BRB No. 10-0673 BLA

LEOTA QUENTEN DICKENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY	)	
	)	DATE ISSUED: 06/28/2011
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5230) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim[1] 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

[1] The current claim is claimant's fourth. Claimant's third claim, filed on February 18, 2005, was denied on October 31, 2005, because claimant did not establish that he suffered from a totally disabling respiratory impairment. Director's Exhibit 3. Claimant filed this claim on February 6, 2007. Director's Exhibit 5.

U.S.C. §§921(c)(4) and 932(*l*)) (the Act). After crediting claimant with at least twenty-five years of coal mine employment,[2] of which at least fifteen years were underground, the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory 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). Considering this claim on its merits, 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. Decision and Order at 7. 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).[3] 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) to this miner's claim, the administrative law judge found invocation of the rebuttable presumption established. 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, he found that employer failed to rebut this presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of the recent Section 1556 amendment to this case. Employer also argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Claimant responds, urging affirmance of

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 6. 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, 1-202 (1989)(*en banc*).

[3] The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that an eligible survivor of a miner who filed a successful claim for benefits is automatically entitled to survivor's benefits, without the burden of reestablishing entitlement. 30 U.S.C. §932(*l*).

the administrative law judge's award of benefits.[4] The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer initially contests the administrative law judge's application of Section 1556 to this case. Employer specifically asserts 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 5 n.1. 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), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.). We, therefore, reject them here for the reasons set forth in that case.[5] *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24

[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established twenty-five years of coal mine employment, with at least fifteen years underground, and that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 14-16. We further affirm, as unchallenged, the administrative law judge's findings, on the merits, that claimant established the existence of a totally disabling respiratory impairment, and, thus, established invocation of the Section 411(c)(4) presumption. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Decision and Order at 21-22.

[5] Further, employer notes, but does not develop an argument, that "Title 30 U.S.C. §921(c)(4) provides limitations on rebuttal evidence which apply only to the 'Secretary.'" Employer's Brief at 5 n.1. In addition, employer correctly notes that the regulation at 20

BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106, at *5 (7th Cir. 2011).

Consequently, we affirm the administrative law judge's application of Section 1556 to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We further affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), based on the administrative law judge's unchallenged findings that claimant established more than fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment.

We next address employer's contention that the administrative law judge erred in his evaluation of the x-ray evidence in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1). Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered fourteen readings of four x-rays dated October 15, 1999, January 15, 2003, June 2, 2005, and May 2, 2007. Decision and Order at 17-18. The administrative law judge explained the weight he accorded the conflicting readings as follows:

The administrative law judge found that the October 15, 1999 x-ray was read as positive for pneumoconiosis by Dr. Patel, a dually qualified, Board-certified radiologist and B reader, and Dr. Gaziano, a B reader, and as negative by Dr. Wiot, a Board-certified radiologist and B reader. Director's Exhibit 1; Claimant's Exhibit 4; Employer's Exhibit 4. Noting that readers who are "Board-certified radiologists and/or B-readers are classified as the most qualified," the administrative law judge concluded that the October 15, 1999 x-ray is positive for the existence of pneumoconiosis, based on the majority of the positive readings by highly qualified readers. Decision and Order at 18. The administrative law judge found that the January 15, 2003 x-ray was read as negative by Dr. Kayi, whose credentials are unknown, and by Dr. Wiot. Director's Exhibit 2; Employer's Exhibit 4. Thus, the administrative law judge found this x-ray to be negative for the existence of pneumoconiosis. Decision and Order at 18. The administrative law judge found that the June 2, 2005 x-ray was read as positive by Dr. Alexander, a Board-certified radiologist and B reader, and Dr. Rasmussen, a B reader, and as negative by Dr. Wiot. Director's Exhibit 3; Claimant's Exhibit 1; Employer's Exhibit 4. The administrative law judge concluded that the June 2, 2005 x-ray is positive for the existence of pneumoconiosis, based on the majority of the positive readings by highly

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C.F.R. §718.305 has not been revised, and is inapplicable to this claim filed after January 1, 1982. 20 C.F.R. §718.305(e).

qualified readers. Decision and Order at 18. Finally, the administrative law judge found that the May 2, 2007 x-ray was read as positive by Dr. Alexander, Dr. Ahmed, a Board-certified radiologist and B reader, and Dr. Rasmussen, a B reader, and as negative by Dr. Wiot, Dr. Meyer, a Board-certified radiologist and B reader, and Dr. Zaldivar, a B reader. Director's Exhibit 13; Claimant's Exhibits 2, 3; Employer's Exhibits 4, 6, 9. Because equal numbers of equally qualified physicians disagreed as to whether the May 2, 2007 x-ray established the existence of pneumoconiosis, the administrative law judge found that their readings were "in equipoise." Decision and Order at 18. Based on his consideration of all of the x-ray readings, the administrative law judge concluded that the x-ray evidence establishes the existence of pneumoconiosis. Decision and Order at 18-19.

Contrary to employer's contention, while the administrative law judge noted that "the positive readings on the record were done by three different dually-qualified physicians and two different B readers" and the "negative readings were done by only two dually qualified physicians and one B reader," the administrative law judge did not engage in a headcount of the x-ray evidence. Employer's Brief at 9. Rather, the administrative law judge properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the radiological qualifications of the physicians, and found that the majority of the readings by well qualified radiologists establish that claimant has pneumoconiosis. We, therefore, reject employer's assertion of error and affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. §718.202(a)(1). *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

Employer next contends that the administrative law judge erred in his evaluation of the medical opinion evidence in finding the existence of clinical pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4). Employer argues that the administrative law judge erred in according greater weight to the opinions of Drs. Rasmussen and Gaziano, that claimant suffers from clinical pneumoconiosis, than to the opinions of Drs. Zaldivar and Castle, that claimant does not suffer from any coal dust related disease. Employer's Brief at 9-11. Contrary to employer's assertion, the administrative law judge gave permissible reasons for according the opinions of Drs. Castle and Zaldivar less weight as to the issue of the existence of pneumoconiosis. We consider employer's assertions of error with regard to these physicians to be little more than a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Evaluating the medical opinions,[6] the administrative law judge found Dr. Zaldivar's opinion as to the existence of pneumoconiosis to be entitled to less weight because he based his conclusions, in part, on his opinion that the presence in the medical record of a negative computerized tomography (CT) scan precludes the possibility of positive chest x-ray evidence. Decision and Order at 20; Employer's Exhibit 12. The administrative law judge correctly noted that, in his January 13, 2010 consultative report, Dr. Zaldivar observed that a May 2, 2007 CT scan had been interpreted by Dr. Scatarige as revealing no opacities of pneumoconiosis, and opined that this "means that the chest x-ray[s] could not be positive for pneumoconiosis considering that the CT scan is a far more precise tool to reveal the small nodules." Employer's Exhibit 12 at 3. Contrary to employer's argument, as noted by the administrative law judge, the Department of Labor has rejected the view that a CT scan is, by itself, "sufficiently reliable that a negative result effectively rules out the existence of pneumoconiosis." Decision and Order at 20, *quoting* 65 Fed Reg. 79,920, 79,945 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 892, 22 BLR 2-409, 422 (7th Cir. 2002). The administrative law judge permissibly explained, in accordance with the Administrative Procedure Act,[7] that the single CT scan in this case does not outweigh the positive x-ray interpretations. Therefore, we affirm his finding. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Decision and Order at 20.

Employer asserts that in declining to credit Dr. Castle's opinion, that claimant does not suffer from clinical pneumoconiosis, the administrative law judge "did not fully consider Dr. Castle's complete assessment," citing his explanation that the negative CT scan reading corroborated the negative x-ray evidence of record. Employer's Brief at 10-11. The record reflects that the administrative law judge fully considered Dr. Castle's conclusions, as set forth in his May 5, 2008 report, his June 10, 2008 deposition, and his January 12, 2010 and May 28, 2010 supplemental reports. Decision and Order at 11-12. Nevertheless, as set forth above, the administrative law judge permissibly determined that the sole negative CT scan of record does not outweigh the positive x-ray interpretations.

[6] The administrative law judge initially noted that Drs. Zaldivar, Castle, and Gaziano are Board-certified in Internal Medicine with subspecialties in Pulmonary Disease, and Dr. Rasmussen is Board-certified in Internal Medicine. Decision and Order at 19.

[7] The Administrative Procedure (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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).

See Compton, 211 F.3d at 211-212, 22 BLR at 2-175; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; Decision and Order at 20. As employer raises no further allegations of error with respect to the administrative law judge's discounting of Dr. Castle's opinion, the administrative law judge's credibility determination is affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

By contrast, the administrative law judge permissibly found the opinions of Drs. Rasmussen and Gaziano to be well-reasoned, persuasive, and in accord with the standards for diagnosing pneumoconiosis set forth in the regulations. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 20. Because the administrative law judge provided valid reasons for crediting the opinions of Drs. Rasmussen and Gaziano over the opinions of Drs. Castle and Zaldivar, we affirm the administrative law judge's finding that the medical opinion evidence establishes clinical pneumoconiosis pursuant to Section 718.202(a)(4).[8]

We next address employer's argument that the administrative law judge erred in finding that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, and, thus, failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 11-14. Employer asserts that, in finding the evidence insufficient to rebut the Section 411(c)(4) presumption, the administrative law judge erred in discounting the opinions of Drs. Castle and Zaldivar. Employer's contention lacks merit.

Considering the medical opinion evidence relevant to the cause of claimant's total respiratory disability, the administrative law judge correctly noted that Drs. Rasmussen and Gaziano opined that claimant's respiratory disability is due, in part, to his coal workers' pneumoconiosis. Decision and Order at 9, 12, 25; Director's Exhibit 13; Claimant's Exhibit 4. By contrast, Drs. Castle and Zaldivar opined that claimant's disabling respiratory impairment is due to pulmonary emboli, with no contribution by pneumoconiosis. Decision and Order at 9-10, 25; Employer's Exhibits 1, 3, 8, 9, 11-14. The administrative law judge rationally discounted the opinions of Drs. Castle and Zaldivar, in part, because they did not diagnose pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-

[8] The administrative law judge misplaced the burden of proof, in requiring claimant to establish the existence of pneumoconiosis, rather than requiring employer to disprove its existence, pursuant to 30 U.S.C. §921(c)(4). However, this error is harmless, as we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), (4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

472 (1986); Decision and Order at 25. Because the administrative law judge provided a proper basis for according less weight to the opinions of Drs. Castle and Zaldivar regarding the cause of claimant's total respiratory disability, we need not address employer's remaining arguments regarding the weight accorded to those opinions. *See Kozele,* 6 BLR at 1-382 n.4.

The administrative law judge has exclusive power to make credibility determinations and resolve inconsistencies in the evidence, *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993), and the Board is not empowered to reweigh the evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999). As the administrative law judge properly considered the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses, *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274, we affirm the administrative law judge's finding that employer failed to meet its burden to establish that claimant's respiratory impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding 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