BRB No. 11-0467 BLA

JACK C. LAKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/16/2012
	)	
CONSOLIDATION 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-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

William S. Mattingly and Tiffany B. Davis (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-Awarding Benefits (10-BLA-5413) of Administrative Law Judge Daniel L. Leland rendered 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 miner's subsequent claim filed on May 27, 2009.[1] Director's Exhibit 4.

The administrative law judge credited claimant with twenty-seven years of underground coal mine employment,[2] and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). Therefore, the administrative law judge determined that the new evidence established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

Considering the claim on its merits, the administrative law judge 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 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 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).

Applying amended Section 411(c)(4), the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. 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. Therefore, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

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[1] Claimant filed two prior claims, both of which were finally denied by the district director. Director's Exhibits 1, 2. His most recent prior claim, filed on July 16, 2001, was denied on March 17, 2003, because claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 2.

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 5; Hearing Transcript at 19. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

On appeal, employer contends that the administrative law judge erred in his analysis of one of the new medical opinions when he found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer further asserts that the administrative law judge erred in applying amended Section 411(c)(4) to this case. Additionally, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the Section 411(c)(4) presumption.[3] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments that amended Section 411(c)(4) may not be applied to this case.

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).

Section 725.309(d)

To be entitled to benefits under the Act, a miner must demonstrate by a preponderance of the evidence 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. Where 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); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Here, the administrative law judge found that the new medical evidence established that claimant is totally disabled, a condition of entitlement he failed to establish in his prior claim. Therefore, the administrative law judge determined that claimant demonstrated a change in an applicable condition of entitlement.

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[3] Employer does not challenge the administrative law judge's findings of twenty-seven years of underground coal mine employment, and that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), employer's sole contention is that the administrative law judge erred in discounting Dr. Renn's deposition testimony that claimant could return to his usual coal mine work if his asthma were better treated. Employer's Brief at 29-32. We disagree.

In his medical report, and when deposed, Dr. Renn initially opined that claimant lacks the respiratory capacity to perform the labor required by his usual coal mine work as a headgate operator. Employer's Exhibit 2 at 5; Employer's Exhibit 14 at 15. Later, however, in response to a question from employer's counsel, Dr. Renn added that if claimant were "maximally treated " for asthma, it would be "very possible that he could go back and do his coal mine work." Employer's Exhibit 14 at 31. Pointing to the results of an April 29, 2010 pulmonary function study, Dr. Renn stated that claimant's "function then would have been good enough for him to go back and do that coal mine work as he described it to me." *Id*. at 32. The administrative law judge discounted Dr. Renn's statements as speculative, and selective, because Dr. Renn assessed claimant's respiratory ability to perform his usual coal mine work based on a single pulmonary function study.[4] Decision and Order at 8 n.3. Contrary to employer's contention, the administrative law judge acted within his discretion in finding this aspect of Dr. Renn's opinion to be speculative, and not well-supported, as it was based on only one of the new pulmonary function studies of record. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-652-53 (4th Cir. 1999); *Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991). Therefore, we reject employer's allegation of error, and affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

Invocation of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in applying amended Section 411(c)(4), because the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's Brief at 12-13. The Board rejected the identical argument in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), slip op. at 4, *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the reasons set forth in that decision. Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March

[4] The administrative law judge noted that Dr. Renn did not address claimant's respiratory ability to perform his usual coal mine work with reference to the pulmonary function studies conducted on December 16, 2009, or on October 19, 2010. Decision and Order at 8 n.3.

23, 2010.[5] In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis, the administrative law judge noted that the burden of proof shifted to employer to rebut the presumption, either by disproving the existence of pneumoconiosis, or by establishing 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); Decision and Order at 9. The administrative law judge found that employer failed to establish either method of rebuttal.[6] *Id.* at 9-11.

In considering whether employer disproved the existence of legal pneumoconiosis,[7] or established that claimant's impairment is unrelated to coal mine employment, the administrative law judge considered the medical opinions of Drs. Fino and Renn. Dr. Fino diagnosed claimant with an obstructive impairment that, over time, has been variable and reversible. Employer's Exhibit 11 at 13. Dr. Fino opined that, based on the variability and reversibility of claimant's pulmonary function study values, "the major disease responsible for the reduction in [claimant's] lung function . . . is asthma," which, Dr. Fino stated, "is a non-coal dust-related condition." *Id.* at 14.

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[5] We deny employer's request to hold this case in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

[6] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 9-11. Employer does not challenge this aspect of the administrative law judge's decision.

[7] "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).

Noting, however, that claimant also exhibited x-ray and diffusion capacity abnormalities consistent with emphysema, Dr. Fino stated, "I cannot rule out some contribution of lung disease related to the inhalation of coal mine dust." *Id*. Dr. Renn opined that claimant has a moderately severe obstructive impairment that is due to asthma, because the impairment is variable and responds to bronchodilator medication. Employer's Exhibit 2; Employer's Exhibit 14 at 23-26, 30, 42. Dr. Renn stated further that claimant's diffusion capacity impairment is due to asbestosis that is unrelated to his coal mine employment. Employer's Exhibit 14 at 31.

The administrative law judge found that, because Dr. Fino stated that he was "unable to rule out some contribution of coal mine dust inhalation to [claimant's] lung disease," Dr. Fino did not provide an opinion establishing "that [claimant] does not have legal pneumoconiosis." Decision and Order at 10. Further, with respect to both Drs. Fino and Renn, the administrative law judge found that neither physician adequately explained why the variability or reversibility of claimant's obstructive impairment eliminated a coal mine dust-related condition. Additionally, the administrative law judge found that, even assuming that claimant has asthma, Dr. Renn did not provide a rationale for why claimant could not have both asthma and legal pneumoconiosis.

Employer contends that the administrative law judge mischaracterized the physicians' opinions and failed to provide any valid reasons for the weight he accorded them. Employer's Brief at 16-31. Employer's contentions lack merit. Since it was employer's burden to disprove the existence of legal pneumoconiosis, the administrative law judge did not err in finding that Dr. Fino's opinion, that he could not "rule out some contribution of lung disease related to the inhalation of coal mine dust," was insufficient to meet employer's rebuttal burden. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980). Further, contrary to employer's contention, the administrative law judge found, as was within his discretion, that Drs. Fino and Renn 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); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Additionally, given that Dr. Renn testified that it is possible for a miner to have both asthma and a coal mine dust-related disease, Employer's Exhibit 14 at 42, the administrative law judge permissibly found that Dr. Renn did not adequately explain why the particular miner in this case does not have both asthma, and a chronic impairment that is related to his coal mine dust exposure. *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). Therefore, we reject

employer's arguments that the administrative law judge mischaracterized the medical opinions, and did not provide valid reasons for the weight he accorded them.[8]

Because the opinions of Drs. Fino and Renn are the only opinions potentially supportive of a finding that claimant does not suffer from legal pneumoconiosis or that his 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.[9] Therefore, we affirm the administrative law judge's award of benefits. *See* 30 U.S.C. §921(c)(4).

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[8] Because we affirm the administrative law judge's findings for the reasons stated above, we need not address employer's other arguments regarding the administrative law judge's analysis of the opinions of Drs. Fino and Renn. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13, 22 BLR 2-162, 2-178 n.13 (4th Cir. 2000); *Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 18-19, 21-22.

[9] Thus, we need not address employer's arguments regarding the weight that the administrative law judge should have accorded the opinions of Drs. Saludes and Schaaf, or the treatment records of Dr. Devabhaktuni. Employer's Brief at 22-27, 34-36.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge