BRB Nos. 12-0593 BLA
and 12-0594 BLA

RITA JEAN OWENS (Widow of and on behalf of LARRY OWENS)	)	
Claimant-Respondent	)	
v.	)	
TENNESSEE CONSOLIDATED COAL	)	DATE ISSUED: 06/27/2013
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Frank K. Newman (Cole, Cole, Anderson & Newman, PSC), Barbourville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, 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: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

Employer appeals the Decision and Order Award of Benefits (2009-BLA-05004 and 2011-BLA-05595) of Administrative Law Judge Daniel F. Solomon, 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).[1] The administrative law judge accepted the parties' stipulation to nineteen years of underground coal mine employment and adjudicated both claims pursuant to 20 C.F.R. Part 718. With respect to the miner's subsequent claim, the administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Based on the filing dates of the miner's subsequent claim and the survivor's 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 and death due to pneumoconiosis in the survivor's claim pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to satisfy its burden to rebut the presumption in

[1] Claimant is the widow of Larry Owens, the deceased miner. Director's Exhibit 8. The miner initially filed an application for benefits on August 25, 2000, which was denied by the district director on October 24, 2000, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner filed a subsequent claim on November 5, 2007, which was denied by the district director. Director's Exhibits 3, 23. The miner requested a hearing. Director's Exhibit 25. While the case was pending with the Office of Administrative Law Judges (OALJ), the miner died on December 9, 2009. Director's Exhibit 53. The miner's claim was returned to the district director for consolidation with claimant's survivor's claim, filed on July 14, 2010. Director's Exhibit 75. The district director denied benefits on the survivor's claim on January 27, 2011. Director's Exhibit 79. Claimant timely requested a hearing in the survivor's claim, and the consolidated claims were returned to the OALJ for a hearing, which was held on May 3, 2012. Director's Exhibits 80-82. The administrative law judge issued a Decision and Order awarding benefits in both claims on July 30, 2012, which is the subject of this appeal.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to these claims, amended Section 411(c)(4) provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis and that the miner's death was due to pneumoconiosis where claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

both claims. Accordingly, the administrative law judge awarded benefits in both the miner's and the survivor's claims.

On appeal, employer challenges the application of amended Section 411(c)(4) to these claims. Employer asserts that the administrative law judge erred in weighing the evidence relevant to rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments with regard to application of amended Section 411(c)(4) to this case. The Director takes no position on the weight accorded the evidence.

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.[3] 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).

I. CONSTITUTIONAL CHALLENGES

Employer asserts that amended Section 411(c)(4) of the Act is not severable from amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), and since amended Section 932(*l*) is unconstitutional, amended Section 411(c)(4) is likewise invalid. *See* 30 U.S.C. §932(*l*), *amended by* Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010). However, employer's constitutional challenges to amended Section 932(*l*) were recently rejected by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. *Vision Processing, LLC v. Groves*, 705 F.3d 551, BLR (6th Cir. 2013); *see B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388, 25 BLR 2-65, 2-83 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Groves*, we reject employer's arguments.

Employer also contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one 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),

[3] Because the record indicates that the miner's last coal mine employment was in Kentucky, we will apply the law 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); Director's Exhibit 3.

and we reject it here for the reasons set forth in that decision. We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to these claims.

II. THE MINER'S CLAIM

Initially, we affirm, as unchallenged on appeal, the administrative law judge's finding that the miner worked in underground coal mine employment for nineteen years, and his determinations that claimant established total disability at 20 C.F.R §718.204(b)(2), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4) because he stated that in order to rebut the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), "the party opposing entitlement must rule out any connection between the miner's impairment and his coal mine employment."[4] Decision and Order at 5, *citing Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in order to rebut the presumption at amended Section 411(c)(4), employer must establish that the miner did not have pneumoconiosis or that the miner's totally disabling respiratory or pulmonary impairment "did not arise out of, or in connection with, coal mine employment." *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011), *citing* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.[5] Despite the administrative law judge's misstatement, we see no prejudicial error, as the administrative law judge explained the weight he accorded employer's medical experts

[4] The administrative law judge jointly considered whether the evidence was sufficient to support an award of benefits under 20 C.F.R. Part 718 and whether employer's evidence was sufficient to establish rebuttal of the amended Section 411(c)(4) presumption.

[5] Employer contends that the administrative law judge erred in citing to 20 C.F.R. §718.305, as the regulation states that it "is not applicable to any claim filed on or after January 1, 1982." 20 C.F.R. §718.305. However, as noted by the Director, Office of Workers' Compensation Programs (the Director), in amending Section 411(c)(4), Congress specifically removed the limiting language and "the amended statute must therefore prevail over any inconsistent language in the current regulation." Director's Letter Brief at 4; *see* 30 U.S.C. §921(c)(4); 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

and we are able to address his rebuttal findings under the standard set forth in *Morrison*. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge determined that a preponderance of the credible x-ray readings established that the miner did not have clinical pneumoconiosis.[6] Decision and Order at 6. With regard to the issue of legal pneumoconiosis,[7] the administrative law judge noted that employer relied on the medical opinions of Drs. Dahhan and Basheda to establish that the miner did not have a coal-dust related respiratory condition. *Id*. at 7-8. Drs. Dahhan and Basheda opined that the miner suffered from disabling chronic obstructive pulmonary disease (COPD) due to smoking and asthma, and not coal dust exposure. Director's Exhibit 35; Employer's Exhibit 4.

The administrative law judge determined that the opinions of Drs. Dahhan and Basheda were not sufficiently explained in light of the objective evidence. Specifically, the administrative law judge observed that in excluding coal dust exposure as a cause of the miner's COPD, Drs. Dahhan and Basheda cited reversibility on the January 8, 2008 and May 7, 2008 pulmonary function studies after the administration of a bronchodilator.[8] Decision and Order at 8. The administrative law judge, however, found

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[6] The regulations provide:

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical 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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[7] "'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[8] According to Dr. Dahhan, the miner's pulmonary function testing "demonstrates significant response to the administration of bronchodilators . . . indicating that it is not a fixed defect arguing against it being due to inhalation of coal dust." Employer's Exhibit 2. Dr. Basheda stated, "the clinical and pulmonary function data demonstrating bronchoreversibility, that is, an 'asthmatic component,' is consistent with chronic

that because they did not address "the miner's fully disabling residual impairment, both [e]mployer's experts failed to sufficiently explain why they believed that smoking was the sole cause of the miner's impairment." *Id.* The administrative law judge therefore found that employer failed to disprove that the miner had legal pneumoconiosis.

Employer argues that the administrative law judge misstated the evidence when discussing the degree of reversibility on the miner's pulmonary function studies after the administration of a bronchodilator. The administrative law judge, however, observed correctly that while Dr. Dahhan described that the pulmonary function studies showed a severe significantly reversible obstructive impairment, "Dr. Basheda actually described it as 'partial' reversibility [and] Dr. Vaezy described it as 'slight.'"[9] Decision and Order at 8; *see* Employer's Exhibit 4; Director's Exhibit 35 at 6; Director's Exhibit 46 at 18.

Employer's assertion that the administrative law judge erred in rejecting the opinions of Drs. Dahhan and Basheda as being insufficiently reasoned is also without merit. The record reflects that the pulmonary function studies, dated January 8, 2008 and May 7, 2008, had qualifying values before and after the use of a bronchodilator.[10] Director's Exhibits 11, 35; Employer's Exhibit 4. Dr. Basheda specifically stated that the May 7, 2008 "post-bronchodilator spirometry demonstrated obstruction based on an FEV1/FVC ratio of less than 0.7. The obstruction was very severe." Director's Exhibit 35. The administrative law judge rationally found that the opinions of Drs. Dahhan and Basheda were not persuasive and reasoned in excluding legal pneumoconiosis because "[t]he existence of a partially reversible respiratory impairment does not rule out the presence of a coexisting fixed impairment related to coal dust exposure."[11] Decision and

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obstructive pulmonary disease due to cigarette smoking. These characteristics are not indicative of obstructive lung disease induced by coal dust exposure." Director's Exhibit 35.

[9] Because Dr. Vaezy opined that the miner was totally disabled due to pneumoconiosis, his opinion does not support rebuttal.

[10] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the appropriate values set forth in the Tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i).

[11] Employer contends that the administrative law judge did not properly resolve the conflict in the evidence regarding the length of claimant's smoking history. However, because the administrative law judge did not reject the opinions of Drs. Dahhan and Basheda on any ground related to the length of the miner's smoking history,

Order at 8; *see* 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Employer's arguments on appeal amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge, as the trier-of-fact, has discretion to assess the credibility of the medical evidence, and the Board will defer to the administrative law judge's credibility determinations, unless they are inherently incredible or patently unreasonable. *See* 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §§725.351(b), 725.477; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306-08, 23 BLR 2-261, 2-284-87 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. We, therefore, affirm the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by establishing that the miner did not suffer from legal pneumoconiosis.

Additionally, contrary to employer's arguments, the administrative law judge permissibly concluded that the opinions of Drs. Dahhan and Basheda are entitled to "less weight" in assessing the etiology of the miner's disability, as they failed to diagnose pneumoconiosis. Decision and Order at 9; *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Thus, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to rebut the presumption at amended Section 411(c)(4) by affirmatively establishing that the miner did not have pneumoconiosis or that his disability did not arise out, or in connection with, coal mine employment.[12] We therefore affirm the award of benefits in the miner's claim.

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we consider the administrative law judge's error, if any, to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[12] Because employer bears the burden to affirmatively establish that the miner did not have pneumoconiosis or that his disability was unrelated to coal dust exposure, *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011), it is not

III. THE SURVIVOR'S CLAIM

The administrative law judge awarded benefits in the survivor's claim pursuant to amended Section 411(c)(4), finding that claimant was entitled to the presumption that the miner's death was due to pneumoconiosis, and that employer did not rebut it. However, under amended Section 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. Because claimant filed her survivor's claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death, claimant is automatically entitled to benefits pursuant to amended Section 932(*l*).[13] 30 U.S.C. §932(*l*). Therefore, we affirm the award of benefits in the survivor's claim on this alternate ground.

necessary that we address employer's arguments with regard to the weight accorded claimant's evidence.

[13] In light of our disposition of claimant's survivor's claim pursuant to amended Section 932(*l*), we need not address the propriety of the administrative law judge's finding that employer did not rebut the presumption of death due to pneumoconiosis at amended Section 411(c)(4).

Accordingly, the administrative law judge's Decision and Order Award of 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