BRB No. 11-0260 BLA

BASIL HOLBROOK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 12/21/2011
	)	
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 Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West 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 (2009-BLA-05048) of Administrative Law Judge Pamela J. Lakes, with respect to a subsequent claim filed on July 30, 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).[1] After crediting claimant with thirty-eight years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge initially determined that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv). Relying on amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge then determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis and that employer did not rebut the presumption, as the preponderance of the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing in its initial brief and reply brief, that the administrative law judge improperly substituted her opinion for that of the physicians when determining that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv). Employer also asserts that the administrative law judge's determination, that it did not rebut the presumption at amended Section 411(c)(4), is not supported by substantial evidence and is inconsistent with applicable law. Regarding the application of amended Section 411(c)(4), employer further contends that the recent amendments to the Act are not severable if all or portions of the Patient Protection and

[1] Claimant filed his initial claim on August 1, 1985, which was denied by Administrative Law Judge Robert M. Glennon on August 23, 1988, because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1. The Board vacated and remanded Judge Glennon's denial of benefits for reconsideration of the medical evidence as to pneumoconiosis. *Holbrook v. Westmoreland Coal Co.*, BRB No. 88-2956 BLA (Apr. 30, 1991)(unpub.). On July 17, 1992, Judge Glennon issued a Decision and Order on Remand again denying benefits. Director's Exhibit 1. The Board affirmed his denial. *Holbrook v. Westmoreland Coal Co.*, BRB No. 92-2274 BLA (Oct. 31, 1994)(unpub.). Claimant requested modification on November 14, 1994, but Administrative Law Judge Gerald Tierney denied benefits on September 19, 1996, because claimant had not established the existence of pneumoconiosis and, therefore, had not established a basis for modification. Director's Exhibit 1. No further action was taken by claimant until he filed the current subsequent claim.

[2] In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Affordable Care Act (PPACA) are found to be unconstitutional. Employer states that retroactive application of the recent amendments is unconstitutional, as it denies employer due process and constitutes a taking of private property. Employer also argues that the provisions affected by the amendments do not apply to responsible operators and applying the amendments to award benefits is premature, as the Department of Labor (DOL) has not promulgated regulations to implement them.

Claimant responds, stating that the administrative law judge properly applied amended Section 411(c)(4) and urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), asserts that, because the administrative law judge permissibly weighed the evidence at 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), (c), the award of benefits should be affirmed. The Director further alleges that, in light of the administrative law judge's finding that claimant established the requisite elements of entitlement, the Board need not address employer's arguments concerning application of the presumption at Section 411(c)(4), but that if the Board reaches these arguments, it should reject them.[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).

I. 20 C.F.R. §718.204(b)(2)

A. The Administrative Law Judge's Findings

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered whether the pulmonary function study (PFS) evidence was sufficient to establish total disability. Decision and Order at 16. The record contains five newly submitted PFSs, all of which were qualifying. Director's Exhibit 11; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 5 The administrative law judge found that Dr. Agarwal's April 10, 2008 PFS

[3] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibits 4, 7. 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 (1989)(*en banc*).

complied with the quality standards, as Drs. Hippensteel and Michos stated that it was valid. Decision and Order at 15; *see* Director's Exhibits 11, 12; Employer's Exhibit 7 at 19. The administrative law judge also stated that he "accept[ed] the validity of the November 7, 2008 test" by Dr. Baker, despite the comments by Drs. Hippensteel and Castle, that the PFS was invalid, because the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(ii) permit only one rebuttal per PFS. Decision and Order at 15; Claimant's Exhibit 1; Employer's Exhibits 5, 7 at 12. The administrative law judge also found that the April 16, 2009 study performed at Stone Mountain Health Services was valid, despite Dr. Hippensteel's testimony to the contrary, as Dr. Hippensteel "did not provide a more definitive statement as to why it should be entitled to less weight." Decision and Order at 16; Claimant's Exhibit 2. The administrative law judge accorded little weight to the two qualifying PFSs performed by Drs. Hippensteel and Castle on August 26, 2008 and March 24, 2009, respectively, as they considered them invalid and no other physician validated them. Decision and Order at 16; Employer's Exhibits 2, 5. Based upon her consideration of all of the newly submitted PFSs, the administrative law judge concluded, "the testing on the whole clearly suggests a pattern of severe respiratory impairment" and supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 16.

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the opinions of Drs. Agarwal and Baker, that claimant is totally disabled from a respiratory standpoint, were consistent with the qualifying PFS results.[5] Decision and Order at 17; *see* Director's Exhibit 11; Claimant's Exhibit 1. In contrast, the administrative law judge found that the contrary opinions of Drs. Hippensteel and Castle were equivocal. Decision and Order at 17; Employer's Exhibits 2, 5. Relying on the opinions of Drs. Agarwal and Baker, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 18.

The administrative law judge also considered the records of claimant's treating pulmonologist, Dr. Robinette, as "other evidence instructive on the issue of total disability." Decision and Order at 18. The administrative law judge stated that these records "favor[ed] a finding of total disability, based on his own pulmonary function tests" and a record of claimant's respiratory decline. *Id*. The administrative law judge also referenced claimant's need for supplemental oxygen as a factor suggesting total disability from a respiratory standpoint. *Id*. at 19.

[5] The administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii), as none of the blood gas studies was qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure in the record. Decision and Order at 16-17.

Based on a consideration of all of the newly submitted evidence, and an evaluation of the exertional requirements of claimant's last coal mine employment, which the administrative law judge determined required moderate to heavy manual labor, the administrative law judge concluded that claimant established that he is totally disabled from a respiratory standpoint at 20 C.F.R. §718.204(b)(2). Decision and Order at 19.

B. Arguments on Appeal

Employer contends that Drs. Agarwal, Baker, and Robinette, based their findings of total disability on claimant's PFS results, without assessing whether the studies were valid. Employer further asserts that the administrative law judge erred in finding three of the PFSs to be valid, despite the absence of a detailed or well-reasoned medical opinion on which to rely. Employer argues that Dr. Renn's invalidation of Dr. Agarwal's study, as supported by the opinions of Drs. Hippensteel and Castle, should be credited over the cursory opinion of Dr. Michos, who found the study to be valid. Similarly, employer alleges that the administrative law judge erred in concluding that the PFSs, as a whole, were sufficient to establish a totally disabling respiratory impairment. Employer contends that the administrative law judge erred in summarily dismissing the concerns of Drs. Hippensteel and Castle, regarding claimant's inability to give maximal effort and the lack of reproducibility of the results. In addition, employer alleges that the administrative law judge exceeded her role as fact-finder by reaching her own conclusion as to whether the PFSs met the technical requirements set forth in the regulations.

Employer also asserts that the administrative law judge erred in finding that the medical opinion evidence supported a finding of total disability, as the opinions of Drs. Agarwal and Baker were not reasoned or documented. Employer argues that Dr. Agarwal, unlike Drs. Hippensteel and Castle, did not review the lung volume testing results. Employer maintains that the administrative law judge improperly substituted her opinion for that of the medical experts in finding that the lung volume studies were not important or useful in assessing claimant's respiratory impairment, because they are not required by the DOL for a complete pulmonary evaluation. Employer further states that Dr. Agarwal based his opinion on the qualifying PFS that he performed, but never indicated whether he believed the study was valid.

Employer further contends that, like Dr. Agarwal, Dr. Baker did not indicate whether the PFS that he administered was valid and did not refute the assessments by Drs. Hippensteel and Castle, that the study was invalid. Employer argues that because Dr. Baker also did not consider the lung volume studies, which Dr. Hippensteel opined were relevant, the administrative law judge must reconsider whether Dr. Baker's opinion is reasoned and documented. Further, contrary to the administrative law judge's determination, employer asserts that the opinions of Drs. Hippensteel and Castle are not equivocal or speculative. Rather, employer maintains that they agreed that claimant's

lung volume studies and blood gas studies did not support a finding of a respiratory impairment and that the PFSs were unreliable in evaluating whether claimant has a totally disabling respiratory impairment.

Employer's contentions are without merit. Regarding the PFS performed by Dr. Agarwal on April 10, 2008, the administrative law judge permissibly rejected Dr. Renn's invalidation of this study, based on the standards promulgated by the American Thoracic Society, as the DOL has not adopted these standards. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); Decision and Order at 15. Thus, the administrative law judge rationally concluded that this study was valid, based on Dr. Michos's report and Dr. Hippensteel concession that it satisfied the regulatory requirements. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); Director's Exhibit 12; Employer's Exhibit 7 at 19; Decision and Order at 15.

The administrative law judge also acted within her discretion in crediting the qualifying PFS performed at Stone Mountain Health Services on April 16, 2009. The administrative law judge permissibly rejected Dr. Hippensteel's opinion, that this study was invalid, as Dr. Hippensteel did not adequately explain his conclusion. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; Decision and Order at 16. In addition, the administrative law judge rationally found that the PFSs obtained by Drs. Hippensteel and Castle were entitled to little weight, as they were not validated by any physician and were treated as invalid by Drs. Hippensteel and Castle. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 16. Consequently, we affirm the administrative law judge's determination that total disability was established at 20 C.F.R. §718.204(b)(2)(i).[6]

[6] The administrative law judge also relied on the pulmonary function study performed by Dr. Baker, which Drs. Hippensteel and Castle indicated was invalid. While the administrative law judge stated that she considered the opinions of Drs. Hippensteel and Castle, she did not specifically explain why she apparently discounted their opinions in concluding that the test provided useful information. *See* Decision and Order at 16. Any error is harmless, however, since the administrative law judge properly credited the pulmonary function studies obtained by Dr. Agarwal and Stone Mountain Health Services. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278. In addition, employer's contention, that Dr. Baker did not validate the results of the pulmonary function study he performed, lacks merit, as Dr. Baker's signature on the form reporting the results indicates that he found the results to be valid. *See Castle v. Eastern Associated Coal Co.*, 12 BLR 1-105 (1988); Claimant's Exhibit 1.

We also affirm the administrative law judge's finding, at 20 C.F.R. §718.204(b)(2)(iv), that the medical opinion evidence supported a determination that claimant is totally disabled from a respiratory impairment. The administrative law judge permissibly credited the opinions of Drs. Agarwal and Baker, that claimant was totally disabled, because they were consistent with the PFS evidence. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 19. Additionally, the administrative law judge acted within her discretion in finding that the opinions of Drs. Hippensteel and Castle did not outweigh the evidence establishing the presence of a totally disabling impairment, as both physicians indicated that they could not accurately measure claimant's lung function by the PFSs and Dr. Hippensteel did not explain how normal lung volumes contradict a finding of total disability under the regulatory criteria set forth in 20 C.F.R. §718.204(b)(2)(i).[7] *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); Decision and Order at 19. Consequently, we affirm the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2).[8]

II. Rebuttal of the Amended Section 411(c)(4) Presumption

A. The Administrative Law Judge's Findings

Based on the administrative law judge's determination that claimant established that he has a totally disabling respiratory impairment, and more than fifteen years of

[7] Employer also cites Dr. Williams's opinion as containing an unreasoned and undocumented diagnosis of total disability. Dr. Williams treated claimant between March 2005 and April 2009. Claimant's Exhibit 4. He noted that claimant had respiratory symptoms and a history consistent with pneumoconiosis and listed chronic obstructive pulmonary disease as a diagnosis. *Id*. The administrative law judge summarized Dr. Williams's treatment records in her discussion of the newly submitted medical evidence, but did not weigh this evidence under 20 C.F.R. §718.204(b)(2). *See* Decision and Order at 10-11. Error, if any, in the administrative law judge's consideration of Dr. Williams's opinion is harmless, as she did not rely on it to support her finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8] Based on our affirmance of this finding, we affirm the administrative law judge's finding of a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See* Decision and Order at 23.

qualifying coal mine employment, she found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4). Decision and Order at 13, 19. The administrative law judge then considered whether employer rebutted the presumption by proving that claimant does not have pneumoconiosis or is not totally disabled by it. *Id*. at 19. The administrative law judge determined that the x-ray evidence "preponderates against a finding of clinical pneumoconiosis," pursuant to 20 C.F.R. §718.202(a)(1). *Id*. at 20. The administrative law judge further found, however, that the medical opinions of Drs. Agarwal and Baker, as supported by Dr. Robinette's opinion, were sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 21. The administrative law judge also stated, "although Drs. Castle and Hippensteel did not find legal pneumoconiosis, their opinions are insufficient to rebut the existence of legal pneumoconiosis." *Id*.

At 20 C.F.R. §718.204(c), the administrative law judge reiterated that the preponderance of the evidence established that claimant suffers from legal pneumoconiosis, as Drs. Agarwal and Baker both found a connection between claimant's respiratory impairment and his previous coal mine employment, and claimant's treating physician, Dr. Robinette, agreed with that assessment. Decision and Order at 22. The administrative law judge noted that Drs. Hippensteel and Castle did not mention claimant's COPD, despite "an extensive treatment history . . . documented in the record." *Id*. at 23. The administrative law judge concluded that, because the medical evidence was sufficient to establish that claimant's disabling respiratory impairment was due, in part, to coal dust exposure, the fact that Drs. Hippensteel and Castle did not consider the existence or origin of claimant's COPD, "ultimately makes their opinions deficient and insufficient to rebut the opinions of Drs. Agarwal and Baker that [c]laimant's disabling lung disease was significantly related to his coal mine dust exposure." *Id*.

B. Arguments on Appeal

Employer contends that amended Section 411(c)(4) is unconstitutional and that the recent court decisions striking down the Patient Protection and Affordable Care Act (PPACA) preclude the application of amended Section 411(c)(4). Employer asserts, in the alternative, that the administrative law judge erred in finding that employer failed to rebut the presumption. We reject employer's allegations.

As employer concedes, the question of the constitutionality of the PPACA and the severability of its provisions has been presented to, but not finally resolved by, the federal courts. Accordingly, we decline to reach the issue at this time. *See Andrews v. Petroleum Helicopters, Inc.*, 16 BRBS 160, 162 (1982). The remainder of employer's constitutional arguments are nearly identical to those that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-197-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed* No. 11-1620 (4th Cir.

June 13, 2011). Therefore, we reject them in this case for the reasons set forth in that decision. *Id*. at 1-197-200; *see also Stacy v. Olga Coal Co*., 24 BLR 1-207, 1-214 (2010), *aff'd sub nom. West Virginia CWP Fund v. Stacy*, F.3d , BLR , 2011 WL 6062116 (4th Cir. Dec. 7, 2011). We also reject employer's allegation that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator, as the courts have consistently ruled that Section 411(c)(4), including the language pertaining to rebuttal, applies to operators, despite the reference to "the Secretary." *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1975); *Keene v. Consolidation Coal Co*., 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

Further, there is no merit to employer's claim that, because the DOL has not promulgated regulations implementing the recent amendments to the Act, there is no guidance concerning the proper rebuttal standard. Courts and the Board have held that the party opposing entitlement can rebut the presumption by proving either that the miner does not or did not have pneumoconiosis, or that the miner's impairment did not arise out of, or in connection with, coal mine employment. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *DeFore v. Alabama By-Products*, 12 BLR 1-27 (1988); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir. Aug. 29, 1989)(unpub.); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987).

Employer's allegations of error regarding the administrative law judge's determination that the evidence is insufficient to establish that claimant does not have legal pneumoconiosis, and is not totally disabled by it, are also without merit. Contrary to employer's contention, the administrative law judge did not presume the existence of legal pneumoconiosis. Rather, the administrative law judge acted within her discretion in finding that the opinions in which Drs. Agarwal and Baker stated that claimant is totally disabled by a respiratory impairment related to coal dust exposure, outweighed the contrary opinions of Drs. Hippensteel and Castle. *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175-76; Decision and Order at 21-22. The administrative law judge rationally found their opinions to be well-documented, well-reasoned, and consistent with claimant's medical records, which document a long period of treatment for lung disease from 1987 through 2007. *Id.*; Decision and Order at 21-22. The administrative law judge also acted within her discretion in discrediting the opinions of Drs. Hippensteel and Castle because they could not state whether claimant had a pulmonary impairment, did not address claimant's history of COPD, and did not account for any possible effect from claimant's thirty-eight years of coal mine employment. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Stark v. Director*, 9 BLR 1-36 (1987); Decision and Order at 21-22.

Consequently, we affirm the administrative law judge's determination that employer did not rebut the presumption at amended Section 411(c)(4).[9]

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

[9] We also reject employer's contention that the administrative law judge should have applied the standard used by the United States Court of Appeals for the Seventh Circuit in *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995), which requires that mining be a necessary cause of the miner's disability. As we have determined, and employer has conceded, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which has held pneumoconiosis must be at least a contributing cause of a miner's totally disabling respiratory impairment. Slip op. at 3 n.4; *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).