BRB No. 11-0197 BLA

RICHARD CRUSENBERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/18/2011
	)	
BLACK MOUNTAIN MINING COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Ann Marie Scarpino (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 (08-BLA-5394) of Administrative Law Judge Pamela Lakes Wood 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 subsequent claim filed on September 17, 2007.[1] Director's Exhibit 3. The administrative law judge credited claimant with at least twenty-two and one-half years of underground coal mine employment, finding "no basis for setting aside [employer's] stipulation." Decision and Order at 15. The administrative law judge found that the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See* 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 2007 claim on the merits.

In considering the merits of claimant's 2007 claim, the administrative law judge 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 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 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.SC. §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 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).

Applying amended Section 411(c)(4), the administrative law judge found that as claimant established at least fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant is entitled to invocation of 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, and, therefore, she found that

[1] Claimant's prior claim, filed on October 30, 1996, was finally denied on March 22, 2001, by Administrative Law Judge Daniel A. Sarno, Jr., because claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

employer failed to rebut this presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also asserts that the administrative law judge erred in evaluating the medical opinion evidence in finding that claimant established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's application of amended Section 411(c)(4). The Director also urges affirmance of the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), sufficient to establish a change in the applicable condition of entitlement, pursuant to 20 C.F.R.§725.309(d), and to invoke the amended Section 411(c)(4) presumption.[2]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends 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 at 4-12. 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) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June

[2] The administrative law judge's finding that claimant established at least twenty-two and one-half years of underground coal mine employment is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

13, 2011).[4] We, therefore, reject them here for the reasons set forth in that decision. *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, 24 BLR 2-385 (7th Cir. 2011).

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 23, 2010. As we have affirmed the administrative law judge's unchallenged finding that claimant established more than fifteen years of qualifying coal mine employment, we next address employer's challenge to the administrative law judge's finding of total disability, pursuant to Section 718.204(b)(2)(iv).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Employer asserts that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered four new medical opinions submitted by Drs. Hippensteel, Forehand, Fino, and Chennareddy. Dr. Hippensteel opined that, based on claimant's "best tests," claimant had "no more than [a] mild obstructive ventilatory impairment that is not sufficient from a respiratory standpoint to keep him from retuning to his previous job in the mines."[5] Director's Exhibit 28 at 10.

[4] Employer requests that the Board revisit its holdings in *Mathews*. Employer's Brief at 7. However, the Board has already reconsidered, and declined to disturb, its prior holdings. *See 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) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Therefore, employer's request is denied.

[5] Dr. Hippensteel also stated that claimant:

Dr. Forehand opined that claimant is unable to perform his usual coal mine employment, shoveling coal onto the belt, because it requires "100 Watts of work," and claimant's FEV1 of fifty-eight percent did not provide claimant with sufficient ventilatory capacity to perform 100 watts of work. Director's Exhibit 18. Dr. Fino opined that, "from a respiratory standpoint . . . [claimant] would not be able to return to his last job." Employer's Exhibit 1 at 10. Dr. Fino added, however, that with more aggressive bronchodilator therapy, he "suspect[ed] [claimant] could return to his last job from a respiratory standpoint." Employer's Exhibit 1 at 11. Dr. Chennareddy stated that he had been treating claimant for the last two years for his multiple medical problems, including diabetes, atrial fibrillation, chronic obstructive pulmonary disease (COPD), hypertension, osteoarthritis, and gastroesophageal reflux disease (GERD), and declared that claimant's "[f]unctional [c]apabilities are significantly limited secondary to his multiple medical problems. I strongly recommended [claimant] for [p]ermanent [d]isability." Claimant's Exhibit 6.

The administrative law judge found that Dr. Chennareddy's opinion could not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), because the physician combined both pulmonary and non-pulmonary conditions together in opining that claimant is totally disabled.[6] Decision and Order at 19. The administrative law judge accorded diminished probative value to the opinion of Dr. Hippensteel, finding it inadequately explained and not well-documented. Decision and Order at 19-20. Based upon the "well-reasoned and documented" opinions of Drs. Fino[7] and Forehand, the

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> . . . has had trouble giving consistent efforts on pulmonary function tests but on his *most reliable tests* he has shown evidence of reversibility of airflow obstruction and lung volume tests have shown he has no restrictive impairment that could relate to a diagnosis of pneumoconiosis which commonly causes a combination of restriction and obstruction.

Director's Exhibit 28 at 10 (emphasis added).

[6] The administrative law judge also found that Dr. Chennareddy's reference to claimant's "permanent disability," rather than his "total disability" was unclear as to its meaning. Decision and Order at 19 n.18. Employer asserts that it "agrees with the [administrative law judge's] decision to give no weight to Dr. Chennareddy's opinion concerning the issue of total disability." Employer's Brief at 12 n.3. Accordingly, the administrative law judge's treatment of Dr. Chennareddy's opinion is affirmed. *See Skrack*, 6 BLR at 1-711.

administrative law judge found that the new medical evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 21.

Employer contends that the administrative law judge erred in discounting the opinion of Dr. Hippensteel and in crediting the opinion of Dr. Forehand. Employer's contentions lack merit.

The administrative law judge found that Dr. Hippensteel's opinion was not well-documented because, although the doctor found that claimant has a mild, reversible obstructive ventilatory impairment, insufficient to keep him from returning to work, the physician based his opinion on the "best tests" and the "most reliable tests," without identifying which tests he considered to be the "best" and "most reliable." Decision and Order at 20. Employer argues that this was error, asserting that "[i]t is clear that Dr. Hippensteel was referring to the testing that was administered by himself and Dr. Fino, as that testing revealed reversibility of the claimant's obstruction." Employer's Brief at 13. Contrary to employer's argument, a review of Dr. Hippensteel's opinion reflects that he reviewed eight pulmonary function studies, including his own.[8] In addition, Dr. Hippensteel could not have relied on Dr. Fino's pulmonary function tests, as they had not yet been performed at the time Dr. Hippensteel offered his opinion.[9] Thus, the administrative law judge reasonably found that Dr. Hippensteel's opinion is not well-documented because Dr. Hippensteel did not identify the specific tests upon which he based his opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-

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[7] The administrative law judge found that, while Dr. Fino speculated that with aggressive medication, claimant could perform his usual coal mine work, Dr. Fino's opinion ultimately stood for the proposition that, based on his existing condition, claimant is totally disabled from a respiratory impairment. Decision and Order at 21. As employer does not challenge the administrative law judge's characterization of Dr. Fino's opinion as one supporting a finding of total respiratory disability, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[8] The eight pulmonary function studies discussed by Dr. Hippensteel in his 2008 report, in which he opined that claimant is not totally disabled, are dated April 17, 2008; October 15, 2007; January 27, 1997; March 18, 1997; May 27, 1999; January 18, 2000; January 11, 2001; and January 28, 2008. Director's Exhibit 28.

[9] Dr. Hippensteel's report, in which he discussed the validity and reliability of the various pulmonary function studies, and opined that claimant is not totally disabled, was prepared in 2008. Director's Exhibit 28. Dr. Fino did not perform his pulmonary function studies until 2009. Employer's Exhibit 1.

323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Moreover, contrary to employer's additional argument, the administrative law judge further permissibly discounted Dr. Hippensteel's opinion because he declined to address the pulmonary function study values obtained by Dr. Forehand on the grounds that they are invalid, a conclusion that is contrary to the to the administrative law judge's own finding.[10] *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Director's Exhibit 28 at 4. As employer raises no other arguments concerning the administrative law judge's treatment of Dr. Hippensteel's opinion, the administrative law judge's finding that Dr. Hippensteel's opinion is not well-documented is affirmed.

There is also no merit to employer's contention that the administrative law judge erred in crediting Dr. Forehand's opinion, that claimant is totally disabled from performing his usual coal mine work from a respiratory standpoint. Employer specifically asserts that Dr. Forehand's opinion is not well-documented because "the doctor did not cite to any studies" in support of his opinion.[11] Employer's Brief at 12. Contrary to employer's argument, in concluding that Dr. Forehand's opinion is "better-reasoned and better-documented" than the other opinions of record, the administrative law judge found that Dr. Forehand's opinion is based on an accurate coal mine employment history of twenty-two and one-half years, the physical demands of claimant's usual coal mine employment as a belt man, and the results of claimant's objective testing. Decision and Order at 19; Director's Exhibit 18. The administrative law judge acknowledged that Dr. Forehand's objective test results are not technically

[10] The administrative law judge noted that Dr. Hippensteel declined to address Dr. Forehand's pulmonary function testing because it had been invalidated by Dr. Long, who is a Board-certified internist with a history of experience in pulmonary medicine. Decision and Order at 16-17, 20; Director's Exhibits 19, 23. However, the administrative law judge further noted that, by contrast, Dr. Forehand's test results had been validated by Dr. Michos, a Board-certified pulmonologist, whom the administrative law judge found "at least equally-qualified" as Dr. Long. Decision and Order at 16-17. Thus, the administrative law judge permissibly declined to find Dr. Forehand's pulmonary function study results to be of diminished probative value. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993); Decision and Order at 17. Moreover, employer does not challenge this finding on appeal.

[11] Dr. Forehand specifically opined that "[s]hoveling the belt requires 100 Watts of work, and an FEV1 of 58% of normal in dusty conditions cannot provide the ventilatory capacity to achieve 100 Watts of work." Director's Exhibit 18 at 1.

qualifying under the regulations.[12] Decision and Order at 8-9, 19. However, the administrative law judge permissibly concluded that Dr. Forehand had persuasively explained that claimant's residual ventilatory capacity was nonetheless insufficient to allow him to perform the physical demands of shoveling coal as a belt man, under a roof less than fifty inches in height. *See Hicks*, 138 F.3d at 532-33, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; s*ee also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); Decision and Order at 19; Director's Exhibit 18. Employer raises no further arguments regarding the administrative law judge's evaluation of Dr. Forehand's opinion. We, therefore, affirm the administrative law judge's determination to credit Dr. Forehand's opinion.

Because it is supported by substantial evidence, the administrative law judge's finding that the new medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), is affirmed. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 21. We further affirm, as supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence, when weighed together with the other relevant evidence of record, established the existence of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 21.

In light of our affirmance of the administrative law judge's finding that the new medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. 718.204(b)(2), we also affirm the administrative law judge's additional determinations that claimant established a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309, and invocation of the rebuttable presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4). Moreover, we affirm, as unchallenged, the administrative law judge's finding that employer failed to meet its burden to establish rebuttal of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24-27. Consequently, we affirm the administrative law judge's award of benefits.

[12] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge