BRB No. 12-0401 BLA

RICHARD A. CARTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 05/13/2013
	)	
MEADOW RIVER COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman and Jeffrey R. Soukup (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Emily Goldberg-Kraft (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/carrier (employer) appeals the Decision and Order-Awarding Benefits (2009-BLA-5870) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a subsequent claim filed on September 17, 2008.[1] Director's Exhibit 3.

The administrative law judge credited claimant with at least nineteen years of underground or substantially similar coal mine employment,[2] and found that the medical evidence developed since the denial of claimant's prior claim established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that the evidence as a whole established that claimant is totally disabled. The administrative law judge therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] Claimant's prior claim, filed on June 6, 2000, was denied by the district director on October 12, 2000, because claimant failed to establish that he was totally disabled. Director's Exhibit 1. Claimant filed his current claim on September 17, 2008. Director's Exhibit 3. The district director denied benefits and claimant requested a hearing, which was held on July 14, 2011. Director's Exhibits 19, 20.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer further asserts that the administrative law judge erred in finding that claimant has sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Additionally, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Finally, employer asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments that Section 411(c)(4) may not be applied to this case, and urging affirmance of the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. In separate reply briefs, employer reiterates its arguments on appeal.[4]

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).

Application of Amended Section 411(c)(4)

Employer contends that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer further contends that the rebuttal provisions of Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's Brief at 33-36, 48-50. Employer's contentions are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision.[5] *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir.

[4] Employer does not challenge the administrative law judge's findings that seven years of claimant's coal mine employment constituted underground coal mine employment, and that the preponderance of the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] To the extent employer requests that this case be held in abeyance pending the outcome of challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, that were not resolved by *Nat'l Fed'n of Indep. Bus. v.*

2011), *cert. denied*, 568 U.S. (2012). Further, we reject employer's argument that the application of amended Section 411(c)(4) to this case is premature for lack of implementing regulations. Employer's Brief at 33. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to this claim.

Invocation of the Section 411(c)(4) Presumption

Qualifying Coal Mine Employment

In order to invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The administrative law judge credited claimant with seven years of underground coal mine employment, and twelve years of employment as a surface worker at an underground mine site. Decision and Order at 12. In so finding, the administrative law judge took official notice that employer's preparation plant where claimant worked was located at the site of an underground mine.[6] The administrative law judge therefore found that claimant's twelve years of employment at employer's preparation plant constituted qualifying coal mine employment under Section 411(c)(4), without the need for claimant to demonstrate that the employment took place in conditions substantially similar to those in an underground mine. *See Muncy*, 25 BLR at 1-29.

Alternatively, the administrative law judge determined that claimant's surface coal mine employment took place in conditions "substantially similar" to those in his underground coal mine employment. The administrative law judge based his alternative finding on claimant's testimony that, although his working conditions were worse underground, his surface coal mine employment was still exceptionally dusty, especially

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Sebelius, 567 U.S. , 132 S.Ct. 2566 (2012), its request is denied. Employer's Brief at 43-48.

[6] In taking official notice, the administrative law judge consulted a Mine Safety and Health Administration (MSHA) accident investigation report, available online, regarding employer's Meadow River No. 1 Mine in Lookout, West Virginia. The administrative law judge provided the Internet address of the MSHA report, and set forth the report's title indicating that the accident investigation concerned an underground coal mine. Decision and Order at 12 n.15.

when it was windy, and that it was very dusty at the surface when he was loading coal into railroad cars. Decision and Order at 12 n.16.

Employer contends that the administrative law judge erred in taking official notice that employer's preparation plant was at an underground mine site. Employer's Brief at 10-12. Additionally, employer argues that the administrative law judge erred in his alternative finding that the conditions in claimant's surface coal mine employment were substantially similar to those in an underground mine. Employer's Brief at 13-15. We disagree with employer that the administrative law judge erred in his "substantial similarity" finding.

Claimant bears the burden of establishing comparable conditions between surface and underground mining. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988); 20 C.F.R. §725.103. Claimant does not need to present evidence of the actual conditions in an underground mine, but need only show that he was exposed to sufficient coal mine dust during his employment. *See Leachman*, 855 F.2d at 512; *Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011). "Sufficient" exposure relates to the miner's personal exposure to coal dust and not the level or extent of the dust environment in an underground mine generally. *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). Further, a claimant's unrefuted testimony is sufficient to support a finding of substantial similarity. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Therefore, contrary to employer's contention, substantial evidence, in the form of claimant's uncontradicted testimony about his dust exposure, supports the administrative law judge's finding that claimant established that his twelve years of surface coal mine employment took place in a working environment that was substantially similar to underground mine conditions. *See Blakley*, 54 F.3d at 1319, 19 BLR at 2-202. Consequently, we affirm the administrative law judge's finding that claimant established that he has a total of at least nineteen years of qualifying coal mine employment for purposes of Section 411(c)(4).[7]

Total Disability and a Change in the Applicable Condition of Entitlement

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed

[7] Because we affirm the administrative law judge's finding that claimant established that his surface coal mine employment was substantially similar to underground coal mine employment, we need not address employer's challenges to the administrative law judge's decision to take official notice that claimant's surface employment took place at an underground mine. Employer's Brief at 10-12.

since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because claimant did not establish total disability. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2),(3).

The administrative law judge found that the preponderance of the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[8] Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge credited the new medical opinions of Drs. Rasmussen and Crisalli, that claimant is totally disabled by a respiratory impairment, and discounted Dr. Zaldivar's opinion, that claimant has a moderate obstructive impairment that is not totally disabling, because Dr. Zaldivar did not address the results of claimant's most recent, qualifying[9] pulmonary function study conducted by Dr. Crisalli. Director's Exhibits 9, 10; Employer's Exhibits 4; 7 at 16. The administrative law judge therefore found that the medical opinion evidence was "sufficient to establish" total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 11. Weighing the evidence together at 20 C.F.R. §718.204(b)(2)(i)-(iv), the administrative law judge found that there was no contrary probative evidence to the pulmonary function study evidence, and determined claimant established total disability based on the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), employer argues that the administrative law judge applied an inconsistent standard by discounting Dr. Zaldivar's opinion because Dr. Zaldivar did not address the results of Dr. Crisalli's more recent pulmonary function study, without also discounting Dr. Rasmussen's opinion for the same reason, as Dr. Rasmussen did not review the study. Employer's Brief at 28-29. Employer's argument lacks merit. The administrative law judge permissibly discounted Dr. Zaldivar's opinion that claimant is not totally disabled, because Dr. Zaldivar did not address the most recent,

[8] The administrative law judge found that total disability was not established by the new evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 10.

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

qualifying pulmonary function study conducted by Dr. Crisalli.[10] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Given that Dr. Rasmussen opined that claimant is totally disabled by a respiratory or pulmonary impairment, the reason the administrative law judge gave for discounting Dr. Zaldivar's opinion does not apply to Dr. Rasmussen's opinion. Employer's allegation of an inconsistent analysis of the evidence is therefore rejected. *See White*, 23 BLR at 1-5.

We also reject employer's argument that the administrative law judge should have discounted the disability assessments of Drs. Crisalli and Rasmussen because, employer alleges, these physicians overstated the exertional requirements of claimant's job as a loadout operator. Employer's Brief at 29-32. Substantial evidence supports the administrative law judge's discretionary determination that claimant's testimony, and the work description that he provided to Dr. Rasmussen, indicated that his job involved heavy labor, consistent with the understanding of Drs. Crisalli and Rasmussen, even if the doctors did not correctly identify each task claimant had to perform.[11] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997);

[10] Review of the record reflects Dr. Crisalli's uncontradicted opinion that claimant's pulmonary function study results worsened between Dr. Zaldivar's examination on March 4, 2009, and his own examination of claimant on January 18, 2010. Employer's Exhibit 4 at 6.

[11] The administrative law judge credited claimant's testimony that he needed to carry thirty to forty-pound bags of coal, climb an eight or nine-foot ladder, turn brake wheels, and sometimes use a "pinch bar" to get railroad cars rolling. Decision and Order at 3, 10. The administrative law judge found that Dr. Rasmussen's description of claimant's coal mine employment was "fairly consistent" with claimant's testimony, except that Dr. Rasmussen did not mention that claimant was required to carry thirty to forty-pound bags of coal. Decision and Order at 10, *citing* Director's Exhibit 9 and Employer's Exhibit 6 at 11-13. The administrative law judge therefore determined that Dr. Rasmussen "actually understated the miner's employment requirements in this respect," but nevertheless "adequately understood the exertional requirements" of claimant's usual coal mine employment. Decision and Order at 10. The administrative law judge further found that Dr. Crisalli identified additional lifting and carrying requirements that claimant did not testify to at the hearing, and he therefore "assume[d] *arguendo* that Dr. Crisalli did overstate the exertional requirements. . . ." *Id.* The administrative law judge determined, however, that Dr. Crisalli's "overarching belief that the miner's job required heavy manual labor" was still accurate. *Id.*

Decision and Order at 10; Hearing Transcript at 11-12. The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore reject employer's allegation of error, and affirm the administrative law judge's finding that the medical opinion evidence was "sufficient to establish" total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 11.

Regarding the administrative law judge's weighing together of all the evidence pursuant to 20 C.F.R. §718.204(b)(2), employer contends that the administrative law judge made "materially inconsistent" findings regarding Dr. Rasmussen's opinion, necessitating a remand for further explanation by the administrative law judge. Employer's Brief at 16-17. Specifically, employer notes that the administrative law judge initially accorded "significant weight" to Dr. Rasmussen's opinion diagnosing total disability under 20 C.F.R. §718.204(b)(2)(iv), but when weighing the evidence together, stated that he accorded "lesser weight" to Dr. Rasmussen's opinion, because he found that Dr. Rasmussen was mistaken in his belief that claimant has no symptoms of congestive heart failure. Decision and Order at 11; Employer's Brief at 16-17. We disagree with employer's position. The administrative law judge's unexplained reference to congestive heart failure relates to the cause of total disability, not to the existence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(a)-(c). Moreover, even assuming, arguendo, that the administrative law judge's observation about Dr. Rasmussen's awareness of symptoms of congestive heart failure related to the existence of total disability, the administrative law judge ultimately determined that Dr. Rasmussen's opinion did "not constitute 'contrary probative evidence'" to the qualifying pulmonary function studies, which established that claimant is totally disabled. Decision and Order at 11; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc). Therefore, we reject employer's argument that a remand is required for the administrative law judge to further explain the weight to which Dr. Rasmussen's opinion is entitled.

As employer makes no further argument regarding the administrative law judge's findings of total disability and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d), those findings are affirmed. Employer does not challenge the determination, on the merits, that all the evidence of record establishes that claimant is totally disabled.[12] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[12] The administrative law judge accorded greater weight to the more recent evidence developed in the current claim. Decision and Order at 12-13.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), 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. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 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, 2-43-44 (4th Cir. 1980). Employer stipulated that claimant suffers from clinical pneumoconiosis.[13] Decision and Order at 13 n.18. Therefore, employer could rebut the Section 411(c)(4) presumption only by establishing that claimant's pulmonary or respiratory impairment did not arise out, or in connection with, coal mine employment.

The administrative law judge considered the medical opinions of Drs. Rasmussen, Crisalli, Durham, and Zaldivar. Drs. Rasmussen, Crisalli, and Durham attributed claimant's pulmonary impairment to both coal mine dust exposure and smoking. Director's Exhibits 1, 9; Employer's Exhibits 4, 6, 8. Dr. Crisalli added that asthma could also be a component of claimant's impairment. Employer's Exhibits 4, 8. In his report, Dr. Zaldivar attributed claimant's obstructive impairment to "a combination of smoking and coal mine dust," but opined that the impairment was insufficient to disable claimant. Director's Exhibit 10 at 2. When deposed, Dr. Zaldivar opined that it was "more likely" that claimant's past smoking habit was the cause of his pulmonary impairment, and that there could also be an asthmatic component, but he further testified that some of claimant's obstructive impairment could be due to clinical pneumoconiosis. Employer's Exhibit 7 at 25, 27.

The administrative law judge discounted aspects of Dr. Zaldivar's reasoning that he found did not adequately address whether claimant suffers from legal pneumoconiosis. Decision and Order at 14. The administrative law judge also found that Dr. Zaldivar's opinion, that smoking was "more likely" to have caused claimant's impairment, was too equivocal to rule out a connection between claimant's impairment and his coal mine employment. *Id.*

[13] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Employer contends that the administrative law judge applied an improper rebuttal standard under Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment.[14] Employer's Brief at 32-39. We disagree. The United States Court of Appeals for the Fourth Circuit has stated, explicitly, that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. In this case, Dr. Zaldivar opined, in his report, that claimant's impairment "is due to a combination of smoking and coal mine dust. . . ." Director's Exhibit 10 at 2. He later testified that it was "more likely" that smoking caused claimant's impairment, though some of claimant's obstruction could be due to clinical pneumoconiosis. Employer's Exhibit 7 at 25, 27. We conclude that substantial evidence supports the administrative law judge's determination that Dr. Zaldivar's opinion does not rule out a contribution by coal mine dust exposure, and thus, does not establish that claimant's impairment did not arise out of, or in connection with, coal mine employment.[15] *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Accordingly, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis, and further affirm the award of benefits.

[14] Much of employer's argument on this point is based on its contention, rejected above, that the rebuttal provisions of Section 411(c)(4) do not apply in cases involving coal mine operators. Employer's Brief at 33-37.

[15] Because we affirm the administrative law judge's rebuttal determination on the basis stated above, we need not address employer's challenges to the administrative law judge's other findings regarding the credibility of Dr. Zaldivar's opinion.

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