

BRB No. 10-0686 BLA

FRANK D. LESTER)
)
 Claimant-Respondent)
)
 v.)
)
 MACK COAL COMPANY,) DATE ISSUED: 09/30/2011
 INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS 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 on Remand - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2008-BLA-5344) of Administrative Law Judge Daniel L. Leland, rendered on a subsequent claim filed on April 30, 2007, pursuant to 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 is before the Board for a second time.¹ The Board previously affirmed, as unchallenged, the administrative law judge's determination that claimant established seventeen years and ten months of coal mine employment, total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309, but that he did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. *Lester v. Mack Coal Co.*, BRB No. 09-0476 BLA, slip op. at 2 n.2 (Mar. 18, 2010) (unpub.). The Board vacated the administrative law judge's finding that claimant established the existence of simple clinical pneumoconiosis, because he did not properly explain the weight accorded a medical treatment x-ray and did not weigh all of the evidence together under 20 C.F.R. §718.202(a). *Id.* at 5-6. Additionally, the Board held that the administrative law judge erred in failing to consider, pursuant to 20 C.F.R. §718.203, the opinions of Drs. Zaldivar and Repsher as to the etiology of radiological findings identified on claimant's x-rays. *Id.* at 7. The Board further held that the administrative law judge erred in failing to render a specific finding as to whether Drs. Rasmussen and Forehand provided reasoned and documented opinions to establish that claimant has a totally disabling respiratory impairment due to *clinical* pneumoconiosis.² *Id.* The Board specifically instructed the administrative law judge on remand to address whether Drs. Rasmussen and Forehand based their disability causation opinions on their belief that claimant has complicated pneumoconiosis. *Id.* Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id.* at 9.

While the case was pending on remand, amendments to the Act were adopted, which affect claims, such as this one, that were filed after January 1, 2005, and were pending on March 23, 2010. 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 a miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying

¹ The procedural history of the case is set forth in *Lester v. Mack Coal Co.*, BRB No. 09-0476 BLA, slip op. at 2 n.1 (Mar. 18, 2010) (unpub.).

² The administrative law judge determined that the evidence is insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See* February 24, 2009 Decision and Order at 9. The administrative law judge specifically found that Dr. Forehand did not address whether the miner's respiratory impairment was due to coal dust exposure, and that Dr. Rasmussen provided an equivocal opinion as to the cause of claimant's respiratory impairment. *Id.*

coal mine employment and a totally disabling respiratory or pulmonary impairment are established. If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of both clinical and legal 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).

In his Decision and Order on Remand, issued on July 30, 2010, the administrative law judge found that the x-ray and medical opinion evidence was sufficient to establish that claimant suffers from clinical pneumoconiosis and that claimant satisfied his burden to establish the existence of the disease, based on a weighing of all the evidence at 20 C.F.R. §718.202(a). The administrative law judge also found, pursuant to 20 C.F.R. §718.203(b), that claimant was entitled to a presumption that his clinical pneumoconiosis arose out of coal mine employment, and that employer did not rebut that presumption. He further found that claimant established total disability due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In consideration of the recent amendments, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption at amended Section 411(c)(4). He also concluded that employer was unable to rebut the presumption, citing to the fact that the evidence of record established that claimant has clinical pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge did not give proper consideration to the opinions of Drs. Zaldivar and Repsher regarding the etiology of the radiological findings on claimant's x-rays. Employer also contends that the administrative law judge did not properly address, in accordance with the Board's remand instructions, whether the opinions of Drs. Forehand and Rasmussen, that claimant is totally disabled by pneumoconiosis, were predicated on their erroneous belief that claimant has complicated pneumoconiosis, and whether their opinions were reasoned and documented. With respect to amended Section 411(c)(4), employer contends that retroactive application of the recent amendments to this claim is unconstitutional. Employer also argues that the administrative law judge erred in finding invocation of the presumption without rendering a specific finding as to whether claimant established at least fifteen years of underground coal mine employment or work in conditions that were substantially similar to underground employment. Employer further argues that the administrative law judge erred in failing to consider whether employer rebutted the amended Section 411(c) presumption, based on evidence that claimant's total disability did not arise out of, or in connection with, his coal mine employment.

Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's constitutional challenges to the recent amendments. The Director, however, agrees with employer that the administrative law judge erred in

awarding benefits pursuant to amended Section 411(c)(4), since he did not properly consider all of the methods by which employer may establish rebuttal of the presumption. The Director maintains that if the Board does not affirm the administrative law judge's award of benefits under 20 C.F.R. Part 718, then the case must be remanded for further consideration as to whether employer rebutted the amended Section 411(c) presumption by establishing that claimant's disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment.

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.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director maintains on appeal that if the Board is unable to affirm the administrative law judge's award of benefits pursuant to 20 C.F.R. Part 718 then the case must be remanded for further consideration pursuant to amended Section 411(c)(4). Thus, we first address the administrative law judge's findings under 20 C.F.R. Part 718.

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

I. Existence of Clinical Pneumoconiosis at 20 C.F.R. §718.202(a)

We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding on remand that claimant established the existence of simple, clinical pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.202(a)(1). *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); Decision and Order on Remand at 2. Employer, however, contends in this appeal that the administrative law judge erred in his consideration of the medical opinion evidence and in finding that claimant established the existence of clinical pneumoconiosis, based on the medical opinions and a review of the overall evidence. We disagree.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that Drs. Rasmussen and Repsher “diagnosed clinical pneumoconiosis based on their positive x-ray readings, which are consistent with a preponderance of the x-ray evidence, and claimant’s history of coal dust exposure. They also performed physical examinations, pulmonary function studies, and blood gas studies.” Decision and Order on Remand at 3. In contrast, the administrative law judge found that Dr. Zaldivar opined that claimant did not have clinical pneumoconiosis based, in part, on his interpretation of an x-ray that is not of record, and the administrative law judge found Dr. Zaldivar’s opinion to be entitled to less weight at 20 C.F.R. §718.202(a)(4). The administrative law judge also assigned less weight to Dr. Repsher’s opinion, that claimant does not have clinical pneumoconiosis, finding that it was insufficiently explained and based primarily on Dr. Repsher’s own x-ray interpretation. In weighing all of the evidence together at 20 C.F.R. §718.202(a), the administrative law judge found that claimant established the existence of clinical pneumoconiosis, based on a preponderance of the x-ray and medical opinion evidence.

Contrary to employer’s contention, the administrative law judge reasonably gave less weight to Dr. Zaldivar’s opinion, finding that he “relied heavily on his [negative] interpretation of an x-ray that is not in the record” in reaching his conclusion that claimant does not have clinical pneumoconiosis.⁴ Decision and Order on Remand at 3; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 536, 21 BLR 2-323, 2-335, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting), *aff’d on recon.*, 24 BLR 1-13 (2007) (McGranery & Hall, J.J., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004) (*en banc*). Employer’s argument that Dr. Zaldivar’s opinion is credible because it is based on a review of the record, as a whole, amounts to little more than a request that the Board reweigh the evidence, which we are not empowered to do.⁵ Employer’s Brief in Support of Petition for Review at 21; *see*

⁴ Dr. Zaldivar specifically cited to the absence of radiographic evidence of nodular changes in the upper lung zones on the x-ray he reviewed to support his opinion. Director’s Exhibit 13.

⁵ The administrative law judge was also not persuaded by Dr. Zaldivar’s explanation as to why the radiological findings were inconsistent with pneumoconiosis. Dr. Zaldivar opined that claimant did not have coal workers’ pneumoconiosis, based on the absence of P type opacities. The administrative law judge noted, however, that “seven of the ten” ILO-classified x-ray interpretations in the record have “demonstrated at least P type densities.” February 24, 2009 Decision and Order at 4 n.3; Director’s Exhibit 13.

Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

The administrative law judge also permissibly rejected Dr. Repsher's opinion, that claimant does not have clinical pneumoconiosis, finding that it was based, in part, on Dr. Repsher's negative reading of an x-ray that was read by a more qualified radiologist as positive for pneumoconiosis.⁶ Decision and Order on Remand at 3; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge also properly found that Dr. Repsher applied a different standard for diagnosing clinical pneumoconiosis than that provided in the regulations. *Id.* As noted by the administrative law judge, Dr. Repsher stated that claimant has no radiographic evidence of simple coal workers' pneumoconiosis, as his "chest x-rays have shown no small rounded opacities primarily in the upper lobes." Claimant's Exhibit 2. The administrative law judge observed correctly, however, that "[t]here is no requirement in the regulations that an x-ray must show rounded opacities . . . to support a finding of pneumoconiosis . . . [n]or is there any requirement in the regulations that the opacities on the x-ray must be initially in the upper lung zones." Decision and Order on Remand at 3, *citing* 20 C.F.R. §§718.102(b), 718.202(a)(1).

Thus, we affirm the administrative law judge's decision to accord less weight to the opinions of Drs. Zaldivar and Repsher, that claimant does not have clinical pneumoconiosis, in his analysis of the medical opinion evidence at 20 C.F.R. §718.202(a)(4).⁷ *See Hicks*, 138 F.3d at 533, 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Moreover, because the administrative law judge permissibly concluded that the contrary opinions of Drs. Zaldivar and Repsher did not outweigh the positive x-ray evidence for clinical pneumoconiosis, we affirm, as supported by

⁶ The administrative law judge mistakenly substituted the name of Dr. Forehand for that of Dr. Repsher in his analysis. Decision and Order on Remand at 3.

⁷ Employer argues that the administrative law judge erred in finding the opinions of Drs. Rasmussen and Forehand to be reasoned and documented as to the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer's Brief in Support of Petition for Review at 19. We consider an error by the administrative law judge in crediting the diagnoses of clinical pneumoconiosis by Drs. Rasmussen and Forehand to be harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the administrative law judge acted properly in finding that claimant established the existence of pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.202(a)(1), and since the opinions of Drs. Rasmussen and Forehand do not constitute contrary evidence to preclude a finding that claimant satisfied his burden to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

substantial evidence, his overall finding that claimant established the existence of simple clinical pneumoconiosis at 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

II. Etiology of Clinical Pneumoconiosis at 20 C.F.R. §718.203(b)

Employer also argues that the administrative law judge erred in his consideration of the opinions of Drs. Zaldivar and Repsher, relevant to rebuttal of the presumption that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b). We disagree. The Board previously instructed the administrative law judge to "address the opinions of Drs. Zaldivar and Repsher as to the etiology of claimant's radiological findings." *Lester*, BRB No. 09-0476 BLA, slip op. at 7. The administrative law judge initially noted that he had found the existence of clinical pneumoconiosis established, based on x-rays dated January 29, 2008, April 22, 2008 and August 21, 2008. February 24, 2009 Decision and Order at 8-9; Decision and Order on Remand at 2;⁸ Employer's Exhibit 2. The administrative law judge reasonably found that neither Dr. Zaldivar nor Dr. Repsher "endeavor[ed] to rebut the presumption that clinical pneumoconiosis *manifested by the positive x-rays* did not arise out of coal mine employment." Decision and Order on Remand at 3 (emphasis added). Thus, we affirm the administrative law judge's finding that employer failed to rebut the presumption that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

III. Disability Causation at 20 C.F.R. §718.204(c)

Employer also asserts that the administrative law judge erred in finding that claimant satisfied his burden to establish that he is totally disabled due to *clinical* pneumoconiosis. Employer contends that, contrary to the Board's specific remand

⁸ The record reveals that Dr. Zaldivar based his opinion, that claimant does not have coal workers' pneumoconiosis, on his review of the September 19, 2007 x-ray, which is not of record, and Dr. Zekan's reading of the July 27, 2007 x-ray. Employer's Exhibit 4. The record does not indicate that Dr. Zaldivar considered the x-rays dated January 29, 2008, April 22, 2008 and August 21, 2008. Similarly, Dr. Repsher, a B reader, opined that claimant does not have coal workers' pneumoconiosis, based on his interpretation of the April 22, 2008 x-ray as negative for pneumoconiosis, 0/0. Employer's Exhibit 2. The administrative law judge found that Dr. Repsher's negative reading of the April 22, 2008 x-ray was outweighed by a positive reading for pneumoconiosis of the same film by Dr. DePonte, a Board-certified radiologist and B reader. Decision and Order on Remand at 3; Claimant's Exhibit 6.

instruction, the administrative law judge failed to properly consider whether the disability causation opinions of Drs. Rasmussen and Forehand were based on their belief that claimant has complicated pneumoconiosis. *See Lester*, BRB No. 09-0476 BLA, slip op. at 8-9. Employer's argument has merit.

On remand, the administrative law judge rejected Dr. Zaldivar's opinion at 20 C.F.R. §718.204(c) because Dr. Zaldivar did not diagnose clinical pneumoconiosis.⁹ Decision and Order on Remand at 4, *citing Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). With respect to the opinions of Drs. Rasmussen and Forehand, the administrative law judge stated:

Drs. Rasmussen and Forehand provided reasoned and documented opinions establishing that claimant has a totally disabling respiratory impairment due to clinical pneumoconiosis as they both correctly found that claimant has clinical pneumoconiosis and total respiratory disability. There is no basis for concluding that the opinions of Drs. Forehand and Rasmussen on disability causation were based on their belief that claimant has complicated pneumoconiosis.

Decision and Order on Remand at 4.

Contrary to the administrative law judge's analysis, the fact that a physician has diagnosed pneumoconiosis and total disability does not necessarily establish that a miner's total disability is due to pneumoconiosis. The administrative law judge has not properly held claimant to his burden of proof at 20 C.F.R. §718.204(c). Moreover, we agree with employer that the administrative law judge's summary finding, "that there is no basis for concluding" that the disability causation opinions of Drs. Forehand and Rasmussen were based on their belief that claimant has complicated pneumoconiosis, fails to satisfy the Board's remand instruction and the requirements of 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).¹⁰ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus, we must vacate the

⁹ The Board previously affirmed the administrative law judge's decision to accord less weight to Dr. Repsher's opinion at 20 C.F.R. §718.204(c) because Dr. Repsher was not of the opinion that claimant is totally disabled. *Lester*, BRB No. 09-0476 BLA, slip op. at 7.

¹⁰ The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) and the award of benefits under 20 C.F.R. Part 718. Since we are unable to affirm the award of benefits, we next consider the propriety of the administrative law judge's award of benefits pursuant to amended Section 411(c)(4) of the Act.

IV. Amended Section 411(c)(4)

Initially, we reject employer's arguments that retroactive application of amended Section 411(c)(4) is unconstitutional, as 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 in Support of Petition for Review at 8-14. The arguments made by employer are substantially similar to the ones 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), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.). We, therefore, reject them here for the reasons set forth in that case. *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.*, 645 F.3d 844, BLR (7th Cir. 2011).

There is also no merit to employer's assertion that the administrative law judge erred in invoking the presumption without making a specific finding as to whether claimant established fifteen years of underground coal mine employment or work in a surface mine in conditions that are substantially similar to those of an underground mine. Contrary to employer's assertion, the administrative law judge specifically found that claimant has "seventeen years and ten months of underground coal mine employment."¹¹ Decision and Order on Remand at 4. We, therefore, affirm the administrative law judge's finding that claimant is entitled to invocation of the amended Section 411(c)(4) presumption. We also affirm the administrative law judge's finding that employer has failed to rebut the presumption by showing that claimant does not have pneumoconiosis.

Notwithstanding, we agree with employer that the administrative law judge erred in failing to specifically consider whether employer established rebuttal of the presumption by proving that claimant's disability did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4). Because the administrative law judge did not make a thorough rebuttal analysis, we are compelled to vacate the award of benefits, pursuant to amended Section 411(c)(4), and remand this case for further

¹¹ The administrative law judge previously found that "for the last fifteen years of his coal mine employment[, claimant] was a continuous miner operator or continuous miner helper." February 24, 2009 Decision and Order at 3.

consideration. On remand, the administrative law judge must first determine whether employer is entitled to rebuttal of the Section 411(c)(4) presumption. If rebuttal of the presumption is established under amended Section 411(c)(4), the administrative law judge must then reconsider claimant's entitlement pursuant to 20 C.F.R. Part 718. If review under 20 C.F.R. part 718 is reached, the administrative law judge should specifically address whether there is a reasoned and documented medical opinion of record to satisfy claimant's burden to establish that he is totally disabled due to clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c).¹² In rendering his credibility determinations on remand, the administrative law judge is instructed to explain his rationale and the bases for all of his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

¹² The administrative law judge should specifically reconcile his findings on disability causation at 20 C.F.R. §718.204(c), with his prior conclusions at 20 C.F.R. §718.202(a)(4), that Dr. Forehand did not specifically address the etiology of claimant's respiratory impairment and that Dr. Rasmussen's opinion was "too equivocal" to establish that claimant's respiratory impairment was due to coal dust exposure. February 24, 2009 Decision and Order at 9.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge