BRB Nos. 10-0447 BLA
and 10-0472 BLA

CAROLYN CARLTON (Widow of, and on behalf of ROBERT CARLTON)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 03/21/2011
GREEN RIVER COAL COMPANY	)	
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Tennessee, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (2007-BLA-5695 and 2007-BLA-5696) of Administrative Law Judge Daniel F. Solomon, denying benefits

on a miner's subsequent claim and denying claimant's request for modification on a survivor's claim, each filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public 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). The administrative law judge credited the miner with twenty-seven years of coal mine employment,[1] as stipulated by the parties. In considering the miner's claim, the administrative law judge initially found that the miner's prior application for benefits, filed on September 9, 2002, was finally denied on December 11, 2003, because the miner failed to establish the existence of a totally disabling respiratory impairment. Decision and Order at 2; Director's Exhibit 2 at 11. On September 2, 2005, the miner filed the current application, his third, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4 at 1. The administrative law judge found that the medical evidence developed since the prior denial of benefits failed to establish the existence of a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge determined that claimant did not demonstrate a change in the applicable condition of entitlement in the miner's claim, as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found that the evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, assuming *arguendo* the existence of the disease, failed to establish that pneumoconiosis contributed to the miner's death pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge found that claimant did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant asserts, with respect to the miner's claim, that the administrative law judge erred in his evaluation of the pulmonary function study and medical opinion evidence, in finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). With respect to the survivor's claim, claimant asserts that the administrative law judge erred in his evaluation of the medical opinion evidence, in finding that claimant failed to establish either the existence of pneumoconiosis, or that pneumoconiosis contributed to the miner's death pursuant to 20 C.F.R. §§718.202(a)(4), 718.205(c). Employer responds, urging affirmance of the administrative law judge's denials of benefits. The Director, Office of Workers' Compensation Programs (the

[1] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Director), has not filed a response brief relevant to the merits of entitlement. Claimant filed a reply brief reiterating her contentions on appeal.[2]

Additionally, claimant asserts that the recent amendments to the Act, which were enacted by Section 1556 of Public Law No. 111-148, are applicable to the miner's and survivor's claims, as each was filed after January 1, 2005, and claimant established that the miner had twenty-seven years of coal mine employment.[3] Claimant contends that, therefore, she is entitled to benefits. Claimant's Brief at 2, 15. The Director asserts that, while Section 1556 is applicable to these claims because they were filed after January 1, 2005, and the miner was credited with twenty-seven years of coal mine employment, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's finding that total disability was not established in the miner's claim. Employer responds, agreeing with the Director, that amended 20 C.F.R. §921(c)(4) is potentially applicable to the survivor's claim, as it was filed after January 1, 2005. Employer, however, contends that retroactive application of the amendment would be unconstitutional, because it would violate employer's due process rights, and would constitute an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution.

As we will set forth below, we affirm the finding that total disability was not established in the miner's claim. Therefore, Section 1556 does not affect the miner's claim. However, because the issue of total disability was not relevant to the survivor's

[2] The administrative law judge's findings, in the miner's claim, that claimant did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii) and, in the survivor's claim, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), are affirmed as unchallenged on appeal. *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).

[3] Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis or, relevant to survivor's claims, death due to pneumoconiosis in cases where the claimant has established that the miner had fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). 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*).

claim until the recent amendments, we conclude that Section 1556 potentially affects the survivor's claim.

To be entitled to benefits under the Act in a miner's claim, claimant must demonstrate, by a preponderance of the evidence, that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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).

I.
MINER'S CLAIM

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

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 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). The miner's prior claim was denied because he failed to establish that he was totally disabled. Director's Exhibit 2 at 11. Consequently, claimant had to submit new evidence establishing that he was totally disabled to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant initially contends that the administrative law judge erred in his evaluation of the new pulmonary function study evidence, pursuant to 20 C.F.R. §718.204(b)(2)(i), relevant to the issue of total disability in the miner's claim. Claimant's

Brief at 3. Claimant asserts that, in finding the new, qualifying,[4] pulmonary function study to be invalid, the administrative law judge erred in according less weight to the opinions of the physicians affiliated with the Department of Labor (DOL), who validated the study, than to the contrary opinions offered by employer's experts. Claimant's Brief at 3. Claimant's contention lacks merit.

Considering the new pulmonary function study performed by Dr. Simpao, on September 20, 2005, the administrative law judge properly found that, while the study produced qualifying values, the validity of the study was challenged by Dr. Long, who explained that the tracings revealed suboptimal effort. Decision and Order at 19; Director's Exhibit 22 at 3. By contrast, Dr. Simpao, who performed the test as part of the DOL-sponsored pulmonary evaluation, indicated that the miner's effort was good, and Dr. Mettu, who reviewed the study on behalf of DOL, indicated that the results were acceptable. Decision and Order at 19; Director's Exhibit 17 at 4.

In weighing this conflicting evidence, the administrative law judge noted that Appendix B to Part 718, regarding the standards for the administration and interpretation of pulmonary function tests, provides that "[t]ests shall not be performed during or soon after an acute respiratory illness." 20 C.F.R. Part 718, Appendix B(2)(i); Decision and Order at 19. The administrative law judge noted further that the September 20, 2005 pulmonary function study was performed ten days before the miner's death, while the miner was undergoing chemotherapy for stage IV lung cancer, and was bedridden. Based on the foregoing information, the administrative law judge found that the miner's rapid deterioration at the time of the DOL evaluation equated to an acute respiratory illness that tainted the 2005 pulmonary function study results. Decision and Order at 7, 19; Hearing Tr. at 34-35. In support of his conclusion that the miner's end stage lung cancer was akin to an acute respiratory illness, the administrative law judge also relied on the medical opinion of Dr. Sargent, who questioned the reliability of the 2005 pulmonary function study results:

> His pulmonary function tests done on 9-20-05 were done [eleven][5] days prior to his death. Dr. Gaines testified that he saw [the miner] on several

[4] A "qualifying" objective study yields values that are equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] As Dr. Sargent correctly noted, the miner death, on October 1, 2005, occurred eleven days after the September 20, 2005 pulmonary function study, not ten days afterwards, as stated by the administrative law judge. However, as the administrative law judge relied on Dr. Sargent's correct opinion to conclude that the September 20, 2005

> occasions prior to these pulmonary function tests and found him to be declining rapidly in health with severe weakness and other symptoms of progressive carcinoma. Therefore, I do not believe [the miner] would be able to perform valid pulmonary functions at this time.

Employer's Exhibit 5. Based on the opinion of Dr. Sargent, together with Dr. Long's opinion that the pulmonary function study results are invalid, the administrative law judge concluded that the 2005 study was entitled to little probative value. Decision and Order at 20.

The regulations provide that, in evaluating the pulmonary function study evidence, the administrative law judge should consider whether a study substantially conforms to the quality standards set forth in 20 C.F.R. §718.103 and Part 718, Appendix B. It is for the administrative law judge, as the fact-finder, to determine whether an objective study that does not conform to the quality standards is nevertheless reliable. *See DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988). Contrary to claimant's arguments, the administrative law judge properly considered the applicable quality standards, together with the medical evidence and lay testimony of record documenting the miner's rapidly deteriorating health and increasing weakness, and permissibly concluded that the September 20, 2005 pulmonary function study, while qualifying, was too unreliable to support a finding of total disability. *See DeFore*, 12 BLR at 1-29; Decision and Order at 19-20. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's findings that the September 20, 2005 pulmonary function study is invalid, and that total disability is not established by the weight of the pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 14.

Claimant next contends that the administrative law judge erred in discounting the opinions of Drs. Gaines, Rasmussen, and Simpao, in determining that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant's Brief at 3. We disagree.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Sargent, Fino, Rasmussen, Gaines, and Simpao. Decision and Order at 21. Dr. Sargent opined that there was "no objective evidence of a ventilatory impairment present prior to [the miner's] death." Decision and Order at 20;

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pulmonary function study was unreliable, the administrative law judge's calculation error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-276 (1984).

Employer's Exhibit 5. The administrative law judge noted that, while Dr. Fino similarly opined that "[t]here was no objective respiratory impairment present," Dr. Fino also concluded that "[f]rom a respiratory standpoint, [the miner] was disabled from returning to his last mining job or a job requiring similar effort as a result of lung cancer." Director's Exhibit 61 at 2, 9. Thus, the administrative law judge permissibly accorded less weight to Dr. Fino's opinion because he found that it was internally inconsistent. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-647-49 (6th Cir. 2003); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Decision and Order at 21. In addition, contrary to claimant's argument, the administrative law judge correctly found that, while Dr. Rasmussen opined that the miner had a "significant degree of ventilatory impairment," and Dr. Gaines opined that the miner had "significant underlying chronic lung disease," neither physician addressed whether the miner's pulmonary impairment would prevent him from performing his usual coal mine work. Decision and Order at 20; Claimant's Brief at 3-7; Claimant's Exhibit 1; Director's Exhibit 62 at 2.

By contrast, the administrative law judge found that only Dr. Simpao clearly opined that the miner's moderate pulmonary impairment would prevent him from performing his usual coal mine work. Decision and Order at 20; Director's Exhibit 17. Contrary to claimant's contention, the administrative law judge permissibly discredited Dr. Simpao's opinion because it was based, in part, on the September 20, 2005 pulmonary function study, which the administrative law judge found to be of diminished probative value. *See Williams*, 338 F.3d at 514, 22 BLR at 2-649; *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984); Claimant's Brief at 7. The administrative law judge further acted within his discretion in concluding that, while Dr. Simpao also based his opinion on his physical findings and the miner's symptoms, it was not clear how much Dr. Simpao relied on the September 20, 2005 pulmonary function study, or whether his opinion would change without that data. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 21. Thus, there is no merit to claimant's assertion that the administrative law judge selectively analyzed Dr. Simpao's report. Claimant's Brief at 7-8. Therefore, the administrative law judge permissibly concluded that claimant failed to satisfy her burden to establish that the miner had a totally disabling pulmonary or respiratory impairment by a preponderance of the reasoned medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 24. We therefore affirm, as supported by substantial evidence, the administrative law judge's determination that the medical opinion evidence failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Thus, we further affirm the administrative law judge's finding that the evidence developed since the prior denial of benefits did not establish that the miner was totally

disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *see also Anderson*, 12 BLR at 1-113; Decision and Order at 24. Consequently, we affirm the administrative law judge's finding that claimant did not establish that the applicable condition of entitlement has changed since the denial of the miner's prior claim, and we affirm the administrative law judge's denial of benefits in the miner's claim pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-7. Moreover, because the miner's claim was denied on the grounds that the miner did not have a totally disabling respiratory impairment, application of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), to the miner's claim is precluded.

II.
SURVIVOR'S CLAIM

As set forth above, because claimant filed her survivor's claim after January 1, 2005, and it was still pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to the survivor's claim.[6] Claimant asserts that she is entitled to benefits under the recent amendments. Claimant's Brief at 2, 15. The Director disagrees, asserting that the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's finding that total disability was not established in the miner's claim. Director's Brief at 1. Employer contends that retroactive application of the amendments would be unconstitutional. Employer's Brief at 14-22. We hold, however, that the administrative law judge's findings, and his denial of benefits in the survivor's claim, must be vacated, and this case must be remanded for application of amended Section 411(c)(4) to the survivor's claim.[7]

Initially, we reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. The arguments made by employer are identical to the ones that the Board rejected in *Stacy v. Olga Coal Co.*, ___ BLR 1-___, BRB No. 10-

[6] Section 411(c)(4) provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or 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) (to be codified at 30 U.S.C. §921(c)(4)).

[7] Because we have affirmed the administrative law judge denial of benefits in the miner's claim, claimant is not derivatively entitled to benefits pursuant to amended Section 422(*l*), 30 U.S.C. §932(*l*).

0113 BLA (Dec. 22, 2010), appeal docketed, No. 11-1020 (4th Cir. Jan. 6, 2011) and *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010)(pending on recon.). We, therefore, reject them here for the reasons set forth in those cases. *See Stacy*, slip op. at 8; *Mathews*, 24 BLR at 1-198-200.

The Section 411(c)(4) presumption requires a determination of whether the miner was totally disabled due to a pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b). Contrary to the Director's assertion, while claimant failed to establish the existence of a totally disabling respiratory impairment in the miner's claim, that issue was not relevant to this survivor's claim until the recent amendments. In addition, if the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis or that the miner's totally disabling pulmonary or respiratory impairment arose out of his coal mine employment. Consequently, we cannot affirm the denial of survivor's benefits on the basis that claimant did not establish the existence of pneumoconiosis, or that the miner's death was due to pneumoconiosis. Thus, in the survivor's claim, we vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.205(c) and remand this case to him.

On remand, the administrative law judge must initially consider whether claimant is entitled to invocation of the rebuttable presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption, the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that the miner did not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge, on remand, should allow for the submission of additional evidence by the parties to address the change in law, consistent with the evidentiary limitations at 20 C.F.R. §725.414. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986).

Accordingly, we affirm the administrative law judge's denial of benefits in the miner's subsequent claim, and vacate the administrative law judge's denial of benefits in the survivor's claim, and remand this case for further proceedings consistent with this opinion.

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