

BRB No. 12-0398 BLA

HAROLD W. DENNISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/25/2013
	)	
PLOWBOY 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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Jeffrey S. Goldberg (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.

Employer appeals the Decision and Order (10-BLA-5552) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to the provisions of 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 July 7, 2009.<sup>1</sup>

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). 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 credited claimant with at least fifteen years of underground coal mine employment.<sup>2</sup> In considering whether the evidence established that claimant suffers from a totally disabling pulmonary impairment, the administrative law judge noted that employer, in the adjudication of claimant's 2001 claim, stipulated that claimant suffers from a totally disabling pulmonary impairment. Although aware that employer wished to retract its prior stipulation, the administrative law judge nevertheless accepted it, noting that "all of the medical experts agree that . . . [c]laimant is disabled from a respiratory standpoint." Decision and Order at 5. The administrative law judge, therefore, found that claimant

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<sup>1</sup> Claimant initially filed a claim for benefits on September 14, 2001. In a Decision and Order dated February 11, 2004, Administrative Law Judge Jeffrey Tureck noted that employer stipulated that claimant suffers from pneumoconiosis, that claimant's pneumoconiosis arose out of his coal mine employment, and that claimant suffers from a totally disabling pulmonary impairment. Director's Exhibit 1. In regard to the latter stipulation, Judge Tureck noted that the medical opinion evidence uniformly supported a finding that claimant suffers from a totally disabling pulmonary impairment. *Id.* Judge Tureck, however, found that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, Judge Tureck denied benefits. *Id.* Claimant's second claim, filed on August 13, 2007, was denied by the district director on May 19, 2008, because claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant took no further action until he filed the current subsequent claim.

<sup>2</sup> Claimant's last coal mine employment was in Virginia. Director's Exhibit 26 at 27. 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).

invoked the rebuttable Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this claim. Employer further contends that the administrative law judge erred in failing to address whether the evidence established that claimant suffers from a totally disabling pulmonary impairment. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contentions that Section 411(c)(4) may not be applied in this case. The Director also argues that the administrative law judge's error, if any, in relying upon employer's prior stipulation was harmless.

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).

Employer asserts that the retroactive application of 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 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. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to this claim.

Employer also argues that the administrative law judge, in finding that claimant invoked the Section 411(c)(4) presumption, erred in relying upon employer's stipulation of total disability that was made in the adjudication of claimant's initial 2001 claim.<sup>3</sup> Employer asserts that, because it retracted its stipulation, the administrative law judge erred in not addressing whether the evidence established that claimant suffers from a totally disabling pulmonary impairment. Employer's argument is rejected. The record contains the new medical opinions of Drs. Habre, Rosenberg and Fino. Dr. Habre, the

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<sup>3</sup> Because employer does not challenge the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

physician who conducted the Department of Labor-sponsored medical evaluation, opined that claimant suffers from a totally disabling pulmonary impairment.<sup>4</sup> Director's Exhibit 15. Moreover, employer's own physicians, Drs. Rosenberg and Fino, each opined that claimant is totally disabled from a pulmonary standpoint.<sup>5</sup> Director's Exhibit 16; Employer's Exhibit 1. Because there are no contrary medical opinions in the record, we affirm the administrative law judge's finding that the new medical opinion evidence supports a finding that claimant suffers from a totally disabling pulmonary impairment. Consequently, we agree with the Director that, under the facts of this case, the administrative law judge's error in accepting employer's prior stipulation was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1984).

In light of our affirmance of the administrative law judge's findings that claimant established fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment, we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Because employer does not challenge the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's award of benefits.<sup>6</sup> 30 U.S.C. §921(c)(4).

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<sup>4</sup> In a report dated September 2, 2009, Dr. Habre opined that claimant's pulmonary impairment, evidenced by his pulmonary function study results, is totally disabling, and renders him unable to perform his last coal mine job. Director's Exhibit 15.

<sup>5</sup> In a report dated December 14, 2009, Dr. Rosenberg indicated that claimant's "pulmonary functions revealed severe obstruction with an oxygenation abnormality and a markedly decreased diffusing capacity measurement." Director's Exhibit 16. Dr. Rosenberg, therefore, opined that, from a pulmonary standpoint, claimant could not perform his previous coal mine employment. *Id.* In a report dated January 16, 2011, Dr. Fino similarly noted that claimant's pulmonary function study results showed "a moderately severe obstructive ventilatory defect." Employer's Exhibit 1. As a result, Dr. Fino also opined that claimant is totally disabled from a respiratory standpoint. *Id.*

<sup>6</sup> 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 an 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.

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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