BRB No. 11-0782 BLA

JOHN R. JONES, III	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DUNKARD MINING COMPANY	)	
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND	)	DATE ISSUED: 08/16/2012
	)	
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.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Edward K. Dixon and Ryan M. Krescanko (Zimmer Kunz, P.L.L.C.), Pittsburgh, Pennsylvania, for employer/carrier.

Jonathan Rolfe (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Awarding Benefits (2010-BLA-5516) of Administrative Law Judge Michael P. Lesniak 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 claim filed on June 8, 2009. Director's Exhibit 2.

The administrative law judge credited claimant with 21.71 years of underground coal mine employment,[1] as stipulated by the parties, and 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 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 underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, 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(a), 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 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 or pulmonary 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 of total disability due to pneumoconiosis pursuant to Section 411(c)(4). Accordingly, the administrative law judge awarded benefits.

[1] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc). Moreover, the record reflects, and employer does not contest, that all of claimant's coal mine employment was underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3; Hearing Tr. at 14; Director's Exhibit 3.

On appeal, employer challenges the administrative law judge's application of Section 411(c)(4) to this case. Employer also argues that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment, based on the parties' stipulation, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the presumption.[2] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's arguments regarding the application of Section 411(c)(4) to this case and to reject employer's allegation that the administrative law judge erred in finding that claimant established the requisite qualifying coal mine employment. In a reply brief, employer reiterates its previous contentions.

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).

Employer contends that the retroactive application of 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 Brief at 5-22. Employer's contentions are substantially similar to the ones recently rejected by the United States Court of Appeals for the Third Circuit. *See B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 254-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-76-85 (4th Cir. 2011), *petition for cert. filed*, May 4, 2012 (No. 11-1342), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Campbell*, we reject employer's arguments. Consequently, we affirm the administrative law judge's application of Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

We next consider employer's contention that the administrative law judge erred in finding that claimant established at least fifteen years of underground coal mine employment, based on the parties' stipulation, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Specifically, employer asserts that it never

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack*, 6 BLR at 1-711.

stipulated to the years of coal mine employment and that, therefore, the administrative law judge erred in failing to make a specific finding as to whether claimant established the requisite fifteen years of qualifying coal mine employment before invoking the Section 411(c)(4) presumption. Employer's Brief at 9. Employer's contentions lack merit.

At the hearing held on December 8, 2010, the administrative law judge asked the parties how many years of coal mine employment claimant alleged.[3] Hearing Tr. at 8. Claimant's counsel responded: "The Department of Labor has proven 21.71 years." *Id.* The administrative law judge then asked employer's counsel: "Do you agree?" *Id.* Employer's counsel responded: "I agree with that, Judge." *Id.* Claimant subsequently testified that all of his coal mine employment was underground. Hearing Tr. at 14. In its post-hearing brief, employer stated that "[Claimant] was employed as a coal miner in the nation's mines for approximately 21 years." Employer's Post-Hearing Brief at 3. Employer raised no arguments regarding the length of claimant's coal mine employment, either at the hearing, or in its post-hearing brief.

Contrary to employer's argument, it would not have been premature for employer to contest the issue of the length of claimant's coal mine employment, either at the hearing, or in its post-hearing brief. Employer's Reply Brief at 9. In addition, employer's arguments regarding the applicability of amended Section 411(c)(4) to this case, raised in its post-hearing brief, indicate employer's awareness of the passage of the amendments to the Act, and of their relevance to this claim. The record reflects employer's counsel's unambiguous agreement, at the hearing, to 21.71 years of coal mine employment. Therefore, we hold that there is no merit to employer's contention that the administrative law judge mischaracterized employer's response at the hearing when he found that it was a stipulation to the length of claimant's coal mine employment. As a stipulation of fact, once accepted by the administrative law judge, is binding upon the parties and upon the trier-of-fact, we affirm the administrative law judge's determination to credit claimant with 21.71 years of coal mine employment. *Nippes v. Florence Mining Co.*, 12 BLR 1-108 (1985)(McGranery, J., dissenting). Therefore, as claimant established the requisite years of underground coal mine employment, and the existence of a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal, by disproving the existence of pneumoconiosis, or establishing that the

[3] The Department of Labor Form CM-1025, listing the issues contested by the parties, indicates that claimant "worked at least 28 years in or around one or more coal mines," and that this issue was not contested by employer. Director's Exhibit 28.

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); Decision and Order at 9.

In determining whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Celko, Rasmussen, and Fino. Drs. Celko and Rasmussen diagnosed claimant with legal pneumoconiosis,[4] in the form of disabling obstructive lung disease and emphysema due to both coal mine dust exposure and smoking. Director's Exhibit 14; Claimant's Exhibit 1. Dr. Celko also diagnosed clinical pneumoconiosis, and Dr. Rasmussen agreed that claimant "likely" has clinical pneumoconiosis.[5] In contrast, Dr. Fino diagnosed claimant with disabling emphysema due entirely to smoking. Employer's Exhibit 1, 4.

Turning first to whether employer rebutted the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment, the administrative law judge accorded less weight to the opinion of Dr. Fino, and credited the opinions of Drs. Celko and Rasmussen that claimant's coal mine dust exposure contributed to his obstructive impairment and emphysema. Decision and Order at 9-10. The administrative law judge, therefore, found that employer failed to establish that claimant's impairment did not arise out of his coal mine employment.

Employer argues that the administrative law judge erred in his consideration of Dr. Fino's opinion. We disagree.

In evaluating Dr. Fino's opinion, the administrative law judge noted that, in explaining the basis for his determination that claimant's respiratory impairment did not arise out of his coal mine employment, Dr. Fino stated that neither of the x-rays he reviewed showed significant retention of dust within the lung tissue. The administrative law judge further noted that Dr. Fino cited, with approval, studies indicating that "as the

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[5] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

severity of pneumoconiosis increase[s], the severity of emphysema increase[s]."[6] Decision and Order at 6, *quoting* Employer's Exhibit 1 at 21.

The administrative law judge acted within his discretion in finding that Dr. Fino's reliance on the lack of clinical pneumoconiosis on x-ray was a reason that was "not necessarily significant or relevant in ruling out coal mine dust exposure as a causative factor" in claimant's impairment. *See* 65 Fed. Reg. 79,920, 79,939, 79,940 (Dec. 20, 2000); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, BLR (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Decision and Order at 9-10; Employer's Exhibit 1 at 20-21; Employer's Exhibit 4 at 16. Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Fino's opinion.

In contrast, the administrative law judge accorded greater weight to the opinions of Drs. Celko and Rasmussen, finding them thoroughly explained and well reasoned. Decision and Order at 10. Contrary to employer's contention, the administrative law judge did not act inconsistently when he discounted Dr. Celko's opinion as to the existence of clinical pneumoconiosis, as based on a discredited positive x-ray, but credited, as "thoroughly explained" and entitled to "considerable weight," his opinion that claimant's emphysema is due, in part, to coal mine dust exposure. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); Decision and Order at 10; Employer's Brief at 14-15. There is no indication that Dr. Celko relied on a positive x-ray reading for clinical pneumoconiosis to diagnose claimant with COPD and emphysema due, in part, to coal mine dust exposure. Nor was the

[6] Dr. Fino cited studies indicating that "the amount of clinical pneumoconiosis in the lungs determines the amount of emphysema," and opined that, because "the amount of pneumoconiosis correlates . . . with the amount of emphysema present," it is "very helpful to estimate the amount of clinical pneumoconiosis in order to assess the contribution to the clinical emphysema from coal mine dust inhalation." Employer's Exhibit 1 at 22. Dr. Fino stated that in "distinguish[ing] the effects of smoking from those of coal mine dust . . . the "key factor is finding an increased burden of coal dust within the lungs which correlates with more emphysema and more reduction in the FEV1." Employer's Exhibit 4 at 16. Dr. Fino added that while it is possible to have disabling legal pneumoconiosis without corresponding clinical pneumoconiosis, Employer's Exhibit 4 at 19, the medical literature supported the conclusion that "even if you had 1/0 x-rays you were not disabled." Employer's Exhibit 4 at 21.

administrative law judge required to find Dr. Rasmussen's opinion to be equivocal, because the doctor opined that it is not possible to distinguish the effects of coal mine dust and smoking on the lungs. Employer's Brief at 16; Claimant's Exhibit 1. Rather, the administrative law judge permissibly found that Dr. Rasmussen's statement, that coal mine dust and smoking can cause obstructive lung disease through similar mechanisms, was "fairly well-reasoned and complie[d] with the standards set forth in the Act and Regulations," and was therefore entitled to substantial weight. *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order at 9.

Having examined the documentation and reasoning of each physician's opinion, in light of the prevailing view of the medical community and scientific literature relied upon by the Department of Labor (DOL) in promulgating the revised regulations, the administrative law judge permissibly concluded that employer did not establish that claimant's impairment did not arise out of, or in connection with, coal mine employment. *See Obush*, 24 BLR at 1-125-26; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 10. Employer's assertions of error in the administrative law judge's determination to accord greater weight to the medical opinions of Drs. Celko and Rasmussen than to that of Dr. Fino amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge permissibly exercised his discretion in weighing the evidence, we affirm his finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of coal mine employment. *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Employer next argues that the administrative law judge erred in finding that employer did not establish rebuttal by disproving the existence of legal pneumoconiosis. 30 U.S.C. §921(c)(4); Employer's Brief at 13. Employer's argument lacks merit. Contrary to employer's contention, the administrative law judge permissibly concluded that the same reasons he gave for discounting Dr. Fino's opinion that claimant's impairment is unrelated to his coal mine employment also undercut Dr. Fino's opinion that claimant does not suffer from legal pneumoconiosis. *See Balsavage*, 295 F.3d at 396-97, 22 BLR at 2-396; *Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; Decision and Order at 24; Employer's Brief at 24-25. Because the opinion of Dr. Fino is the only opinion supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal by showing that claimant does not have pneumoconiosis. 30 U.S.C. §921(c)(4). Because we affirm the administrative law judge's findings that employer did not establish rebuttal of the Section 411(c)(4) presumption, we affirm the award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge