BRB No. 11-0843 BLA

ROLLAND E. GOODIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANTELOPE COAL COMPANY/RIO TINTO ENERGY AMERICA	)	DATE ISSUED: 09/27/2012
	)	
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 Granting Living Miner's Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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 Granting Living Miner's Benefits (2008-BLA-05435) of Administrative Law Judge Richard K. Malamphy, rendered on a claim filed on May 14, 2007, 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). The administrative law judge credited claimant with at least twenty-five years of coal mine employment, and determined that claimant worked over fifteen years on the surface in conditions that were substantially similar to those in an underground mine. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer failed to establish rebuttal of the presumption by proving that claimant did not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case, arguing that retroactive application thereof constitutes a denial of due process and an unconstitutional taking of private property, and that the presumption does not apply in cases where an employer is liable for benefits.[2] Employer also contends that the administrative law judge erred in finding that claimant's work conditions were substantially similar to those in an underground mine, and that claimant was entitled to invocation of the amended Section 411(c)(4) presumption. Further, employer challenges the administrative law judge's weighing of the evidence in finding that rebuttal was not established, and asserts that this case must be remanded for claimant to receive a complete pulmonary evaluation, as the quality of the x-ray obtained

[1] Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to this living miner's claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010).

[2] Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the PPACA, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

by Dr. Bodoni was poor. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's challenges to the applicability of amended Section 411(c)(4). The Director submits that he fulfilled his statutory obligation to provide claimant with a complete pulmonary evaluation, and that the administrative law judge properly evaluated the evidence in finding that claimant established over fifteen years of qualifying coal mine employment. The Director declines to respond further regarding the remainder of employer's arguments, unless specifically requested to do so by the Board.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 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).

Initially, we reject employer's contention that retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2010), we also reject employer's argument that the provisions at amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. *See also Usury v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim.

[3] The administrative law judge's finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] As claimant's last coal mine employment was in Wyoming, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 2, 4.

Employer next argues that, absent a regulatory standard of proof for evaluating the comparability of claimant's surface mining conditions with those in an underground mine, the administrative law judge's reliance on his "experience with the testimony of underground coal miners" imposed an improper standard, in violation 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). Employer's Brief at 34. Further, employer asserts that claimant "was not exposed to constant dust, that unlike underground mines he was shielded from most dust in cabs of equipment, that he was allowed to smoke cigarettes, and that while there was some dust, it was not the degree of dust described to be present in underground coal mines." Employer's Brief at 35. Thus, employer maintains that this case must be remanded for the administrative law judge to provide a "meaningful analysis" regarding comparability of conditions. *Id.* We disagree.

In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is only required to proffer sufficient evidence of dust exposure in his or her work environment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). A claimant's unrebutted testimony may support such a finding of similarity, *Summers*, 272 F.3d at 479, 22 BLR at 2-275, and his burden of proof to establish comparability is met where he produces "sufficient evidence of the surface mining conditions under which he worked." *Leachman*, 855 F.2d at 512-13; *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4, 1-7 (1987)(miner need not demonstrate that surface mine conditions are similar to the "most dusty area of an underground mine").

In the present case, the administrative law judge determined that claimant's more than twenty-five years of surface coal mine employment included "three to five years in a warehouse, nine years as an oiler, and the remainder [] in strip mines as an equipment operator, primarily driving a scraper, water truck, or blader." Decision and Order at 3-4, 17; *see* Hearing Transcript (H. Tr.) at 29-31, 49-50, 54. Claimant used the scraper to clean the top coal; he hooked hoses up to the water trucks from pumps in the bottom of the pit, and then put water "on the roads and wherever it was needed" in order to "try to keep the dust down;" and he used the blader on the roads, where the coal dust was pulverized into a fine powder. Decision and Order at 3; H. Tr. at 30-32. Claimant also hauled coal from the shovel to the hopper, and hauled overburden from the shovel to the dump. Decision and Order at 3; H. Tr. at 26. Additionally, claimant operated a bobcat or tractor with a front end loader to clean up coal that had spilled out of the hopper. Decision and Order at 3-4, 18; H. Tr. at 38-39. Claimant testified that working conditions at the mine sites were consistently dusty, as the trucks were "always kicking

up" the pulverized dust, and the drag line area was narrow and enclosed on both sides, "[s]o when you're going through there, you're always having that dust kick up and just hang in the air." Decision and Order at 4; H. Tr. at 34-35. On clear days without much wind, "you just see a haze hanging over in that area;" on hot days, the water evaporates too quickly to keep the dust down, and sometimes it "gets so bad that they have to close runs down, they can't see enough to . . . get the trucks . . . in and out." Decision and Order at 4, 17-18; H. Tr. at 35-36. On a windy day, "it's like a sandblaster sometimes," blasting sand or coal. Decision and Order at 4, 18; H. Tr. at 39. Claimant testified that he was regularly exposed to dust as an oiler, since he worked on-site servicing equipment in the pit, where active mining was occuring. Decision and Order at 3-4, 18; H. Tr. at 29, 37-38. The administrative law judge determined that, as an equipment operator, claimant also was regularly exposed to dust, despite the fact that the cabs of his equipment were enclosed and contained air filtration systems, as "a fine black powder" still got into the cabs and coated the surfaces. Decision and Order at 4, 18; H. Tr. at 54-56. Further, claimant frequently exited his vehicles to fill his water truck and perform other duties. Decision and Order at 18; H. Tr. at 32-33, 35-37.

The administrative law judge found that claimant was a credible witness and, based on his experience with the testimony of underground miners, concluded that claimant's uncontroverted description of the dusty working conditions in the strip mines was substantially similar to that of underground coal miners, satisfying the comparability requirement for invocation of the presumption at amended Section 411(c)(4).[5] Decision and Order at 18. Contrary to employer's argument, the administrative law judge applied the proper standard in evaluating whether claimant's working conditions were substantially similar to those of an underground miner, and we reject employer's assertion that comparability requires exposure to "constant dust." *See Leachman*, 855 F.2d at 512; *Summers*, 272 F.3d at 479, 22 BLR at 2-275; Employer's Brief at 35-36. We also reject employer's argument that the protection afforded by enclosed cabs with air filtration systems and the vagaries of the weather conditions militate against the administrative law judge's finding of comparability.[6] The administrative law judge specifically considered these factors, and rationally determined that claimant's work duties entailed regular exposure to coal dust "even when inside the truck." Decision and

[5] The administrative law judge excluded consideration of claimant's warehouse work from this analysis, because his work "as an oiler and equipment operator adds up to more than fifteen years," i.e., the time period required for invocation of the presumption under amended Section 411(c)(4). 30 U.S.C. §921(c)(4); Decision and Order at 18.

[6] Employer's argument that comparability was not established because claimant "was allowed to smoke cigarettes" is belied by claimant's testimony that "he couldn't smoke underground in the mine or in the cab of the truck." *See* Employer's Brief at 35; Decision and Order at 5; H. Tr. at 41, 48-49.

Order at 18. As claimant's testimony provides sufficient specificity regarding dust exposure levels to support the administrative law judge's conclusions, we affirm the administrative law judge's finding of at least fifteen years of qualifying coal mine employment. *See Leachman*, 855 F.2d at 512; *Summers*, 272 F.3d at 473, 22 BLR at 2-265; *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61 (2012); *McGinnis*, 10 BLR at 1-7. Consequently, we affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis afforded by amended Section 411(c)(4).

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Specifically, employer maintains that the administrative law judge failed to apply the proper legal standard on rebuttal; failed to address Dr. Meyer's interpretation of a September 7, 2010 CT scan[7] relevant to the issue of clinical pneumoconiosis; and selectively analyzed the medical opinion evidence relevant to rebuttal. Employer's Brief at 39-43.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. The administrative law judge correctly acknowledged that rebuttal requires employer to affirmatively establish that claimant does not suffer from pneumoconiosis, or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9; Decision and Order at 23. After finding that the x-ray evidence as a whole was in equipoise, since equally-qualified readers provided both negative and positive interpretations for pneumoconiosis, Decision and Order at 24-25, the administrative law judge determined that a July 7, 2008 CT scan was interpreted by Dr. Wiot as showing mild emphysema, mild irregular bibasilar peripheral interstitial fibrosis consistent with idiopathic pulmonary fibrosis unrelated to coal dust exposure, and no evidence of pneumoconiosis. Decision and Order at 26; Employer's Exhibit 6. However, a September 7, 2010 CT scan ordered by Dr. Rose was interpreted by Dr. Lynch as showing moderate emphysema related to coal dust exposure and/or smoking; a radiologically indeterminate left midlung nodule; and infiltrative lung disease, characterized primarily by groundglass abnormality with mild centrilobular nodularity, that did not exhibit typical features of pneumoconiosis but "certainly could be" secondary to coal dust exposure or smoking. Decision and Order at 26; Claimant's Exhibit 10. The administrative law judge then accurately reviewed the medical opinions of record and

[7] Dr. Meyer interpreted the September 7, 2010 CT scan as showing no findings consistent with pneumoconiosis; rather, the scan revealed moderate centrilobular emphysema, and mild nonspecific peripheral predominant pulmonary fibrosis of a pattern atypical of pneumoconiosis. Employer's Exhibit 12.

determined that the physicians agreed that the presentation of claimant's lung disease on x-ray and CT scan is not typical of pneumoconiosis. Decision and Order at 5-14, 30. However, as the physicians also agreed that claimant has a respiratory or pulmonary impairment, the administrative law judge evaluated the extent to which the conflicting opinions regarding the cause of claimant's impairment were well-reasoned and adequately supported.[8] Decision and Order at 27-30. The administrative law judge properly accorded little weight to Dr. Bodoni's diagnosis of disabling pneumoconiosis, to the extent that it was based on his positive x-ray interpretation of a film that better-qualified doctors classified as either quality 3 or unreadable, and because Dr. Bodoni otherwise provided a limited explanation of how the testing he performed supported his diagnosis.[9] Decision and Order at 25, 28: Director's Exhibit 15; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also permissibly accorded little weight to the opinions of Drs. Repsher[10] and Farney,[11] that claimant does not have

[8] We reject employer's argument that the administrative law judge erred in failing to weigh the treatment notes of Dr. Smith under 20 C.F.R. §718.104(d). Employer's Brief at 40-41. The administrative law judge accurately summarized Dr. Smith's treatment records and acknowledged that they did not include a diagnosis of pneumoconiosis, and that the physician indicated that the radiographic evidence is not typical of pneumoconiosis. Decision and Order at 13-14, 28; Claimant's Exhibit 9. However, as Dr. Smith diagnosed chronic obstructive pulmonary disease (COPD), pulmonary fibrosis, and emphysema with moderately severe obstruction, but did not address the cause of these conditions, his treatment notes are insufficient to meet employer's burden on rebuttal. Decision and Order at 28; *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

[9] We reject employer's assertion that the poor quality of Dr. Bodoni's x-ray demonstrates that claimant was not provided with a complete pulmonary evaluation, necessitating a remand for further evidentiary development and a transfer of liability to the Black Lung Disability Trust Fund. Employer's Brief at 37-38. As the Director, Office of Workers' Compensation Programs (the Director), correctly notes, because Dr. Bodoni obtained all necessary testing and addressed the essential elements of entitlement, the Director's statutory obligation to provide claimant with a complete pulmonary evaluation is discharged, as the Director is required to provide each miner with a complete evaluation, not a dispositive one. *See* 30 U.S.C. §923(b), 20 C.F.R. §725.406(a); *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129 (2009)(en banc).

[10] Dr. Repsher examined claimant on November 15, 2007, and diagnosed chronic pulmonary obstructive disease (COPD), centrilobular emphysema, and severe chronic bronchitis due to smoking, with no evidence of medical or legal pneumoconiosis. Decision and Order at 9-11, 27; Employer's Exhibits 3, 8.

pneumoconiosis and that his respiratory impairment is due to smoking, because these physicians did not explain why coal dust exposure was not a contributing or aggravating cause of claimant's condition. Decision and Order at 29-30; *see* 20 C.F.R. §718.201(b); *Clark*, 12 BLR at 1-155. Moreover, both doctors relied on statistical probability to exclude coal dust exposure as a cause of claimant's chronic obstructive pulmonary disease (COPD) and emphysema, without explaining why claimant's specific condition did not represent an exception, and both doctors expressed views that were inconsistent with the conclusions contained in the medical literature and scientific studies relied upon by the Department of Labor (DOL) in amending the regulations. *See* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,939, 79,940-45 (Dec. 20, 2000); *Gunderson v. U.S. Dept. of Labor*, 601 F.3d 1013, 24 BLR 2-297 (10th Cir. 2010); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009); Decision and Order at 29. Additionally, Dr. Farney excluded a diagnosis of legal pneumoconiosis based on the comparatively lower risks associated with working in a surface mine, contrary to the administrative law judge's finding that claimant's coal dust exposure was substantially similar to that of an underground miner. *See* Decision and Order at 17-18, 29; Employer's Exhibit 9 at 29-30. The administrative law judge determined that the remaining opinion of Dr. Rose,[12] that coal dust exposure was a contributing cause of claimant's disabling centrilobular emphysema and interstitial fibrosis, did not support rebuttal of the amended Section 411(c)(4) presumption. Decision and Order at 6-9, 28, 30.

The administrative law judge concluded that the lack of typical radiographic and CT scan evidence of pneumoconiosis was not dispositive, as DOL recognized in the preamble to the revised regulations that COPD and emphysema may be attributable to coal dust exposure absent clinical pneumoconiosis. Decision and Order at 29-30; 65 Fed. Reg. at 79,939. Thus, the administrative law judge's failure to address the CT scan interpretation of Dr. Meyer constitutes harmless error, as the administrative law judge found that employer failed to meet its burden of showing that claimant does not have legal pneumoconiosis, or that his respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. *See Larioni v. Director, OWCP*, 6

---

[11] Dr. Farney examined claimant on July 7, 2008, and diagnosed chronic bronchitis and COPD caused by smoking, with evidence of emphysema secondary to smoking. Decision and Order at 11-13, 27; Employer's Exhibits 5, 9.

[12] Dr. Rose examined claimant on October 20, 2010, and diagnosed both medical and legal pneumoconiosis. She explained that, while claimant's x-ray findings "are not the classic upper lung rounded opacities of coal workers' pneumoconiosis," the findings of diffuse interstitial fibrosis and emphysema were attributable in part to coal dust exposure. Dr. Rose concluded that claimant's disabling lung disease was multifactorial, caused by coal dust exposure, uranium mining exposure, and smoking. Decision and Order at 7-8, 27; Claimant's Exhibits 8 at 8-9, 11 at 2-4.

BLR 1-1276 (1984); *see also Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his findings that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption and that claimant is entitled to benefits.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge