

BRB No. 11-0709 BLA

WALLACE S. MEYERS )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 LABELLE PROCESSING COMPANY )  
 )  
 and )  
 ) DATE ISSUED: 06/08/2012  
 A.T. MASSEY 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 Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer.

Barry H. Joyner (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 (2009-BLA-5738) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent 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 a claim filed on June 17, 2008.<sup>1</sup> Director's Exhibit 3. The administrative law judge held a hearing on September 15, 2010.

In a Decision and Order dated June 16, 2011, the administrative law judge correctly noted that Congress amended the Act in 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this living 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 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 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. *Id.*

Applying amended Section 411(c)(4), the administrative law judge credited claimant with thirty-three years and eight months of coal mine employment, of which at least thirty-one years were underground, and found that claimant has a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge found that claimant established invocation of the rebuttable presumption. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment did not arise out of, or in connection with, his coal mine employment. *See* 30 U.S.C. §921(c)(4). Therefore, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

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<sup>1</sup> This is claimant's third claim for benefits. His first claim, filed in 1984, was denied in 1985. Director's Exhibit 1. Claimant filed his second claim on June 27, 2006; the district director denied it on February 9, 2007, finding that claimant failed to establish any of the elements of entitlement. Director's Exhibit 2.

On appeal, employer challenges the constitutionality of amended Section 411(c)(4) and its application to this case. Both claimant and the Director, Office of Workers' Compensation Programs, have filed responses, urging affirmance of the administrative law judge's decision.<sup>2</sup>

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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as a taking of employer's property in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 5-9. Employer's arguments are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 (Oct. 28, 2011), slip op. at 4, *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 Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011) (rejecting due process and takings challenges to amended Section 411(c)(4)); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 253-63, BLR (3d Cir. 2011) (rejecting similar arguments against applying amended 30 U.S.C. §932(l)). Consequently, we affirm the administrative law judge's application of amended Section

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<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had thirty-three years and eight months of coal mine employment, of which at least thirty-one years were underground, and that the new evidence established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's findings, on the merits, that claimant established the existence of a totally disabling respiratory impairment and thus established invocation of the Section 411(c)(4) presumption, and that employer failed to rebut the presumption by establishing that claimant does not have pneumoconiosis or that claimant's impairment did not arise out of, or in connection with, his coal mine employment. *See Skrack*, 6 BLR at 1-711.

<sup>3</sup> Claimant's coal mine employment was in Pennsylvania. Director's Exhibits 6, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

Employer raises no other arguments. Because we have affirmed the administrative law judge's findings that claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and that employer failed to rebut the presumption, we affirm the award of benefits.

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