

BRB No. 12-0567 BLA

ANN B. STIPCAK )  
(Survivor of and on behalf of JOHN A. )  
STIPCAK) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
HELEN MINING COMPANY ) DATE ISSUED: 08/29/2013  
 )  
and )  
 )  
VALLEY CAMP 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 Awarding Lifetime and Survivor Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Richard A. Seid (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Lifetime and Survivor Benefits (2010-BLA-5191) of Administrative Law Judge Thomas M. Burke (the administrative law judge), rendered on a miner's subsequent claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>1</sup> The administrative law judge credited the miner with at least fifteen years of underground coal mine employment, and found the existence of pneumoconiosis arising out of coal mine employment established, based on the parties' stipulation, and adjudicated both claims pursuant to 20 C.F.R. Part 718. The administrative law judge further found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Based on the filing date of the miner's subsequent claim, and his determinations that the miner worked at least fifteen years in underground coal mine employment and suffered from a totally disabling respiratory impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis in the miner's claim under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>2</sup> The

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<sup>1</sup> Claimant is the widow of John A. Stipcak, the deceased miner. The miner filed an application for black lung benefits on February 22, 1984, which was denied by Administrative Law Judge Gerald M. Tierney on January 4, 1989, because the evidence was insufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment. Living Miner (LM) Director's Exhibit 1. The miner filed a subsequent claim on September 1, 2006. The miner died on December 23, 2008, prior to the scheduled hearing on his claim. LM Director's Exhibit 70. Claimant filed her survivor's claim on February 10, 2009. Survivor's Claim (SC) Director's Exhibit 2. Subsequently, the miner's claim was returned to the district director for consolidation with claimant's survivor's claim. LM Director's Exhibit 73. On August 24, 2009, the district director issued a Proposed Decision and Order awarding benefits. SC Director's Exhibit 16. Employer timely requested a hearing, and the consolidated claims were returned to the Office of Administrative Law Judges for a hearing, which was held on July 22, 2011. Administrative Law Judge Thomas M. Burke (the administrative law judge) issued a Decision and Order awarding benefits in both claims on July 5, 2012, which is the subject of this appeal.

<sup>2</sup> Section 1556 of Public Law No. 111-148 contained amendments to the Act, which are applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to the miner's claim, under amended Section 411(c)(4), if the evidence establishes that the miner worked at least fifteen years in underground coal mine employment or in coal mine employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or

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

Addressing the survivor's claim, the administrative law judge noted that, pursuant to amended 30 U.S.C. §932(*l*), 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.<sup>3</sup> Because claimant filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death, the administrative law judge awarded claimant survivor's benefits under amended Section 932(*l*).

On appeal, employer first contends that the administrative law judge improperly allowed claimant to submit, as affirmative medical report evidence in the miner's claim, Dr. Bajwa's medical report, which had been excluded when offered as the complete pulmonary evaluation provided by the Department of Labor (DOL). Employer also alleges that the delay in processing the miner's claim violated its due process rights, requiring its dismissal from the case and the transfer of liability to the Black Lung Disability Trust Fund (Trust Fund). Employer further challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2), asserting that the administrative law judge was prohibited from relying on the pulmonary function study and medical report of Dr. Bajwa to establish that the miner was totally disabled, as the study and opinion were improperly admitted into the record. Employer also argues that the administrative law judge failed to consider all relevant evidence, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 30 U.S.C. §932(a) and 33 U.S.C. §919(d), asserting that the administrative law judge did not weigh the treatment records. Employer also challenges the constitutionality of the amended regulations and their retroactive application in this case. Regarding the survivor's claim, employer contends that, because the administrative law judge erred in awarding benefits in the miner's claim, claimant is not entitled to survivor's benefits pursuant to amended Section 932(*l*).

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pulmonary impairment, there will be a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

<sup>3</sup> Relevant to the survivor's claim, the amendments revived Section 422(*l*) of the Act, which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits. 30 U.S.C. §932(*l*).

Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief, urging the Board to reject employer's arguments concerning the admission of Dr. Bajwa's medical report and its dismissal as the responsible operator. The Director also urges the Board to reject employer's contentions regarding the constitutionality of amended Sections 411(c)(4) and 932(l).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural and evidentiary rulings for abuse of discretion. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-62 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

### **I. The Admission of Dr. Bajwa's Report and Employer's Request to be Dismissed as Responsible Operator**

After the miner filed his subsequent claim on September 1, 2006, the district director sent him a list of physicians with whom he could schedule the complete pulmonary evaluation mandated under Section 413(b) of the Act, 30 U.S.C. 923(b), as implemented by 20 C.F.R. §725.406.<sup>5</sup> The miner selected Dr. Bajwa and signed a statement indicating that this physician had not examined or treated him in the twelve months preceding the filing of his subsequent claim. Living Miner (LM) Director's Exhibit 8. Dr. Bajwa performed an examination of the miner on November 14, 2006, and submitted his report to the district director on November 22, 2006. LM Director's Exhibit 13.

By motion dated March 6, 2007, employer requested that the claim be dismissed, as the miner did not appear for an examination that employer had scheduled with Dr.

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<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); LM Director's Exhibit 4; Decision and Order at 4; Hearing Transcript at 32.

<sup>5</sup> Section 413(b) of the Act, 30 U.S.C. §923(b), as implemented by 20 C.F.R. §725.406, requires the Director, Office of Workers' Compensation Programs (the Director), to provide each miner with a complete pulmonary evaluation at no expense to the miner. Pursuant to 20 C.F.R. §725.406(b), "the miner may not select any physician who has examined the miner or provided medical treatment within the twelve months preceding the date of the miner's application." 20 C.F.R. §725.406(b).

Fino for February 27, 2007. LM Director's Exhibit 24. On March 16, 2007, the district director issued an Order to Show Cause, requiring the miner to explain his failure to appear. LM Director's Exhibit 25. The miner's counsel responded by letter dated April 4, 2007, and stated that the miner's wife reported that he could travel only by ambulance due to the effects of cancer. LM Director's Exhibit 26. The miner's counsel also indicated that a letter from Dr. Woolcock, the miner's treating physician, would be forthcoming. The district director indicated, in correspondence dated May 22, 2007, that the letters from the miner's counsel and Dr. Woolcock established good cause for the miner's absence from the examination scheduled by employer and that the claim would proceed. LM Director's Exhibit 27. The district director issued a proposed Decision and Order awarding benefits on May 24, 2007, and employer requested a hearing. LM Director's Exhibits 28, 29.

The claim was transferred to the Office of Administrative Law Judges (OALJ) on August 6, 2007, and assigned to Administrative Law Judge Michael P. Lesniak for a hearing. LM Director's Exhibit 35. In a letter dated October 9, 2007, employer informed the DOL that Dr. Bajwa's November 14, 2006 report did not satisfy the terms of 20 C.F.R. §725.406(b), as Dr. Bajwa had examined claimant less than twelve months prior to the filing of his subsequent claim.<sup>6</sup> LM Director's Exhibit 40. The record does not contain a response from the DOL. Employer then filed a motion dated December 21, 2007, in which it asked Judge Lesniak to dismiss it as a party to the claim and to transfer liability to the Trust Fund. Alternatively, employer requested that the case be remanded to the district director in order for the DOL to obtain another pulmonary evaluation.

The miner responded, through counsel, and noted his agreement with employer's representation of the facts but asserted that he intended to adopt Dr. Bajwa's medical report as his own evidence. The miner stated that "adoption of this evidence is even more necessitated in this case," due to his "debilitating physical condition," which "prohibited him from submitting to any additional medical development by either party." LM Director's Exhibit 41. The miner further indicated that employer's request for remand to obtain a new DOL-sponsored pulmonary evaluation "appears to be moot," based on the miner's "inability to submit to additional medical testing." *Id.* The Director also responded to employer's motion and agreed that the case should be remanded to the district director for a new pulmonary evaluation, but argued that employer should not be dismissed because the district director had reasonably relied on the miner's statement that he had not been treated by Dr. Bajwa within the twelve months preceding the scheduling of the examination by DOL.

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<sup>6</sup> According to Dr. Bajwa's deposition testimony, he first saw the miner for medical treatment on April 22, 2006, after a referral from the miner's family physician for assessment of a "large pleural effusion." LM Director's Exhibit 8 at 5.

On January 11, 2008, Judge Lesniak issued an Order Denying Motion to Dismiss and Remanding Claim to District Director, wherein he found that the miner's November 14, 2006 DOL-sponsored pulmonary evaluation by Dr. Bajwa violated the terms of 20 C.F.R. §725.406(b), as Dr. Bajwa had treated claimant less than twelve months prior to the date of the miner's subsequent claim for benefits. January 11, 2008 Order at 2, contained in LM Director's Exhibit 43. Nevertheless, Judge Lesniak determined that claimant was entitled to submit Dr. Bajwa's report as affirmative evidence, based on the lack of any prohibition on doing so in the regulations. January 11, 2008 Order at 2. Judge Lesniak, however, denied employer's request to be dismissed as a party in the claim and/or to have liability for the claim transferred to the Trust Fund. *Id.* Judge Lesniak found that employer met the requirements set forth in the regulations and did not contest its designation as the responsible operator. January 11, 2008 Order, *citing* 20 C.F.R. §§ 725.465, 725.494, 725.496. Judge Lesniak remanded the miner's claim to the district director with instructions to obtain a new complete pulmonary evaluation and stated, "[w]hether [the miner] is able to perform the medical examination shall be determined by the assigned DOL physician." January 11, 2008 Order at 2.

While the case was on remand, the miner submitted a letter to the district director in which Dr. Woolcock, his treating physician, stated that the miner was "not medically able to travel more than eight to ten miles for evaluations or hearings" and was "homebound except for doctor and hospital visits." LM Director's Exhibit 50. The district director accepted Dr. Woolcock's assertions and requested authorization to obtain the miner's medical records in lieu of a physical examination. LM Director's Exhibit 51. Medical records from the Indiana Regional Medical Center and Dr. Woolcock were received and copies were sent to employer. The district director issued a proposed Decision and Order awarding benefits on June 27, 2008. LM Director's Exhibit 57.

Pursuant to employer's request for a hearing, the claim was referred to the OALJ on September 16, 2008. LM Director's Exhibit 59. The miner died on December 23, 2008. LM Director's Exhibit 70. At the hearing, which was held before the administrative law judge on July 22, 2011, employer again objected to the admission of Dr. Bajwa's report. The administrative law judge overruled employer's objection and admitted Dr. Bajwa's report, and the accompanying objective studies, into the record as affirmative case evidence. Hearing Transcript at 8-9.

Employer maintains that, because Dr. Bajwa's report of his November 14, 2006 pulmonary evaluation did not meet the requirements of 20 C.F.R. §725.406(b), based on the miner's failure to inform the DOL that Dr. Bajwa had examined him in the twelve month period preceding the filing of his subsequent claim, the administrative law judge was required to exclude it from the record entirely. Employer's argument is without merit. The regulation set forth in 20 C.F.R. §725.414 specifies the quantity and type of evidence that the parties may submit in connection with a claim. The terms of 20 C.F.R.

§725.414(a)(2)(i), (a)(3)(i), limit the parties to the submission of, *inter alia*, two medical reports in support of their respective affirmative cases, but they do not set forth limitations on the source of the medical reports. Moreover, there is nothing in 20 C.F.R. §725.406(b) that mandates the exclusion of DOL-sponsored pulmonary evaluations that do not satisfy its requirements. Accordingly, we hold that the administrative law judge acted within his discretion in finding that Dr. Bajwa's medical report, and the results of the objective tests that he performed, were admissible under 20 C.F.R. §725.414(a)(2)(i), as affirmative case evidence in the miner's claim. *See Clark*, 12 BLR at 1-153.

Employer also contends that it was deprived of due process by the district director's failure to obtain a complete pulmonary evaluation on remand, the delays in the processing of the miner's claim, and the admission of Dr. Bajwa's report. To establish that a due process violation in the adjudication of the miner's claim has occurred, employer must prove that it was deprived of a meaningful opportunity to defend against the claim. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807, 21 BLR 2-302, 2-320 (4th Cir. 1998); *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). Although the facts in this case establish that adjudication of the miner's claim was delayed by the improper selection of Dr. Bajwa, and that there was no physical examination of the miner after the case was remanded to the district director, employer has not proven that it was deprived of a meaningful opportunity to defend against the miner's claim.

As the Director maintains, employer is incorrect in alleging that the district director's failure to request an independent assessment of the miner's ability to appear "deprived the operator of a complete pulmonary examination." Director's Letter Brief at 7, *quoting* Employer's Brief in Support of Petition for Review at 10. Because the Act requires that the DOL provide *a miner* with a complete pulmonary evaluation to substantiate his or her claim, the fact that the district director did not obtain a new complete pulmonary evaluation on remand did not constitute a failure to fulfill an obligation to employer.<sup>7</sup> 30 U.S.C. §923, as implemented by 20 C.F.R. §725.406; *see Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994).

We also reject employer's related argument, that the delay in the adjudication of the miner's claim prevented it from having the miner examined by one of its own

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<sup>7</sup> Employer also states that it is aggrieved because the miner, rather than the Department of Labor (DOL), should have paid for Dr. Bajwa's examination. We agree with the Director, that whether the DOL "absorbs the cost of Dr. Bajwa's examination is . . . not a concern for [employer] to champion." Director's Letter Brief at 6. We further note that employer has offered no support for its suggestion that, but for the DOL providing Dr. Bajwa's examination, the miner would not have been able to procure one.

physicians before the miner's death, thereby violating employer's right to due process. On April 4, 2007, in response to the district director's show cause order, the miner's counsel reported that the miner did not appear for the examination that employer had scheduled with Dr. Fino because he was able to travel only by ambulance. LM Director's Exhibit 26. Thus, employer became aware that the miner's poor health rendered him unable to appear for further physical examinations several months before employer's letter dated October 9, 2007, informing the DOL that Dr. Bajwa's report did not meet the requirements of 20 C.F.R. §725.406, and more than a year prior to the miner's death on December 23, 2008.

In light of this chronology, employer's inability to have the miner examined by its own physician was attributable to the miner's poor health, rather than the delay necessitated by the remand to the district director to obtain a new complete pulmonary evaluation. Furthermore, employer was able to develop evidence in defense of the miner's claim, in the form of medical opinions based on reviews of the miner's hospital and treatment records, and to submit evidence rebutting Dr. Bajwa's report. Because the DOL's actions did not prevent employer from obtaining a physical examination of the miner and employer was able to respond to the evidence supportive of a finding of entitlement, we deny employer's allegations of a denial of due process. *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *C & K Coal Co. v. Taylor*, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999). Consequently, we deny employer's request that it be dismissed as a party. *Id.*

## **II. Application of Amended Sections 411(c)(4) and 932(l)**

Employer argues that retroactively applying amended Section 932(l), including the awarding of retroactive benefits, is unconstitutional as a violation of due process, and as a taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 17-27. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has rejected employer's argument that retroactive application of the 2010 amendments to the Act to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property. *See B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 133 S.Ct. 127 (2012); *see also Vision Processing, LLC v. Groves*, 705 F.3d 551, 556-58 (6th Cir. 2013) *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Campbell* and *Stacy*, we reject employer's arguments to the contrary.

We also find no merit in employer's allegation that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. The courts have consistently ruled that amended Section 411(c)(4), including

the language pertaining to rebuttal, applies to operators, despite the reference therein to “the Secretary.” Employer’s Brief at 13; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1975); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); see *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff’d on other grounds sub nom. Mingo Logan Coal Co. v. Owens*, \_\_\_ F.3d \_\_\_, 2013 WL 3929081 (4th Cir. July 31, 2013) (No. 11-2418) (Niemeyer, J. concurring).

Further, we reject employer’s assertion that it was premature for the administrative law judge to find that employer failed to rebut the amended Section 411(c)(4) presumption when neither the administrative law judge, nor the parties, had the benefit of guidance from the DOL, in the form of implementing regulations, concerning the standard required to establish rebuttal. Employer’s Brief at 15-17. The mandatory language of the amendments supports the conclusion that their provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); see also *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Ala. Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998). Additionally, the Act provides that, in order to rebut the Section 411(c)(4) presumption, the evidence must establish that the miner does not have pneumoconiosis or that the miner’s disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. See 30 U.S.C. §921(c)(4). Therefore, the administrative law judge did not err in considering the present claim pursuant to amended Section 411(c)(4).

### **III. Entitlement in the Miner’s Claim**

#### **A. Change in an Applicable Condition of Entitlement and Invocation of the Amended Section 411(c)(4) Presumption**

In order to establish entitlement to benefits in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must establish that the miner suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. When 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 miner’s last claim was denied because he did not establish total disability. LM Director’s Exhibit 1. Consequently, to obtain review of the merits of the miner’s current claim,

claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2)–(3).

Employer initially contends that the administrative law judge erred in finding that the new pulmonary function study evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i). The record includes the results of one new pulmonary function study conducted by Dr. Bajwa on October 24, 2006. LM Director’s Exhibit 14. The administrative law judge noted that the miner’s pulmonary function study produced qualifying values before the administration of a bronchodilator and non-qualifying values after the administration of a bronchodilator.<sup>8</sup> Decision and Order at 5. Although the administrative law judge did not render a definitive finding as to whether claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), he indicated that the qualifying pre-bronchodilator results supported Dr. Bajwa’s diagnosis of a totally disabling pulmonary impairment. Decision and Order at 11-12; Director’s Exhibit 13.

Employer asserts that, because the pulmonary function study should have been excluded from the record, the rebuttable presumption was improperly invoked. We reject employer’s contention, based on our holding that Dr. Bajwa’s medical report, and the accompanying objective test results, were properly admitted as affirmative case evidence in the miner’s claim. *Slip op.* at 10. Because employer does not otherwise challenge the administrative law judge’s finding that the October 24, 2006 pulmonary function study supported Dr. Bajwa’s opinion, it is affirmed. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also argues that the administrative law judge erred in determining that the newly submitted medical opinion evidence was sufficient to establish total disability. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Bajwa and Castle, the pathology reports of Drs. Oesterling, Perper and Tomashefski, the autopsy report of Dr. Goldblatt, the death certificate signed by Dr. Woolcock, and the miner’s treatment records. Decision and Order at 6-13. The administrative law judge noted that Dr. Tomashefski opined that the miner did not have a pulmonary disability during his lifetime, while Drs. Bajwa and Castle opined that the miner was totally disabled from a pulmonary standpoint, but disagreed as to whether the miner’s pulmonary condition was intrinsic or extrinsic. Decision and Order at 6-8, 9, 12; LM Director’s Exhibit 13; LM Employer’s Exhibits 5, 10, 12, 15.

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<sup>8</sup> A “qualifying” pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A “non-qualifying” study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge found that the preponderance of the pathology evidence corroborated “Dr. Bajwa’s conclusion that the miner’s total pulmonary disability resulted[,] at least in part[,] from an intrinsic condition reflected in lung parenchymal abnormalities.” Decision and Order at 12. The administrative law judge further found that Dr. Tomashefski’s opinion, regarding the severity of the miner’s pneumoconiosis, was outweighed by the contrary opinions of the other pathologists, Drs. Perper and Oesterling, as well as the x-ray evidence. *Id.* at 13. The administrative law judge concluded, “it is determined that the pathology evidence supports Dr. Bajwa’s conclusion that the miner suffered from an intrinsic totally disabling pulmonary condition.” *Id.* Based on this finding, the administrative law judge found that claimant established a change in an applicable condition of entitlement and invocation of the amended Section 411(c)(4) presumption. *Id.* at 13, 16.

Employer argues that, because the miner’s pulmonary impairment was caused by the side effects of lymphoma – an extrinsic condition – the administrative law judge erred in determining that claimant established total disability at 20 C.F.R. §718.204(b)(2). In support of its contention, employer cites the nonqualifying objective studies, the miner’s treatment records detailing the progression of his lymphoma, and the medical opinions in which Drs. Castle, Oesterling and Tomashefski explained that the miner’s pulmonary impairment was caused by lymphoma. Employer also maintains that the administrative law judge erred in crediting Dr. Perper’s opinion, that the miner had significant coal workers’ pneumoconiosis, when resolving the conflict among the physicians as to whether the miner’s pulmonary impairment was attributable to an intrinsic pulmonary disease.

Employer’s contentions are without merit. The issue is not whether a respiratory or pulmonary impairment is due to an intrinsic, or extrinsic, disease process; the relevant inquiry at 20 C.F.R. §718.204(b)(2) is solely whether a totally disabling respiratory or pulmonary impairment is, or was, present. In this case, the administrative law judge’s finding that claimant established total disability under 20 C.F.R. §718.204(b)(2) is supported by substantial evidence, including: the qualifying pre-bronchodilator pulmonary function study; Dr. Bajwa’s opinion diagnosing a totally disabling obstructive impairment; Dr. Castle’s statement that the miner had a severe restrictive impairment; and Dr. Perper’s determination that the miner had a totally disabling pulmonary condition as early as 1987.<sup>9</sup> *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995),

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<sup>9</sup> Because Dr. Tomashefski focused on the extent of the miner’s pneumoconiosis, and whether it caused the miner’s pulmonary impairment, and Dr. Oesterling commented primarily on the extent of the miner’s pneumoconiosis, their opinions were relevant to the issue of total disability causation and, therefore, did not conflict with the evidence supportive of a finding of total disability at 20 C.F.R. §718.204(b)(2). LM Employer’s Exhibits 3, 4, 8, 10, 15. The miner’s medical records, which describe his treatment for

*aff'g* 16 BLR 1-11 (1991); LM Director's Exhibits 13, 14; LM Claimant's Exhibit 5; LM Employer's Exhibits 5, 12, 13, 14 at 59. We affirm, therefore, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's findings that the miner had more than fifteen years of qualifying coal mine employment, and a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

### **B. Rebuttal of the Amended Section 411(c)(4) Presumption**

The administrative law judge found that, because employer could not rebut the amended Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis, employer could establish rebuttal only by proving that the miner's total disability did not arise out of, or in connection with, his coal mine employment.<sup>10</sup> Decision and Order at 15. The administrative law judge then determined that employer failed to meet its burden. *Id.* at 15-16.

Relevant to the issue of total disability causation, employer alleges that the administrative law judge did not properly weigh the opinions in which Drs. Castle and Tomaszewski attributed the miner's pulmonary impairment solely to lymphoma. Contrary to employer's argument, the administrative law judge rationally determined that, because Drs. Castle and Tomaszewski relied on their beliefs that the miner did not have any parenchymal abnormalities in his lungs, when the preponderance of the pathology evidence established the existence of such abnormalities, in the form of mild to moderate coal workers' pneumoconiosis and severe emphysema, their opinions were entitled to little weight. *See Fields*, 10 BLR at 1-21-1-22; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984); Decision and Order at 15-16. Because the administrative law judge permissibly exercised his discretion as fact-finder in weighing the evidence, we affirm his finding that employer failed to rebut the amended Section 411(c)(4) presumption by

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lymphoma and related conditions, also did not conflict with this evidence. LM Director's Exhibits 52, 53.

<sup>10</sup> The administrative law judge relied upon employer's stipulation that the existence of simple pneumoconiosis was established at 20 C.F.R. §718.202(a). Decision and Order at 23-24.

proving that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Plesh v. Director, OWCP*, 71 F.3d 103, 113, 20 BLR 2-30, 2-49 (3d Cir. 1995). We further affirm, therefore, the award of benefits in the miner's claim.

#### **IV. Entitlement in the Survivor's Claim**

The administrative law judge awarded claimant survivor's benefits pursuant to amended Section 932(l), based on his findings that claimant filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death. Decision and Order at 16. Employer's sole contention on appeal is that, if the administrative law judge's award of benefits in the miner's claim is not affirmed, his award of benefits in the survivor's claim must be vacated. In light of our affirmance of the administrative law judge's award of benefits in the miner's claim, employer's only argument in regard to the survivor's claim is moot. Therefore, the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Lifetime and Survivor Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge