on November 8, 2006 because claimant did not establish the existence of pneumoconiosis. Director’s Exhibit 3.

² The record reflects that claimant’s last coal mine employment was in Virginia. Decision and Order at 2; Director’s Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

³ In a July 2, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and allowed the parties to submit supplemental briefing addressing the change in law, and to submit additional medical evidence directed at the new legal standard, consistent with the evidentiary limitations of 20 C.F.R. §725.414. Claimant and the Director, Office of Workers’ Compensation Programs, asserted that amended Section 411(c)(4) is applicable to this case. Employer conceded that amended Section 411(c)(4) may be applicable to this case, but moved for a remand to the district director to develop additional evidence. On September 16, 2010, the

Applying amended Section 411(c)(4), the administrative law judge invoked the rebuttable presumption of total disability due to pneumoconiosis. Therefore, the administrative law judge found that claimant established a change in an applicable condition of entitlement, through invocation of the presumption. *See* 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred by not issuing her Decision and Order within twenty days after the hearing, as required by 20 C.F.R. §725.476. Employer asserts that, because it was prejudiced by this delay, it must be dismissed and liability must be transferred to the Black Lung Disability Trust Fund. Employer further challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that employer's argument regarding 20 C.F.R. §725.476 is without merit, and requesting that the Board reject employer's contentions regarding the application of amended Section 411(c)(4). Claimant responds, urging the Board to affirm the administrative law judge's award of benefits.⁴

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

Employer initially contends that the administrative law judge failed to issue her decision in a timely fashion. Specifically, employer points to 20 C.F.R. §725.476, which

administrative law judge denied employer's request for a remand, but reopened the record for the submission of additional evidence and supplemental briefing. Employer and claimant submitted supplemental briefs, and employer submitted a supplemental physician's report.

⁴ We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established at least thirty years of coal mine employment, with at least fifteen years underground, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *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).

directs that “the administrative law judge shall issue a decision and order with respect to the claim” within twenty days after a hearing is officially terminated. Employer argues that the administrative law judge’s delay caused her decision to be issued after the effective date of the amendments to the Act. Employer contends that, because the parties’ respective burdens were “significantly alter[ed]” by the amendments, employer’s interests were prejudiced by the untimely issuance of the Decision and Order. Employer’s Brief at 26-30. Employer contends that, therefore, it should be dismissed as the responsible operator potentially liable for the payment of benefits.

The Director responds, arguing that the twenty-day language found at 20 C.F.R. §725.476 “is directory, not mandatory or jurisdictional,” and therefore the administrative law judge’s failure to comply with the 20 C.F.R. §725.476 directive does not relieve employer of liability in the present claim. Director’s Brief at 4, *quoting Maryland Casualty Co. v. Cardillo*, 99 F.2d 432, 434 (D.C. Cir. 1938). The Director further argues that, even if compliance with 20 C.F.R. §725.476 were mandatory, employer waived this argument, because it failed to raise the twenty-day requirement issue before the administrative law judge. Director’s Brief at 4 n.3. The Director notes, additionally, that employer has not established that it has suffered any prejudice as, even if the administrative law judge had issued her decision prior to the enactment of the amendments, claimant could still have benefitted from the amendments by any action that would have kept his case pending on or after March 23, 2010, such as requesting modification, or filing an appeal. Director’s Brief at 4-5. Claimant joins in support of the Director, arguing that employer should not be dismissed as the responsible operator in this case.

We agree with the Director that employer waived any objection to the administrative law judge’s failure to comply with 20 C.F.R. §725.476. Employer did not raise the issue when it filed its position statement on the applicability of the amendments to the Act, or at any time while the case was before the administrative law judge. *See, e.g., Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995). Accordingly, we will not address employer’s arguments regarding 20 C.F.R. §725.476.

Employer next contests the administrative law judge’s application of Section 1556 to this case. Employer specifically asserts that retroactive application of amended Section 411(c)(4) is unconstitutional, because it violates employer’s due process rights, and constitutes an unlawful taking of employer’s property, in violation of the Fifth Amendment to the United States Constitution. Employer’s Brief at 15-22. In addition, employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators, because amended Section 411(c)(4) provides that “the Secretary” can rebut the presumption, but does not refer to responsible operators. Employer’s Brief at 29. The arguments employer makes are virtually

identical to those the Board rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011). We, therefore, reject them here for the reasons set forth in that decision. *Owens*, slip op. at 4; *see also* *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). We further reject employer's request that we remand this case to the administrative law judge so that it can submit evidence concerning the economic impact of the amendments. *See Stacy*, 671 F.3d at 387; Employer's Brief at 25.

We also reject employer's assertion that it was premature for the administrative law judge to award benefits pursuant to the recent amendments to the Act, because the Department of Labor has yet to promulgate regulations implementing the rebuttable presumption at amended Section 411(c)(4). Employer's Brief at 30. As we noted in *Mathews*, the mandatory language of the recent amendments to the Act supports the conclusion that these provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *see also Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Ala. Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998). Therefore, the administrative law judge did not err in considering the present claim pursuant to amended Section 411(c)(4).

Further, we deny employer's request that this case be held in abeyance pending the United States Supreme Court's resolution of the legal challenges to Public Law No. 111-148. *See Stacy*, 671 F.3d at 383 n.2; *Mathews*, 24 BLR at 1-201; Employer's Brief at 10, 15. 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 also 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 finding that employer failed to rebut the presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4). Specifically, employer argues that the administrative law judge erred in affording claimant an improper presumption of legal pneumoconiosis.⁵ Employer further contends that the administrative law judge

⁵ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

erred in weighing the medical opinion evidence in determining whether employer established rebuttal of the amended Section 411(c)(4) presumption. Employer's arguments are without merit.

Initially, we reject employer's argument that the administrative law judge "erred by affording [c]laimant a non-existent presumption of legal pneumoconiosis." Employer's Brief at 33. Contrary to employer's contention, the administrative law judge determined that, because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); *see Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980).

Addressing the first method of rebuttal, the administrative law judge found that the x-ray evidence disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 15. In determining whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Castle, Fino, Baker, and Agarwal. While all of the physicians agree that claimant suffers from some form of obstructive pulmonary defect, they differ as to whether the disease was caused by coal dust exposure. Drs. Castle⁶ and Fino⁷ opined that claimant suffers from bronchial asthma, a condition unrelated to his coal mine dust exposure. Employer's Exhibits 1-4. In contrast, Drs. Baker and Agarwal opined

⁶ Dr. Castle diagnosed a moderate degree of airway obstruction with a marked degree of variability and bronchoreversibility, due to bronchial asthma, unrelated to coal mine dust exposure. Employer's Exhibit 3 at 12-13. Dr. Castle noted that on most occasions, claimant's pulmonary function studies showed a moderate degree of airway obstruction, without restriction or diffusion abnormality, with a very significant degree of bronchoreversibility, consistent with bronchial asthma. Employer's Exhibit 3 at 12. Dr. Castle opined that when coal workers' pneumoconiosis causes an impairment, it generally does so by causing a mixed irreversible obstructive and restrictive ventilatory defect. *Id.*

⁷ Dr. Fino diagnosed claimant with an obstructive impairment that, over time, has been variable and reversible. Employer's Exhibits 1 at 11, 2 at 20. Dr. Fino opined that, based on the variability and reversibility of claimant's pulmonary function study values, claimant suffers from asthma, unrelated to coal mine dust inhalation. Employer's Exhibit 2 at 27-28.

that claimant's chronic obstructive pulmonary disease is due to coal mine dust exposure. Claimant's Exhibits 1, 2.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge discredited the opinions of Drs. Castle and Fino, that claimant does not suffer from legal pneumoconiosis, because neither physician adequately explained his opinion that claimant's more than thirty years of coal mine dust exposure did not contribute to his disabling obstructive impairment. Decision and Order at 18. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Castle and Fino. We disagree. The administrative law judge noted that, while Dr. Castle opined he could "effectively rule out coal dust exposure as playing any role in [claimant's] respiratory or pulmonary impairment," Employer's Exhibit 8, he based his opinion, in part, on the significant reversibility of claimant's impairment after bronchodilator administration. Decision and Order at 17, 18; Employer's Exhibit 3 at 12. In light of the fact that claimant's obstructive impairment was not completely reversed upon the application of a bronchodilator, the administrative law judge found, as was within her discretion, that Dr. Castle did not adequately explain how he excluded coal mine dust as an additional, contributing factor to claimant's impairment. See 20 C.F.R. §718.201(a)(2); *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); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 18. The administrative law judge, therefore, permissibly discredited Dr. Castle's opinion.

Evaluating Dr. Fino's opinion, the administrative law judge noted that, while the physician concluded that claimant's obstructive impairment is due to bronchial asthma, unrelated to coal mine dust exposure, Dr. Fino also stated that he "can't ignore 40 years of working in the coal mines, and that certainly may have contributed to some obstruction," and that he "cannot rule out some obstruction due to coal mine dust."⁸ Decision and Order at 15-16; Employer's Exhibit 1 at 11. Since it is employer's burden to disprove the existence of legal pneumoconiosis, the administrative law judge permissibly found that Dr. Fino's opinion, that he could not "rule out some obstruction due to coal mine dust," is insufficient to meet employer's rebuttal burden. See *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and

⁸ During his deposition, Dr. Fino reiterated that he could not exclude a portion of claimant's impairment as being due to coal mine dust exposure. Employer's Exhibit 2 at 29.

Order at 18. The administrative law judge further found, as was within her discretion, that like Dr. Castle, Dr. Fino did not adequately explain why claimant's response to bronchodilators, and the variability of his impairment, necessarily eliminated a coal mine dust-related impairment. *See* 20 C.F.R. §718.201(a)(2); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Swiger*, 98 F. App'x at 237; Decision and Order at 18. Thus, as the administrative law judge provided valid reasons for discounting the opinion of Dr. Fino, we need not address employer's remaining arguments regarding the administrative law judge's evaluation of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Because the opinions of Drs. Castle and Fino are the only opinions potentially supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of the disease. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we affirm the administrative law judge's finding that employer failed to establish the first method of rebuttal by disproving the existence of legal pneumoconiosis.

Employer next argues that the administrative law judge erred in finding that employer failed to establish rebuttal by showing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with, employment in a coal mine," pursuant to 30 U.S.C. §921(c)(4); Employer's Brief at 55-56. Employer's argument lacks merit. The record reflects that all of the physicians agree that claimant's disability is due to his pulmonary impairment. Decision and Order at 6-8. The administrative law judge permissibly concluded that the same reasons for which she discredited the opinions of Drs. Castle and Fino, on the issue of legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See 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 19. Because the opinions of Drs. Castle and Fino are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. *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 Corp.*, 12 BLR 1-27, 1-29 (1988).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish rebuttal by proving either that claimant does not have pneumoconiosis, or that claimant's disability did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 18-20.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge