

BRB Nos. 11-0437 BLA
and 11-0686 BLA

MARY E. HEDGEPATH)	
(o/b/o and Widow of BOBBY)	
HEDGEPATH))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 04/18/2012
)	
PEABODY COAL COMPANY)	
)	
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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5494, 08-BLA-5500) of Administrative Law Judge Donald W. Mosser awarding benefits on claims 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 a miner's subsequent claim filed on November 20, 2006,¹ and a survivor's claim filed on March 19, 2007.

In regard to the miner's subsequent claim, the administrative law judge credited the miner with twenty-three years of underground coal mine employment,² and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). Therefore, the administrative law judge determined that the new evidence established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

Considering the miner's claim on its merits, the administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to the 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 the miner was totally disabled 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)). 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); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, BLR (6th Cir. 2011).

Applying amended Section 411(c)(4), the administrative law judge found that, because the miner 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), the miner invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that the miner did not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge

¹ The miner's previous claim, filed on May 5, 1994, was finally denied by the district director on October 12, 1994. Director's Exhibit 1.

² The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. 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).

found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

In regard to the survivor's claim, the administrative law judge noted that Section 1556 also revived Section 932(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Because claimant³ filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was found entitled to receive benefits at the time of his death, the administrative law judge awarded claimant survivor's benefits pursuant to amended Section 932(*l*).

Alternatively, the administrative law judge found that claimant established that the miner's death was due to pneumoconiosis. Specifically, the administrative law judge noted that, under amended Section 411(c)(4), if a miner had at least fifteen years of qualifying coal mine employment and had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 479-80. The administrative law judge found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and determined that employer did not rebut the presumption. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits in the survivor's claim pursuant to amended Section 411(c)(4).

On appeal, employer contends that the administrative law judge erred in finding that the miner established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.⁴ Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption in the miner's claim. Additionally, employer argues that the administrative law judge erred in applying amended Section 932(*l*) to award benefits in the survivor's claim, because the miner had not been found entitled to benefits at the time of his death, and because the award of benefits in the miner's claim was not final. Further, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption in the survivor's claim. Claimant responds in support of the

³ Claimant is the surviving spouse of the miner, who died on January 30, 2007. Director's Exhibit 34.

⁴ Employer's appeal in the miner's claim was assigned BRB No. 11-0437 BLA, and its appeal in the survivor's claim was assigned BRB No. 11-0686 BLA. By Order dated August 16, 2011, the Board consolidated these appeals for purposes of decision only.

administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.⁵

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).

Section 725.309

To be entitled to benefits under the Act, a miner must demonstrate by a preponderance of the evidence that he 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. 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 administrative law judge found that, because the miner failed to establish any element of entitlement in his prior claim, he need only establish "any one of the elements of entitlement." Decision and Order at 5.

Employer contends that the administrative law judge misidentified total respiratory disability as a condition of entitlement that was previously adjudicated against the miner. Employer asserts that, to establish a change in an applicable condition of entitlement, the miner had to demonstrate either that he suffered from pneumoconiosis, or that he was totally disabled *due to pneumoconiosis* pursuant to 20 C.F.R. §718.204(c). We disagree.

The district director's October 12, 1994 denial letter indicated summary findings that the evidence did not show that (1) the miner suffered from pneumoconiosis; (2) the disease was caused at least in part by coal mine work; or (3) the miner was "totally disabled by the disease." Director's Exhibit 1. The issue of total disability due to

⁵ Because employer does not challenge the administrative law judge's finding that the miner had fifteen years of qualifying coal mine employment for purposes of establishing invocation of the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

pneumoconiosis encompasses two distinct elements, total respiratory disability, and the cause of that disability. 20 C.F.R. §718.204(b), (c). In this case, the district director's denial letter did not indicate that the evidence established the existence of a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The administrative law judge reasonably interpreted the district director's terse letter as indicating that the miner did not establish any element of entitlement in his prior claim. Consequently, the administrative law judge correctly inquired whether the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). 20 C.F.R. §725.309(d)(2); *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-64-65 (2004) (*en banc*), *vacated on other grounds sub nom., Sewell Coal Co. v. Director, OWCP [Dempsey]*, 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008).

Because employer does not challenge the administrative law judge's finding that the new evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's attendant finding that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d).

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

In light of our affirmance of the administrative law judge's findings that the miner established over 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), we affirm the administrative law judge's finding that the miner invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).⁶ 30 U.S.C. §921(c)(4).

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

Because the miner invoked the presumption of total disability 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 by disproving the existence of pneumoconiosis, or by proving that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C.

⁶ We deny employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *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).

§921(c)(4); Decision and Order at 10. The administrative law judge found that employer failed to establish either method of rebuttal.⁷ *Id.* at 6-11.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.⁸ The administrative law judge considered the medical opinions of Drs. Repsher and Fino. Drs. Repsher and Fino diagnosed the miner with chronic obstructive pulmonary disease (COPD) due entirely to cigarette smoking. Employer's Exhibits 3-5. The administrative law judge discredited the opinions of Drs. Repsher and Fino because neither physician adequately explained, based on the specific facts of this case, why coal dust mine dust exposure did not contribute to the miner's COPD:

Both physicians rely on medical literature to support their opinions, but neither physician adequately explains how this literature relates to the miner involved in this case, even if the accuracy of the medical literature could be accepted. [Both physicians] say it is possible to distinguish between the effects of cigarette smoking on the lung as compared with the effects of coal dust exposure. Yet, they do not adequately explain how they made such a distinction in this case.

Decision and Order at 10. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id.*

Employer contends that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Fino. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Fino and Repsher, that the miner's COPD was due solely to smoking, because neither physician adequately explained how they eliminated the miner's twenty-three years of coal mine dust exposure as a source of his COPD. *See Morrison*, 644 F.3d at 480; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge, therefore, properly

⁷ In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 6-11. Employer does not challenge this aspect of the administrative law judge's decision.

⁸ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

discounted the opinions of Drs. Fino and Repsher.⁹ *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the opinions of Drs. Fino and Repsher are the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis, or that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *See Morrison*, 644 F.3d at 480. Therefore, we affirm the administrative law judge's award of benefits. *See* 30 U.S.C. §921(c)(4).

The Survivor's Claim

Having awarded benefits on the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l). Therefore, the administrative law judge determined that claimant is derivatively entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

Employer argues that the administrative law judge erred in applying amended Section 932(l) to award benefits in the survivor's claim, because the miner had not been found entitled to benefits at the time of his death, and because the award of benefits in the miner's claim was not final. We disagree, and hold that amended Section 932(l) applies to the current claim, despite the fact that the miner was not receiving payments as a result of an award of benefits at the time of his death. Contrary to employer's assertion, as long as the miner is ultimately determined to be eligible to receive benefits, a survivor is entitled to payment of benefits. 30 U.S.C. §§901(a), 932(l); *see* 20 C.F.R. §725.212(a)(3)(ii); *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). Consequently, we affirm the award of benefits on the basis that claimant is derivatively entitled to survivor's benefits under amended Section 932(l). We, therefore, need not address employer's challenge to the administrative law judge's findings that employer did not rebut the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

⁹ Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Repsher and Dr. Fino, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge