

BRB No. 11-0504 BLA

PATRICIA F. SHRADER)
)
 Claimant-Respondent)
)
 v.)
)
 PINNACLE MINING COMPANY)
)
 and)
) DATE ISSUED: 04/19/2012
 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 Granting Request for Modification and Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Amy Jo Holley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Granting Request for Modification and Awarding Benefits (2009-BLA-05708) of Administrative Law Judge Kenneth A. Krantz (the administrative law judge) rendered on a claim filed 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). This case involves claimant's request for modification of the denial of her claim filed on February 2, 2005. Director's Exhibit 2. Initially, the claim was denied by Administrative Law Judge Jeffrey Tureck, on September 25, 2007, because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 54. Pursuant to claimant's appeal, the Board affirmed Judge Tureck's denial of benefits. *P.S. [Shrader] v. Pinnacle Mining Co.*, BRB No. 08-0155 BLA (Sept. 22, 2008)(unpub.). Director's Exhibit 67. Claimant timely requested modification, *see* 20 C.F.R. §725.310, and the case was subsequently assigned to the administrative law judge for a hearing, which was held on May 20, 2010. Director's Exhibits 71, 76.

The administrative law judge credited claimant with twenty-six years of underground coal mine employment,¹ and properly noted that while claimant's request for modification was pending, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010.² Relevant to this 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

¹ The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibits 4, 5. Accordingly, the Board will apply the law 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).

² In view of the potential applicability of amended Section 411(c)(4), Administrative Law Judge Jeffrey Tureck issued an Order on April 6, 2010, providing the parties with an opportunity to address the change in law, and to submit additional medical evidence directed at the new legal standard, consistent with the evidentiary limitations of 20 C.F.R. §725.414. Claimant, employer, and the Director, Office of Workers' Compensation Programs, filed briefs; employer submitted the May 13, 2010 deposition testimony of Dr. Spagnolo. Employer's Exhibit 3.

of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and establishes 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) (to be 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 the miner'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 found that because claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that her pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, and, therefore, the administrative law judge found that employer failed to rebut the presumption. Thus, the administrative law judge concluded that claimant established a mistake in the prior determination that she was not entitled to benefits, pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge granted claimant's request for modification, and awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and invocation of the amended Section 411(c)(4) presumption. Employer further asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the presumption of total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's arguments that amended Section 411(c)(4) may not be applied to this case. In reply, employer requests that this case be held in abeyance pending the resolution of the constitutional challenges to Public Law No. 111-148 in federal court.³

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,

³ Employer does not challenge the administrative law judge's finding of twenty-six years of underground coal mine employment. Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

Employer first contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator, and 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. Employer’s Brief at 50-72. Employer’s contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA, slip op. at 4 (Oct. 28, 2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision.

Further, there is no merit to employer’s claim that, because the Department of Labor has not promulgated regulations implementing the recent amendments to the Act, there is no guidance concerning the proper rebuttal standard.⁴ Courts and the Board have held that the party opposing entitlement can rebut the presumption by proving either that the miner does not or did not have pneumoconiosis, or that the miner’s impairment did not arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980); *DeFore v. Ala. By-Products*, 12 BLR 1-27 (1988); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988), *aff’d sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir. Aug. 29, 1989)(unpub.); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). We affirm, therefore, the administrative law judge’s application of the rebuttal provisions of amended Section 411(c)(4) to employer in this case, and deny employer’s request to hold this case in abeyance. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

Employer next asserts that the administrative law judge erred in weighing the medical evidence in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), and invocation of the amended Section 411(c)(4) presumption.

In evaluating the evidence relevant to total disability, the administrative law judge initially found that claimant did not establish total disability through the pulmonary function and blood gas study evidence, pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and

⁴ On March 30, 2012 the Department of Labor issued proposed regulations implementing the recent amendments to the Act, subject to a sixty-day notice and comment period. 77 Fed. Reg.19456 (Mar. 30, 2012).

found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 24-25. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Forehand, Rasmussen, Castle, Spagnolo,⁵ and Hippensteel.⁶ The administrative law judge found that “[Drs. Forehand, Rasmussen, Castle, and Spagnolo] opined that claimant is totally and permanently disabled and unable to perform her last coal mining job or similarly arduous work,” while only Dr. Hippensteel opined that claimant is able to perform her usual coal mine work. Decision and Order at 25. The administrative law judge concluded that “Dr. Hippensteel, while very qualified, does not possess sufficient qualifications for his solitary opinion to outweigh those of the other physicians of record.” Decision and Order at 25. Thus, the administrative law judge determined that “the preponderance of the medical opinion evidence . . . shows that claimant suffers from a total disability that would preclude her from performing her usual coal mine employment” Decision and Order at 25.

Employer contends that substantial evidence does not support the administrative law judge’s findings, because the administrative law judge mischaracterized the opinions of Drs. Castle and Spagnolo, when he found them to be opinions that claimant is totally disabled by a respiratory impairment. Employer’s Brief at 42-45. Employer also asserts that the administrative law judge erred in not weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b). See *Shedlock v. Bethlehem Mines Corp.*, 9

⁵ Neither Dr. Spagnolo’s consultative medical report, dated September 16, 2009, nor his curriculum vitae, designated as Employer’s Exhibits 1 and 2, respectively, is contained in the record before the Board. By Order dated September 9, 2011, the Board directed the parties to forward copies of these exhibits to the Board. To date, the parties have not responded to the Board’s Order. Dr. Spagnolo’s May 13, 2010 deposition, Employer’s Exhibit 1, is contained in the record.

⁶ Drs. Forehand and Rasmussen opined that claimant is totally and permanently disabled from a respiratory standpoint from performing her usual coal mine work, with its attendant requirement for heavy manual labor. Director’s Exhibits 9, 33, 41. In contrast, Drs. Castle and Spagnolo opined that claimant is capable of performing her usual coal mine work from a respiratory standpoint, but indicated that she likely does not have the cardiac capacity to perform her usual work. Director’s Exhibits 27, 43, 44; Employer’s Exhibit 3. Dr. Hippensteel initially opined that claimant has a totally disabling respiratory impairment; but after reviewing additional evidence, he concluded that claimant retains the respiratory capacity for hard manual labor, and is not totally disabled from a respiratory standpoint. Director’s Exhibits 10, 39.

BLR 1-195, 1-198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc); Employer's Brief at 40-42. Employer's contentions have merit.

The regulations provide, in relevant part, that a miner shall be considered totally disabled if the evidence establishes that the miner has a "*pulmonary or respiratory impairment* which, standing alone, prevents or prevented the miner from performing his or her usual coal mine work." 20 C.F.R. §718.204(b)(1)(i)(emphasis added). Contrary to the administrative law judge's findings, the opinions of Drs. Castle and Spagnolo, that claimant is capable, from a respiratory standpoint, of performing her usual coal mine work as a fire boss and general inside laborer, but likely lacks the cardiac capacity to perform her usual work, do not support a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *See Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); Director's Exhibits 27, 43, 44; Employer's Exhibit 3. Consequently, the administrative law judge improperly characterized their opinions. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

As Dr. Hippensteel also opined that claimant retains the respiratory capacity to perform her usual coal mine work, and only Drs. Forehand and Rasmussen diagnosed total respiratory disability, we must vacate the administrative law judge's finding that a preponderance of the medical opinion evidence established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for reconsideration of that issue. On remand, the administrative law judge must reassess the medical opinion evidence and determine whether claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). If the administrative law judge, on remand, finds the medical opinion evidence sufficient to establish total disability, he must weigh all the relevant probative evidence together, both like and unlike, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. 20 C.F.R. §718.204(b); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

In light of our decision to vacate the administrative law judge's determination that claimant established total respiratory disability pursuant to 20 C.F.R. § 718.204(b), we must vacate the administrative law judge's determination that claimant invoked the amended Section 411(c)(4) presumption. On remand, if the administrative law judge finds that claimant has invoked the Section 411(c)(4) presumption, he must reconsider whether employer has rebutted the presumption, by disproving the existence of pneumoconiosis, or by establishing 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).⁷

In the interest of judicial economy, and in order to avoid the repetition of error on remand, we will address employer’s contention that, in evaluating the evidence relevant to the existence of legal pneumoconiosis, the administrative law judge mischaracterized Dr. Hippensteel’s opinion when he discounted it. Employer’s Brief at 23. As employer asserts, contrary to the administrative law judge’s analysis, Dr. Hippensteel did not rely on claimant’s response to bronchodilators on pulmonary function testing to conclude that coal mine dust exposure played no role in claimant’s respiratory impairment. Decision and Order at 20; Employer’s Brief at 23-24. Rather, Dr. Hippensteel opined that the *degree* of claimant’s impairment was variable, in that it improved, over time, from a severe obstructive impairment when he examined her, to a minimal obstructive impairment when Dr. Rasmussen later examined her, and that such variability is consistent with an impairment due to cigarette smoking, not coal mine dust exposure. Dr. Hippensteel’s September 14, 2005 report (Director’s Exhibit 10) at 3-4, Dr. Hippensteel’s September 12, 2006 deposition (Director’s Exhibit 39) at 17. Therefore, if the administrative law judge, on remand, finds the amended Section 411(c)(4) presumption invoked, he should reconsider the opinion of Dr. Hippensteel, together with the other medical opinions of record, in determining whether employer has rebutted the presumption. We decline to address, as premature, employer’s remaining arguments regarding the administrative law judge’s weighing of the medical opinion evidence in finding that rebuttal of the Section 411(c)(4) presumption was not established.

⁷ Contrary to the administrative law judge’s analysis, Decision and Order at 7-24, claimant need not prove directly the existence of pneumoconiosis in order to establish a basis for modification. If claimant establishes invocation of the amended Section 411(c)(4) presumption, the existence of pneumoconiosis is presumed, and 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). If the administrative law judge determines that employer has not rebutted the presumption, claimant will have established a mistake in the prior determination that she is not entitled to benefits, and thus, a basis for modification of the prior denial, pursuant to 20 C.F.R. §725.310. See *Betty B Coal Co. v. Director, OWCP* [Stanley], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Granting Request for Modification and 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in result only because I respectfully disagree with my colleagues as to the applicable law. The United States Supreme Court specifically stated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 35-37, 3 BLR 2-36, 2-56-59 (1975) that the limitation on rebuttal provision, which is set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is applicable only to the Secretary of Labor and not an employer.⁸ *Id.* Consequently, in the absence of duly promulgated regulations, I would hold that the rebuttable presumption is applicable here, but the limitations on rebuttal are not. In all other respects, I agree with my colleagues.

JUDITH S. BOGGS
Administrative Appeals Judge

⁸ The limitation on rebuttal provisions state:

The *Secretary* may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

30 U.S.C. §921(c)(4) (emphasis added).