BRB No. 12-0197 BLA

POLLY BLOOMER (o/b/o JACK BLOOMER, deceased) [1]	)	
Claimant-Respondent	)	
v.	)	
DEBRA LYNN COALS, INCORPORATED	)	
	)	DATE ISSUED: 12/18/2012
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 of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Johanna F. Ellison and Tighe A. Estes (Ferreri & Fogle), Lexington, Kentucky, for employer.

Maia S. Fisher (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 appeals the Decision and Order (06-BLA-5914) of Administrative Law Judge Robert B. Rae awarding benefits on a claim filed pursuant to the provisions of the

[1] The miner died on May 8, 2007. Hearing Tr. at 9. Claimant, the miner's widow, is pursuing the claim on his behalf. Director's Exhibit 58.

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's subsequent claim filed on July 13, 2005.[2] Director's Exhibit 3.

The administrative law judge credited the miner with thirty years of coal mine employment,[3] pursuant to the parties' stipulation and the evidence of record, and 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 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, 124 Stat. 119 (2010) (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 claimant established that the miner had thirty years of qualifying coal mine employment. Additionally, the administrative law judge found that the new medical evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[2] This is the miner's second claim. The miner's prior claim, filed on March 28, 1985, was denied on July 19, 1989, because the miner did not establish any element of entitlement. Director's Exhibit 1.

[3] The miner's coal mine employment was in Kentucky. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

On appeal, employer challenges the administrative law judge's application of Section 411(c)(4) to this case. 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. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's arguments regarding the application of Section 411(c)(4).[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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially asserts that constitutional challenges to the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), of which the amendments are a part, may affect the viability of amended Section 411(c)(4). Subsequent to the briefing in this case, the United States Supreme Court upheld the constitutionality of the PPACA. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012). Thus, employer's arguments regarding the constitutionality of the PPACA are moot.

Employer raises no additional challenges to the administrative law judge's application of Section 411(c)(4) to this case, or his finding that, having established the requisite years of qualifying coal mine employment, and total disability, claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis, pursuant to Section 411(c)(4). Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Accordingly, we turn to employer's contentions regarding rebuttal of the Section 411(c)(4) presumption.

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that the miner's pulmonary or respiratory

[4] Employer does not challenge the administrative law judge's findings that the new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and, thus, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Nor does employer challenge the administrative law judge's finding that the miner had thirty years of qualifying coal mine employment, sufficient to satisfy the requirement of Section 411(c)(4). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). The administrative law judge found that employer did not establish rebuttal by either method.[5] Decision and Order at 16-17.

In determining whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Baker, Stoltzfus, Broudy, Dahhan, and Westerfield. Dr. Baker opined that the miner had legal pneumoconiosis,[6] in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, and that the miner's disabling respiratory impairment was due to coal mine dust exposure, smoking, and the presence of a lung mass. Director's Exhibit 11. Dr. Stoltzfus, the miner's treating physician, diagnosed chronic lung disease, due to the combined effects of coal mine dust, smoking, and lung cancer. Director's Exhibit 72. In contrast, Drs. Broudy, Dahhan, and Westerfield opined that the miner did not have legal pneumoconiosis, but suffered from a disabling respiratory impairment that was due to smoking, lung cancer, and the effects of radiation treatment.[7] Director's Exhibit 14; Employer's Exhibits 2, 4, 5, 6. The administrative law judge

[5] 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 16-17. Employer does not challenge this aspect of the administrative law judge's decision.

[6] "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).

[7] Dr. Broudy opined that the miner suffered from a very severe impairment, which was largely restrictive, but which included some obstruction. Dr. Broudy concluded that the restrictive portion of the miner's impairment was due to lung cancer, radiation therapy, and rheumatoid arthritis, and that the obstructive portion of the miner's impairment was due to smoking, with no contribution from coal mine dust. Employer's Exhibits 2, 5. Dr. Dahhan opined that the miner suffered from a severe, partially reversible obstructive ventilatory impairment, with no restriction. Dr. Dahhan opined that the miner's impairment resulted from his lengthy smoking habit, and was contributed to by lung cancer, radiation therapy, and rheumatoid arthritis, but that coal mine dust exposure played no role. Director's Exhibit 14; Employer's Exhibit 4 at 15-17. Dr. Westerfield opined that the miner did not suffer from any pulmonary or respiratory impairment causally related to coal mine dust exposure. Employer's Exhibit 6.

found that the opinions of employer's physicians, Drs. Broudy, Dahhan, and Westerfield, were not sufficiently reasoned to establish rebuttal. Decision and Order at 17-22, 24.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Broudy, Dahhan, and Westerfield did not establish rebuttal. Employer's Brief at 13-15. Moreover, employer argues that the administrative law judge erred in crediting the opinions of Drs. Baker and Stoltzfus. Employer's Brief at 10-12.

Contrary to employer's assertion, the administrative law judge provided valid reasons for discounting the opinions of Drs. Broudy, Dahhan, and Westerfield. The administrative law judge correctly noted that each of these physicians relied, in part, on the length of time since the miner left his coal mine employment to support their conclusions that only the miner's cigarette smoking, and his consequent lung cancer and radiation therapy, and not his coal mine dust exposure, could have caused his disabling respiratory impairment.[8] Decision and Order at 12-15. The administrative law judge, therefore, found that the opinions of Drs. Broudy, Dahhan, and Westerfield were inconsistent with the amended regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see A & E Coal Co. v. Adams*, 694 F.3d 798, BLR (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488, BLR (6th Cir. 2012); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); Decision and Order at 14-15. The administrative law judge, therefore, permissibly discounted the opinions of Drs. Broudy, Dahhan, and Westerfield.

[8] Dr. Broudy opined that that forty years of coal mine dust exposure is sufficient to cause pneumoconiosis in a susceptible individual, but stated that it was "far more likely" that the miner's smoking history had caused his impairment. Employer's Exhibit 5 at 16. Dr. Broudy concurred that the miner's lung cancer, radiation therapy, and arthritis were more likely to have caused the miner's impairment than his exposure to coal mine dust, particularly considering that the miner's coal dust exposure had ended twenty years before. Dr. Broudy clarified that any coal mine dust-related impairment would have ended when the miner's exposure ended, as it is fairly unusual for a dust-related impairment to progress after cessation of exposure. Employer's Exhibit 5 at 19. Dr. Dahhan opined that the miner's bronchitis was not due to coal mine dust exposure, because coal mine dust exposure causes industrial bronchitis, which ceases when exposure ceases. Employer's Exhibit 4 at 15. Dr. Westerfield opined that because the miner did not display symptoms until years after his coal mine dust exposure ceased, his impairment was not causally related to coal mine dust exposure. Employer's Exhibit 6 at 6.

Moreover, the administrative law judge permissibly questioned the opinions of Drs. Broudy, Dahhan, and Westerfield because they failed to adequately explain how they eliminated the miner's coal mine dust exposure as a source of his pulmonary impairment.[9] *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 12-13.

In sum, substantial evidence supports the administrative law judge's finding that employer's evidence is not sufficient to disprove the existence of pneumoconiosis, or to establish that the miner's disabling impairment did not arise out of, or in connection with, coal mine employment.[10] Decision and Order at 15-17. We, therefore, affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

[9] The administrative law judge found that none of the physicians discussed the significance of the fact that the miner stopped smoking at about the same time he stopped working in the mines, or that his coal dust exposure was slightly longer than his smoking history. Drs. Broudy and Dahhan noted that the miner had a thirty-two pack-year smoking history, ending in 1980 or 1982, and had a forty year coal mine employment history, ending in 1984. Director's Exhibit 14; Employer's Exhibits 2, 4, 5. Dr. Westerfield relied on the exposure histories provided in the medical reports he reviewed, including those of Drs. Broudy and Dahhan. Employer's Exhibit 6.

[10] Thus, we need not address employer's allegations of error regarding the administrative law judge's consideration of the medical opinions of Drs. Baker and Stoltzfus.

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