BRB No. 10-0685 BLA

ALDA R. DAMERON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG BEAR MINING COMPANY	)	
	)	DATE ISSUED: 08/25/2011
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 of Thomas M. Burke, 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. Atkins (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer.

Jonathan Rolfe (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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (09-BLA-5693) of Administrative Law Judge Thomas M. Burke awarding benefits 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 miner's claim filed on October 20, 2008. After crediting claimant with twenty-three years of coal mine employment,[1] at least fifteen years of which were underground, 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.[2] 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, 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. Therefore, the administrative law judge found that employer failed to rebut the 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 further contends that claimant failed to establish the requisite fifteen years of qualifying coal mine employment in order to establish invocation of the Section 411(c)(4) presumption. Employer also argues that

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[1] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 1, 2. 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*).

[2] In a March 30, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements. Claimant, employer and the Director, Office of Workers' Compensation Programs, each submitted position statements.

the administrative law judge erred in finding that employer failed to rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption. In a reply brief, employer reiterates its previous contentions.[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 rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 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 6-12. The arguments employer makes 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 13, 2011). 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, BLR (7th Cir. 2011). Further, consistent with *Mathews*, we deny employer's request that this case be held in abeyance until the Department of Labor issues guidelines or promulgates regulations implementing amended Section 411(c)(4). Employer's Brief at 13-16. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing, and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations.

[3] Because employer does not challenge the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Mathews, 24 BLR at 1-201. Employer's request, that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148, is also denied. *See Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011); Employer's Brief at 16 n.6. 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.

Employer next contends that the administrative law judge erred in finding invocation of the Section 411(c)(4) presumption established because claimant failed to establish the requisite fifteen years of qualifying coal mine employment. Under Section 411(c)(4), claimant must establish that he was employed for at least fifteen years in an underground coal mine, or in a coal mine "other than an underground mine" in work conditions that "were substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Employer specifically argues that the administrative law judge failed to provide support for his determination that claimant established at least fifteen years of underground coal mine employment. The administrative law judge found that claimant established twenty-three years of coal mine employment overall.[4] In describing his coal mine employment, claimant testified that he worked in low coal on his hands and knees for twenty years:

> Well, what I think – I might be totally wrong, but what I think has filled me up full of this coal dust I never worked in a mines [sic] over forty (40) inches, thirty (30) to forty (40) inches is the highest coal I ever worked in. If you could stand up, you could probably get out of the dust. But, see, *where I was on my hands and knees for twenty (20) some years* I never could get out of the dust.

[4] The administrative law judge noted that claimant alleged twenty-three years of coal mine employment on the employment history form he submitted with his application for benefits, and noted further that employer stipulated to nineteen years of coal mine employment. Decision and Order at 3. The administrative law judge found that claimant's Social Security earnings records documented nineteen years of coal mine employment between 1963 and 1984, but he also took into account claimant's testimony that he began working in coal mines at age thirteen or fourteen, and those wages were not reported. The administrative law judge also considered that claimant consistently reported at least twenty years of coal mine employment to the physicians who examined him in this claim. Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibits 1, 4. Accordingly, based on claimant's testimony and the documentary evidence of record, the administrative law judge found that claimant worked in coal mine employment for the twenty-three years he alleged on his application for benefits. Decision and Order at 3.

Hearing Transcript at 14 (emphasis added).

Relying upon this testimony, the administrative law judge found that claimant "worked as an underground coal miner for more than fifteen years." Decision and Order at 12. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). The Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). Claimant's uncontradicted testimony supports the administrative law judge's inference that claimant spent over fifteen years in underground coal mine employment. Because it is based upon a permissible inference, the administrative law judge's finding, that claimant established at least fifteen years of underground coal mine employment, is affirmed. We, therefore, affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Because claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[5] 30 U.S.C. §921(c)(4). Decision and Order at 12. The administrative law judge found that employer failed to establish either of these methods of rebuttal. *Id.* at 12-19.

Employer first contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.[6] The administrative law judge considered the medical opinions of Drs. Rasmussen, Forehand, Zaldivar, and Spagnolo. Drs. Rasmussen and Forehand diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 11; Claimant's Exhibit 1. Although Dr. Zaldivar

[5] In light of the applicability of amended Section 411(c)(4), the administrative law judge reopened the record, and allowed the parties an opportunity to submit additional evidence. In response, employer submitted supplemental reports from Drs. Spagnolo and Zaldivar, which the administrative law judge admitted into evidence. Decision and Order at 2; Employer's Exhibits 10, 11.

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

also diagnosed COPD, he opined that the disease was due entirely to claimant's cigarette smoking. Employer's Exhibits 1, 5, 7, 11. Dr. Spagnolo diagnosed asthmatic bronchitis, and bronchiolitis caused by cigarette smoking. Employer's Exhibits 4, 8, 10. Drs. Zaldivar and Spagnolo opined that none of claimant's medical conditions was attributable to his coal mine dust exposure. Employer's Exhibits 10, 11.

In evaluating the conflicting evidence, the administrative law judge accorded less weight to Dr. Forehand's diagnosis of legal pneumoconiosis because he found that it was not sufficiently reasoned. Decision and Order at 15. The administrative law judge next accorded less weight to Dr. Spagnolo's opinion, that claimant did not suffer from legal pneumoconiosis, because he found that the doctor failed to adequately explain how he eliminated claimant's twenty-three years of coal mine employment as a contributor to claimant's disabling obstructive impairment. *Id.* at 16. The administrative law judge credited Dr. Rasmussen's opinion, that claimant suffers from legal pneumoconiosis, over Dr. Zaldivar's contrary opinion, because he found that Dr. Rasmussen's opinion was better reasoned, and more consistent with the regulations. *Id.* at 15-18. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 18.

Employer argues that the administrative law judge erred in his consideration of Dr. Spagnolo's opinion. We disagree. The administrative law judge noted that Dr. Spagnolo relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment.[7] Decision and Order at 16. The administrative law judge found, as was within his discretion, that Dr. Spagnolo did not adequately explain why the irreversible portion of claimant's pulmonary impairment[8] was not due, in part, to coal mine dust exposure or why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 16. As the administrative law judge's basis for discrediting Dr. Spagnolo's opinion is rational

[7] Dr. Spagnolo opined that the post-bronchodilator values from claimant's 2008 and 2009 pulmonary function studies "show a strong element of reversibility that is usually seen in individuals with asthma." Employer's Exhibit 4.

[8] The administrative law judge found that, although the 2008 and 2009 pulmonary function studies showed reversibility, the post-bronchodilator results also showed "a residual, fixed obstructive impairment sufficiently severe to meet the disability standards set forth at Appendix B of Part 718." Decision and Order at 16.

and supported by substantial evidence, it is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000).

We also reject employer's contention that the administrative law judge erred in crediting Dr. Rasmussen's opinion over that of Dr. Zaldivar. The administrative law judge permissibly accorded greater weight to Dr. Rasmussen's opinion, that coal mine dust and cigarette smoke cause COPD by identical mechanisms, because he found that it is consistent with the Department of Labor's recognition that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms – namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with the decrease in positive enzymes in the lung."[9] Decision and Order at 17, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). In contrast, the administrative law judge permissibly found Dr. Zaldivar's contrary reasoning, that dust-induced emphysema and smoke-induced emphysema occur through different mechanisms and therefore, can be distinguished,[10] to be at odds with the Department of Labor's position regarding the medical science.[11] *See Obush*, 24 BLR at 1-125-26; Decision and Order at 16-17. Consequently, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[12] *See Barber v. U.S.*

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[9] Dr. Rasmussen explained that the "mechanisms by which coal mine dust and cigarette smoke cause COPD and emphysema is identical with both toxic substances causing an abnormal reaction of lung macrophages or scavenger cells . . . in susceptible individuals." Claimant's Exhibit 1.

[10] Dr. Zaldivar stated that the damage caused by deposited dust within the lungs occurs "through mechanical means," while "smoking causes damage through chemical means." Employer's Exhibit 1.

[11] Because the administrative law judge provided a valid basis for according less weight to Dr. Zaldivar's opinion, the administrative law judge's error, if any, in according less weight to his opinion for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to Dr. Zaldivar's opinion.

[12] We reject employer's assertion that the administrative law judge committed reversible error in failing to weigh the negative x-ray evidence in conjunction with the medical opinion evidence. Employer fails to explain how the x-ray evidence that was negative for clinical pneumoconiosis would undermine a presumption that claimant's COPD constitutes legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211

Steel Mining Co., 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980).

Employer next argues 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, employment in a coal mine." Employer's argument lacks merit. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Spagnolo, that claimant's pulmonary impairment did not arise out of his coal mine employment, because these doctors, contrary to the administrative law judge's finding, did not diagnose legal pneumoconiosis. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 24. Because the opinions of Drs. Zaldivar and Spagnolo are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *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.); *Defore v. Alabama By-Products*, 12 BLR 1-27, 1-29 (1988).

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.

F.3d 203, 210, 22 BLR 2-162, 2-173 (4th Cir. 2000); *Barber v. U.S. Steel Mining Co.*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge