

BRB No. 12-0369 BLA

EARNEL E. O'QUINN)
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 Claimant-Respondent)
)
 v.)
)
 ISLAND CREEK KENTUCKY MINING) DATE ISSUED: 03/07/2013
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 and)
)
 ISLAND CREEK COAL COMPANY)
)
 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 of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5039) of Administrative Law Judge Pamela J. Lakes awarding benefits on a claim filed pursuant to 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 1, 2009.¹

Congress 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 underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, 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(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §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), the administrative law judge credited claimant with forty-six years of underground coal mine employment,² and found that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption.³ Accordingly, the administrative law judge awarded benefits.

¹ Claimant filed two previous claims, both of which were finally denied. Director's Exhibits 1, 2. Claimant's most recent prior claim, filed on June 8, 2000, was denied by an administrative law judge on November 16, 2001, because the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 2.

² The record indicates that claimant's coal mine employment was in Virginia. Hearing Transcript at 17. 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 Having found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that employer did not rebut the presumption, the administrative law judge found that claimant established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(d); Decision and Order at 5.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.⁴ Claimant has not filed a response brief.⁵ The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's contention that the administrative law judge erred in applying Section 411(c)(4) to this case.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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). Claimant's prior claim was denied because he failed to establish that his total disability was due to pneumoconiosis. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing total disability due to pneumoconiosis. 20 C.F.R. §725.309(d).

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

Employer asserts 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. Further, employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's

⁴ The administrative law judge's findings that claimant established forty-six years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), are unchallenged on appeal. Those findings are, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ Claimant died on March 31, 2010. Director's Exhibit 11. Gary O'Quinn, the executor of claimant's estate, is pursuing the claim. Director's Exhibits 13, 43.

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.

Employer next argues that the application of Section 411(c)(4) is premature, because the Department of Labor has not yet promulgated regulations implementing the amendments to the Act. Employer's Brief at 32-34. We reject this argument. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4). In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 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). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 9-14.

The administrative law judge properly found that, because employer stipulated to the existence of clinical pneumoconiosis, Hearing Transcript at 7-8, employer cannot rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *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); Decision and Order at 9. Employer, however, contends that the administrative law judge erred in finding that the evidence did not prove 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). Employer specifically argues that the administrative law judge erred in her consideration of the opinions of Drs. Fino, Basheda, and Bush.

Dr. Fino diagnosed coal workers' pneumoconiosis, and severe emphysema due to smoking. Employer's Exhibit 6. Dr. Fino opined that claimant was totally disabled due to smoking, with coal mine dust "play[ing] no role." *Id.* Dr. Basheda diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease (COPD), and bronchial asthma. Employer's Exhibit 5. Dr. Basheda opined that claimant suffered from a totally

disabling respiratory impairment due to severe tobacco-induced COPD, with superimposed bronchial asthma. *Id.* Dr. Basheda opined that claimant's coal workers' pneumoconiosis was not associated with any significant respiratory impairment or disability. *Id.* Dr. Bush diagnosed simple coal workers' pneumoconiosis, bronchopneumonia, emphysema (centrilobular and focal), and carcinoma. Employer's Exhibits 3, 7. Dr. Bush opined that while claimant's minimal focal emphysema was due to "coal dust disease," his centrilobular emphysema was not related to coal mine dust exposure. Employer's Exhibit 3. Dr. Bush opined that claimant suffered from "some degree of respiratory impairment prior to death." *Id.* Dr. Bush opined that claimant's bronchopneumonia and centrilobular emphysema were causes of claimant's respiratory impairment, but that claimant's carcinoma and coal worker's pneumoconiosis were not. *Id.* Dr. Bush explained that claimant's carcinoma was too limited in size to have contributed to claimant's respiratory impairment. *Id.* Dr. Bush further explained that claimant's pneumoconiosis affected "no more than 3% of the lung tissue[,] which is too limited in degree to have any contribution to impairment or disability." *Id.*

The administrative law judge discounted Dr. Fino's conclusion that any reduction in claimant's FEV1 value that was caused by coal mine dust exposure was clinically insignificant, and played no role in his disability. Decision and Order at 11. The administrative law judge found that Dr. Fino failed to adequately explain why claimant's coal workers' pneumoconiosis had no effect on his severely compromised respiratory function. *Id.* at 12. Moreover, the administrative law judge found that Dr. Fino failed to provide a basis for his opinion that claimant's coal mine dust exposure did not contribute to, or aggravate, his totally disabling emphysema, which the doctor attributed exclusively to smoking. *Id.* The administrative law judge accorded diminished weight to Dr. Basheda's opinion because the doctor eliminated coal dust exposure as a cause of claimant's pulmonary impairment based, in part, upon the fact that claimant's pulmonary function was "fairly normal" two years after he ceased coal mining. Decision and Order at 12. The administrative law judge found that the doctor's reasoning was at odds with the recognition that pneumoconiosis is a latent and progressive disease. *Id.* Finally, the administrative law judge accorded less weight to Dr. Bush's opinion, finding that the doctor failed to adequately explain his basis for eliminating claimant's coal workers' pneumoconiosis and focal emphysema as contributors to his totally disabling pulmonary impairment. *Id.* at 12-13.

Employer contends that the administrative law judge erred in finding that the opinions of Drs. Fino, Basheda, and Bush did not establish rebuttal of the Section 411(c)(4) presumption. We disagree. The administrative law judge permissibly found that Dr. Fino failed to provide an adequate explanation for ruling out claimant's coal workers' pneumoconiosis as a contributor to his totally disabling pulmonary impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76

(4th Cir. 1997); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 11-12. The administrative law judge also permissibly discounted Dr. Fino's opinion, that claimant's totally disabling COPD was due solely to smoking, because the physician failed to adequately explain how he eliminated claimant's forty-six years of coal mine dust exposure as a source of the COPD. See *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 12. The administrative law judge permissibly found that Dr. Basheda's opinion, regarding the cause of claimant's pulmonary impairment, was entitled to less weight because it was inconsistent with the recognition that pneumoconiosis is a latent and progressive disease. 20 C.F.R. §718.201(c) (recognizing that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure"); see *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); Decision and Order at 12. Finally, the administrative law judge permissibly found that Dr. Bush failed to adequately explain why claimant's coal workers' pneumoconiosis (which, he opined, destroyed up to three percent of the lung parenchyma),⁶ along with claimant's focal emphysema, did not contribute to claimant's totally disabling respiratory or pulmonary impairment. See *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 12-13.

Because the opinions of Drs. Fino, Basheda, and Bush are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of, or in connection with, his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal.⁷ See *Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). Therefore, we affirm the administrative law judge's award of benefits.⁸ 30 U.S.C. §921(c)(4).

⁶ The administrative law judge noted that Dr. Bush acknowledged the presence of multiple silicotic nodules measuring up to 0.5 cm., and one silicotic nodule measuring 0.8 cm. x 0.5 cm. Decision and Order at 12; Employer's Exhibit 3.

⁷ Thus, we need not address employer's arguments regarding the weight that the administrative law judge accorded Dr. Forehand's opinion, or her determination of the length of claimant's smoking history. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁸ Because we affirm the administrative law judge's findings that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and that employer did not rebut the presumption, we also affirm the administrative law judge's determination that claimant established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(d).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge