BRB No. 12-0531 BLA

FINIS RAY CATES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/12/2013
	)	
ISLAND CREEK 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.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, 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.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (10-BLA-5093) 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 March 16, 2009.[1]

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 twenty-four years of underground coal mine employment.[2] The administrative law judge further found that the evidence established that claimant suffers from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption.[3] 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 case.[4] Employer further contends that the

[1] Claimant initially filed a claim for benefits on March 25, 2002. In a Decision and Order dated September 7, 2005, Administrative Law Judge Robert L. Hillyard found that the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1. Accordingly, Judge Hillyard denied benefits. *Id.*

[2] The record indicates that claimant'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).

[3] Having found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that employer did not rebut the presumption, the administrative law judge found that claimant established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(d); Decision and Order at 8.

[4] To the extent employer requests that this case be held in abeyance pending the outcome of challenges to other provisions of the Patient Protection and Affordable Care

administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. 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, and that the administrative law judge applied an improper rebuttal standard.

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).

Application of Amended Section 411(c)(4)

Employer contends that the retroactive application of amended Section 411(c)(4) is unconstitutional. Employer further contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. 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. Because employer does not challenge the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), 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. §921(c)(4). The administrative law judge found that employer failed to disprove the existence of clinical or legal pneumoconiosis.[5]

Act, Public Law No. 111-148, that were not resolved by *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012), its request is denied. Employer's Brief at 4-7.

[5] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical

In finding that employer failed to disprove the existence of pneumoconiosis, employer argues that the administrative law judge applied an improper rebuttal standard. We disagree. The administrative law judge correctly found that, once claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden shifted to employer to affirmatively establish that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011); Decision and Order at 5.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Selby and Jarboe. Drs. Selby and Jarboe diagnosed claimant with emphysema due to cigarette smoking. Employer's Exhibits 1-4. Drs. Selby and Jarboe opined that claimant's emphysema was not due to his coal mine dust exposure. *Id.* The administrative law judge found that the opinions of Drs. Selby and Jarboe, regarding the etiology of claimant's emphysema, were not reasoned, because neither physician explained how he was able to distinguish between the effects of coal mine dust exposure and cigarette smoking. Decision and Order at 8. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* Because employer does not challenge the administrative law judge's basis for discrediting the opinions of Drs. Selby and Jarboe, we affirm the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis.[6] *See Skrack*, 6 BLR at 1-711.

Employer next argues that the administrative law judge erred in failing to consider whether employer rebutted the Section 411(c)(4) presumption 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). We agree. The administrative law judge failed to address this second method of establishing rebuttal. Since it is the

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community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

[6] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Therefore, we need not address employer's contention that the administrative law judge erred in finding that employer failed to disprove the existence of clinical pneumoconiosis.

administrative law judge's duty to make factual determinations, *see Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983), we vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, and remand this case to the administrative law judge for him to address whether employer has affirmatively established 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).

Accordingly, the administrative law judge's Decision and Order 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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I would find merit in employer's argument and respectfully disagree with my colleagues as to the application of the rebuttal limitations of 30 U.S.C. §921(c)(4) to employers; however, Board precedent is to the contrary. Accordingly, I concur in all respects.

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JUDITH S. BOGGS
Administrative Appeals Judge