BRB No. 11-0713 BLA

BARBARA A. COPLEY (Widow of HOWARD COPLEY)	)	
Claimant-Respondent	)	
v.	)	
BUFFALO MINING COMPANY	)	DATE ISSUED: 07/31/2012
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 Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (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 appeals the Decision and Order Awarding Benefits (2010-BLA-05463) of Administrative Law Judge Adele Higgins Odegard rendered on a survivor's claim[1] filed on July 24, 2009, 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). In considering the claim, the administrative law judge noted that Congress enacted amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, Section 1556 of Public Law No. 111-148 reinstated 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 surface mine employment in conditions substantially similar to those of an underground mine, and suffered from 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) (to be codified at 30 U.S.C. §921(c)(4)).

The administrative law judge determined that claimant established that the miner had twenty-eight years of qualifying coal mine employment and that the miner was totally disabled. Thus, the administrative law judge found that claimant is entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.[2]

On appeal, employer contends that the administrative law judge did not conduct a proper weighing of all of the evidence at 20 C.F.R. §718.204(b)(2), prior to concluding that claimant established total disability. Regarding rebuttal of the amended Section 411(c)(4) presumption, employer argues that the administrative law judge erroneously

[1]Claimant is the widow of the miner, Howard Copley. Director's Exhibit 8. The administrative law judge found that, while the miner filed several claims during his lifetime, he was finally denied benefits on August 24, 2004. Decision and Order at 2; Director's Exhibits 1, 82; Claimant's Exhibit 2.

[2]The administrative law judge determined that payment of benefits should commence effective January 2009, "the month in which the miner died." Decision and Order at 17. According to the miner's death certificate, he died on April 28, 2009. Director's Exhibit 8.

found that employer failed to prove that the miner did not have pneumoconiosis and that his disability was unrelated to his coal mine employment. Employer specifically challenges the credibility determinations of the administrative law judge with regard to the opinions of Drs. Oesterling, Bush, Rosenberg and Spagnolo. Employer further argues that the administrative law judge erred in failing to consider whether employer rebutted the presumption by proving that the miner's death was unrelated to his coal mine employment. Additionally, employer contests the constitutionality of the amendments and also requests that the Board hold this case in abeyance, pending resolution of the legal challenges to the PPACA.

Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, urging the Board to reject employer's request to hold this case in abeyance. The Director further asserts, however, that the administrative law judge "misstated the rebuttal burden in this case," insofar as he required employer to establish that the miner's respiratory disability did not arise out of, or in connection with, his coal mine employment. Director's Brief at 1. The Director maintains that the proper method for rebutting the amended Section 411(c)(4) presumption in a survivor's claim is to prove either that "the miner did not suffer from pneumoconiosis or that the miner's death was wholly unrelated to his coal mine employment." *Id*. Nevertheless, the Director suggests that the Board could hold that the administrative law judge's error is harmless, as her determination that employer failed to prove that the miner's respiratory impairment did not arise out of, or in connection with, coal mine employment, may preclude a determination that coal mine employment played no role in the miner's death. The Director contends that if this approach is unavailing, the administrative law judge's Decision and Order must be vacated and the case must be remanded for further consideration.

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.[3] 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. Constitutionality of Amended Section 411(c)(4)

As an initial matter, we reject employer's contention that retroactive application of the amended Section 411(c)(4) presumption to claims filed after January 1, 2005, constitutes a due process violation and an unlawful taking of private property, for the

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

same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).[4] *See also B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Furthermore, we deny employer's request that the case be held in abeyance as, subsequent to the filing of employer's Brief in Support of Petition for Review, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

II. Invocation of the Amended Section 411(c)(4) Presumption

The administrative law judge determined that claimant established that the miner worked twenty-eight years in underground coal mine employment, and we affirm that finding as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). The administrative law judge also found that claimant established that the miner had a totally disabling respiratory impairment, based on the qualifying pulmonary function studies[5] and the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(i), (iv).[6] Initially, we reject employer's contention that the administrative law judge erred in failing to weigh "all the evidence together under Section 718.204 in determining whether the evidence as a whole, establishes that the [m]iner was totally disabled. . . ." Employer's Brief in Support of Petition for Review at 12. The administrative law judge considered the evidence pursuant to each subsection at 20 C.F.R. §718.204(b)(2)(i)-(iv) and rationally determined that the "valid pulmonary function studies," and the "physician opinions on the issue of the miner's total disability," established, by a "*preponderance of the evidence*," that the miner was totally disabled due to a respiratory condition. Decision and Order at 10 (emphasis added); *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc). The administrative law judge's analysis is consistent with the requirement, set forth in *Shedlock*, that the administrative law judge consider all the contrary probative evidence, prior to finding total disability established. *See Shedlock*, 9 BLR at 1-198. Therefore, as it is supported by substantial evidence, we affirm the

[4] Employer notes that, while the Board has upheld the constitutionality of the amendments, it wishes to preserve its constitutional arguments for purposes of an appeal.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B.

[6] The administrative law judge found that the blood gas study results were non-qualifying and that there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); 20 C.F.R. Part 718, Appendix C.

administrative law judge's finding that claimant established that the miner had a totally disabling respiratory impairment. Because employer has raised no other specific allegations of error with regard to invocation, we affirm the administrative law judge's finding that claimant is entitled to the presumption at amended Section 411(c)(4). *Skrack*, 6 BLR at 1-711; Decision and Order at 10.

III. Rebuttal of the Amended Section 411(c)(4) Presumption

The administrative law judge first considered whether employer rebutted the amended Section 411(c)(4) presumption by showing that the miner did not have pneumoconiosis. Decision and Order at 10. The administrative law judge noted that, "although the degrees of severity differ, each medical report acknowledged that the [m]iner had pneumoconiosis at the time of his death." *Id.* The administrative law judge concluded that, because "the evidence at autopsy establishes that the [m]iner had pneumoconiosis," employer failed to rebut the presumption by disproving the existence of the disease. *Id*. at 11.

Employer contends that the administrative law judge erred in concluding that the miner had pneumoconiosis, based on the autopsy and medical evidence, without considering that "[p]ractically every x-ray and [computerized tomography (CT)] scan of record in the instant claim is negative for or non-diagnostic of coal workers' pneumoconiosis." Employer's Brief in Support of Petition for Review at 10. Employer alleges that, because the administrative law judge did not specifically address "the diagnostic imaging" in this case, her Decision and Order fails to satisfy the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. Employer's Brief in Support of Petition for Review at 10-11 n.3. Employer also contends that the administrative law judge erred in failing to weigh together all of the evidence relevant to the existence of pneumoconiosis. *Id.* at 11, *citing Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Although the administrative law judge did not specifically summarize the x-ray and CT scan readings in this case, we consider this error to be harmless as the administrative law judge's finding that the miner had pneumoconiosis is supported by substantial evidence in the record. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Contrary to employer's argument, the administrative law judge permissibly credited the autopsy evidence, since it is "highly reliable" for diagnosing the presence or absence of pneumoconiosis. Decision and Order at 10; *see Gray v. SLC Coal Co.*, 176 F.3d 382, 387, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). Furthermore, the

administrative law judge correctly observed that a preponderance of the autopsy and medical opinion evidence supports a conclusion that the miner suffered from pneumoconiosis: Dr. Rosenberg diagnosed a "minimal" degree of simple coal workers' pneumoconiosis (CWP); Dr. Spagnolo found "mild" CWP; Dr. Bellam completed the death certificate and reported simple pneumoconiosis as the immediate cause of the miner's death; Dr. Racadag performed the autopsy and reported simple CWP; Dr. Oesterling reviewed the autopsy slides and concluded that the miner had mild "micronodular" CWP; and Dr. Bush reviewed the autopsy slides and found "a very mild degree of simple [CWP]." Director's Exhibits 8-9, 16-17; Employer's Exhibits 1-2. We, therefore, reject employer's contention that the administrative law judge's Decision and Order fails to satisfy the APA, and we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); Decision and Order at 10.

The administrative law judge next considered whether employer rebutted the presumption at amended Section 411(c)(4), "by establishing that the [m]iner's impairment did not arise out of his coal mine employment." Decision and Order at 11. The administrative law judge found that "all four physicians' opinions regarding the cause of the [m]iner's disability alluded to smoking as a possible etiology." *Id*. at 15. The administrative law judge found that Dr. Bush's disability causation opinion was equivocal and that Dr. Oesterling did not rule out coal dust exposure as a contributing cause of the miner's disabling respiratory impairment. *Id*. The administrative law judge further found that the opinions of Drs. Spagnolo and Rosenberg, that coal dust exposure did not contribute to the miner's disabling emphysema, were neither adequately explained nor adequately reasoned. *Id*. at 16. The administrative law judge concluded that employer "is not able to rebut the presumption that the miner's death was due to pneumoconiosis, because [employer] failed to establish that the [m]iner's disabling impairment was not related to his coal mine employment." *Id*.

Although employer challenges the administrative law judge's credibility determinations, we first address the Director's assertion that the administrative law judge "misstated the rebuttal burden in this case." Director's Brief at 1. The Director asserts that the administrative law judge erred insofar as she considered whether employer rebutted the amended Section 411(c)(4) presumption by establishing that the miner's total disability did not arise out of, or in connection with, coal mine employment. The Director contends that "invocation of amended Section 411(c)(4) by a survivor results *only* in a presumption of death due to pneumoconiosis" and "[c]onsequently, the presumption is rebutted by proving that the miner did not suffer from pneumoconiosis or that the miner's death was wholly unrelated to his coal mine employment." *Id*. (emphasis added).

We agree that the administrative law judge applied the wrong rebuttal standard in this case. When Congress originally enacted Section 411(c)(4), 30 U.S.C. §921(c)(4), the Act provided that a survivor could establish entitlement by proving either that the miner was totally disabled due to pneumoconiosis at the time of his death or that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §901(a). Accordingly, if the Section 411(c)(4) presumption was invoked in a survivor's claim filed prior to 1982, the miner was presumed to have been totally disabled due to pneumoconiosis *and* his death was presumed to have been due to pneumoconiosis. *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988). The party opposing entitlement was required to rebut both presumptions in order to defeat an award of benefits. *Id*.

The Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981), repealed Section 411(c)(4) for all claims filed after January 1, 1982, and altered the general purpose provision of the Act by striking the language stating that one purpose of the Act was to allow survivors to establish entitlement to benefits based on a miner's *total disability* due to pneumoconiosis at the time of death. *See West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011). The Act now provides:

> It is, therefore, the purpose of this subchapter to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis *and to the surviving dependents of miners whose death was due to such disease* . . . .

30 U.S.C. §901 (1982) (emphasis added); *see Campbell*, 662 F.3d at 2-254-63, 25 BLR at 2-25-27; *Mancia v. Director, OWCP*, 130 F.3d 579, 584 n.6, 21 BLR 2-214, 2-225 n.6 (3d Cir. 1997). Although the 2010 amendments to the Act contained in the PPACA reinstated the Section 411(c)(4) presumption, they did not alter the requirement, at 30 U.S.C. §901 (1982), that the survivor establish that the miner's death was due to pneumoconiosis in order to be entitled to benefits.[7] *See* Section 1556 of Public Law No. 111-148; Director's Brief at 2.

Based on the foregoing statutory history, we conclude that invocation of the amended Section 411(c)(4) presumption, in a survivor's claim filed after January 1, 2005, gives rise to a presumption that the miner's death was due to pneumoconiosis. In order to rebut this presumption, therefore, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal

[7] Section 1556 of the Patient Protection and Affordable Care Act (PPACA), entitled "Equity for Certain Eligible Survivors," amended Section 411(c)(4) of the Black Lung Benefits Act, 30 U.S.C. 921(c)(4), by striking the last sentence of that section, which limited application of Section 411(c)(4) to claims filed before January 1, 1982. Thus, amended Section 411(c)(4) is now applicable to all claims filed after January 1, 2005 that are pending on or after March 23, 2010, the enactment date of the PPACA.

mine employment. This view of the rebuttal methods available in a survivor's claim is consistent with the standard set forth by the Department of Labor in proposed 20 C.F.R. §718.305, implementing amended Section 411(c)(4), which states:

> **§718.305 Presumption of pneumoconiosis**
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> * * *
>
> (d) Rebuttal. . . .
>
> (2) Survivor's Claim. In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by establishing that
>
> (i) the miner did not have pneumoconiosis, as defined in section 718.201; or
>
> (ii) the miner's death did not arise in whole or in part out of dust exposure in the miner's coal mine employment.

77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

In this survivor's claim, claimant invoked the amended Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Thus, contrary to the administrative law judge's analysis, the cause of the miner's respiratory disability was irrelevant to determining whether employer rebutted the presumption of death due to pneumoconiosis.[8] Because the administrative law judge erred in considering the issue of disability causation, rather than requiring employer to prove that the miner's death was unrelated to his coal mine employment, we vacate the administrative law judge's finding that employer did not establish rebuttal. Consequently, we vacate the award of benefits and remand this case for the administrative law judge to determine whether employer has rebutted the amended Section 411(c)(4) presumption by proving that the miner's death did not arise in whole, or in part, out of dust exposure in the miner's coal mine employment.[9]

[8] In light of this holding, we decline to address employer's allegations of error regarding the administrative law judge's weighing of the medical opinions relevant to the cause of the miner's respiratory disability.

[9] We reject the suggestion that the award of benefits could be affirmed if the Board were to hold that employer's failure to rebut the presumption of disability causation precluded employer from rebutting the presumption of death causation. *See* Director's Brief at 2. Remand is required as the administrative law judge has not made the necessary factual findings regarding the cause of the miner's death and the Board is

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration 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

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not empowered to engage in the initial consideration of evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984).