BRB Nos. 12-0388 BLA
and 12-0389 BLA

MARY LOU SCHOFFSTALL (o/b/o and Widow of CHARLES W. SCHOFFSTALL)	)	
Claimant-Respondent	)	
v.	)	
HARRIMAN COAL CORPORATION	)	
and	)	DATE ISSUED: 03/28/2013
AMERICAN MINING INSURANCE	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order on Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (08-BLA-5225, 08-BLA-5226) of Administrative Law Judge Adele H. Odegard awarding benefits on a survivor's 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, involving a miner's claim and a survivor's claim, is before the Board for the second time.

The miner filed a claim for benefits on July 6, 2004. In a Decision and Order dated February 28, 2007, Administrative Law Judge Paul H. Teitler adjudicated the miner's claim, and found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, Judge Teitler found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, Judge Teitler denied benefits.

While his appeal was pending before the Board, the miner died on March 5, 2007. Claimant, the miner's surviving spouse, filed a survivor's claim on April 6, 2007. Claimant filed a Motion to Remand, requesting that the Board remand the miner's claim for consolidation with her survivor's claim. By Order dated September 24, 2007, the Board granted claimant's motion, dismissed the miner's appeal, and remanded the miner's claim for modification proceedings.[1] *Schoffstall v. Harriman Coal Corp.*, BRB No. 07-0639 BLA (Sept. 24, 2007) (Order) (unpub.).

In a Decision and Order dated June 25, 2009, Adele Higgins Odegard (the administrative law judge) found that the new evidence supported a finding of 21.27 years of coal mine employment,[2] slightly more than that previously credited by Judge Teitler. However, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge denied claimant's request for modification of the miner's claim. 20 C.F.R. §725.310. In her adjudication of the survivor's claim, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Moreover, the administrative law judge found that, even if the evidence established the existence of pneumoconiosis, it did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, denied benefits in the survivor's claim.

[1] On remand, the district director consolidated the miner's and survivor's claims. Director's Exhibit 71.

[2] The miner's coal mine employment was in Pennsylvania. Director's Exhibit 4 (miner's claim). Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that the evidence did not establish that the miner suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Schoffstall v. Harriman Coal Corp.*, BRB Nos. 09-0730 and 09-0732 BLA (July 29, 2010) (unpub.). The Board, therefore, affirmed the administrative law judge's denial of claimant's request for modification of the miner's claim. *Id.* In regard to the survivor's claim, the Board noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005.[3] Relevant to the survivor'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 amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that the miner had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden shifts to employer to rebut the presumption by establishing either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment. *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

In light of the potential applicability of amended Section 411(c)(4), the Board vacated the administrative law judge's denial of benefits in the survivor's claim, and remanded the case for further consideration. *Schoffstall v. Harriman Coal Corp.*, BRB Nos. 09-0730 and 09-0732 BLA (July 29, 2010) (unpub.). The Board instructed the administrative law judge, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption.[4] *Id.*

Applying amended Section 411(c)(4) on remand, the administrative law judge found that the miner worked for at least ten years in underground coal mine employment. Decision and Order on Remand at 6. The administrative law judge further found that the

[3] Because the miner filed his claim before January 1, 2005, the miner's claim is not affected by the recent amendments.

[4] Claimant sought to appeal the denial of the miner's claim to the Third Circuit, but the Third Circuit dismissed her appeal for lack of jurisdiction. The Third Circuit concluded that the Board's Decision and Order would not be an appealable final order, pursuant to 20 C.F.R. §§725.479, 725.482, until the Board resolved both the miner's claim and the survivor's claim.

miner established additional coal mine work as a slate picker at above-ground breakers (five years), and as a truck driver transporting coal to the breakers (six years). *Id.*at 6-7. Because she found it "highly likely that all of the [m]iner's work at the breakers was at underground mine sites," the administrative law judge found that the miner's five years of work at the breakers also constituted qualifying underground coal mine employment for the purpose of invoking the presumption. *Id.*at 7. Alternatively, the administrative law judge credited the miner's credible and unrebutted testimony that all of his coal mine work occurred in dusty conditions. *Id.* The administrative law judge, therefore, found that the miner's five years of coal mine work at the breakers also occurred in conditions substantially similar to those in an underground mine. *Id.* Combining the miner's five years of coal mine work at the breakers with the miner's ten years of underground coal mine employment, the administrative law judge found that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[5] *Id.* The administrative law judge further found that the evidence established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id.* at 8-15. The administrative law judge, therefore, found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis. *Id.* at 15. The administrative law judge also found that employer failed to rebut the presumption. *Id.* at 15-19. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, employer argues that the administrative law judge erred in finding that the miner had at least fifteen years of qualifying coal mine employment, and thus erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer failed to rebut the presumption. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's award of benefits. Claimant has not filed a response brief.[6]

[5] In addition, the administrative law judge found that the miner's six years as a truck driver at the breakers occurred in conditions substantially similar to those in an underground mine. Decision and Order on Remand at 7-8.

[6] In its acknowledgment letter, the Board noted that employer's Notice of Appeal listed the case numbers for both the miner's claim (08-BLA-5225) and the survivor's claim (08-BLA-5226). The Board, therefore, assigned two BRB docket numbers to employer's appeal, BRB No. 12-0388 BLA to the miner's claim and BRB No. 12-0389 BLA to the survivor's claim. Despite the Board's assignment of two BRB numbers to employer's appeal, the only appeal currently before the Board is employer's appeal of the survivor's claim.

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).

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

Employer specifically argues that the administrative law judge erred in crediting the miner with the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer does not challenge the administrative law judge's finding that the miner worked for at least ten years in underground coal mine employment. Employer focuses instead on the miner's additional five years of coal mine work at the above-ground breakers, arguing that the administrative law judge erred in finding that this work constituted "underground" coal mine employment. Employer, however, does not challenge the administrative law judge's alternative finding that the miner's coal mine work at the above-ground breakers occurred in conditions substantially similar to those in an underground mine. We, therefore, affirm the administrative law judge's determination that claimant's five years of work at the breakers occurred in conditions substantially similar to those in an underground mine.[7] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm the administrative law judge's determination that claimant established the necessary fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption.

Because employer does not challenge the administrative law judge's finding that the medical evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), this finding is also affirmed. *See Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's findings that the miner had more than fifteen years of qualifying coal mine employment, and was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

[7] In light of our affirmance of the administrative law judge's finding that the miner's five years of coal mine work at the breakers occurred in conditions substantially similar to those in an underground mine, we need not address employer's challenge to the administrative law judge's alternative finding that the miner's work at the breakers also constituted "underground" coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1984).

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

Because claimant invoked the presumption of death 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. 30 U.S.C. §921(c)(4); Decision and Order on Remand at 15. The administrative law judge found that employer failed to disprove the existence of clinical pneumoconiosis. The administrative law judge also found that employer failed to disprove that the miner's disabling respiratory impairment did not arise out of his coal mine employment. The administrative law judge, therefore, found that employer failed to establish rebuttal of the Section 411(c)(4) presumption.

In challenging the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, employer notes that Judge Teitler, in his 2007 Decision and Order, found that the miner failed to establish the existence of clinical pneumoconiosis. Employer's focus upon Judge Teitler's earlier finding ignores the fact that while the miner, in pursuit of his own claim, bore the burden of proof in establishing the existence of clinical pneumoconiosis, claimant, by invoking the Section 411(c)(4) presumption in the survivor's claim, shifted the burden to employer to disprove the existence of pneumoconiosis. In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge noted that Judge Teitler had previously found that the x-ray evidence was "evenly balanced" regarding the existence of clinical pneumoconiosis. Decision and Order on Remand at 17. The administrative law judge also considered evidence submitted by the parties on remand in the survivor's claim, and found that it did not disprove the existence of clinical pneumoconiosis. The administrative law judge expressly found that employer's expert, Dr. Fino, conceded, in his April 2, 2008 medical report and June 12, 2008 deposition testimony, that there was x-ray evidence of clinical pneumoconiosis. Decision and Order on Remand at 17, 19; Employer's Exhibits 1, 2. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer did not disprove the existence of clinical pneumoconiosis.[8] *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002). Because employer does not raise any additional contentions of error, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal of the Section 411(c)(4) presumption.

[8] Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *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).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits in the survivor's claim.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge