

BRB No. 12-0129 BLA

ETTA R. DAUGHERTY (Widow, and on behalf of, GEORGE DAUGHERTY))
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 Claimant-Respondent)
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 v.)
)
 ISLAND CREEK KENTUCKY MINING) DATE ISSUED: 11/23/2012
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 and)
)
 ISLAND CREEK COAL COMPANY c/o)
 WELLS FARGO DISABILITY)
)
 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 on Living Miner's and Survivor's Claims of Linda S. Chapman, 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.

Jonathan P. Rolfe (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 Benefits on Living Miner's and Survivor's Claims (2008-BLA-5786 and 2011-BLA-5409) of Administrative Law Judge Linda S. Chapman, rendered on a miner's subsequent claim, filed on July 15, 2007, and a survivor's claim, filed on September 2, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ On March 23, 2010, Congress enacted amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. These amendments reinstated the presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), which provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and 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. The amendments also revived Section 422(l), 30 U.S.C. §932(l), which provides that the 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, without having to establish that the miner's death was due to pneumoconiosis.

The administrative law judge initially determined that the newly submitted evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2) and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) in the miner's claim. The administrative law judge further found that the amended Section 411(c)(4) presumption was invoked, as employer conceded that the miner's coal mine employment was underground and total disability was established pursuant to 20 C.F.R. §718.204(b). The administrative law judge determined that employer did not rebut the presumption and, therefore, awarded benefits in the miner's claim, effective June 2007. With respect to the survivor's claim, the

¹ Claimant is the surviving spouse of the deceased miner. Survivor's Director's Exhibit 1. She is pursuing the miner's claim on behalf of his estate and is also pursuing a claim for survivor's benefits. The miner filed his first claim for benefits on July 31, 1991, which was denied by the district director on October 23, 1991 by reason of abandonment. Miner's Director's Exhibit 1. The miner filed a second claim for benefits on December 3, 1996, which was denied by the district director because the miner failed to establish any element of entitlement. Miner's Director's Exhibit 2. He did not further pursue this claim.

administrative law judge found that, pursuant to amended Section 932(I), claimant was automatically entitled to benefits, and awarded benefits commencing May 2008.

On appeal, employer argues that the retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property.² With respect to invocation of the amended Section 411(c)(4) presumption, employer argues that the administrative law judge erred in crediting the miner with seventeen and three-quarter years of underground coal mine employment. Employer acknowledges that, if the constitutionality of the Act is upheld and the Board affirms the award of benefits in the miner's claim, claimant has satisfied the prerequisites for derivative entitlement under amended Section 932(I). Claimant responds, urging affirmance of the awards of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, urging the Board to reject employer's arguments and to affirm the administrative law judge's Decision and Order in its entirety.³

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

I. Application of the Amendments

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005 does not constitute a due process violation or an unconstitutional taking of private property. *See*

² Employer's request to hold the case in abeyance, pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012)

³ We affirm the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), as those findings are unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Miner's Director's Exhibits 1, 2, 5.

W. Va. CWP Fund v. Stacy, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

II. Invocation of the Presumption – Length of Coal Mine Employment

In this case, the miner alleged twenty years of coal mine employment on his application for benefits. Miner's Director's Exhibit 4. In computing the length of coal mine employment, the administrative law judge prepared a chart identifying the number of quarters of coal mine employment that the miner had from 1969 through 1977.⁵ Decision and Order at 13. For the period from 1978 through 1985, the administrative law judge found that the miner's Social Security earnings reports reflected that he was engaged in coal mine employment in all four quarters of each year, earning from approximately \$10,000 to \$21,000 annually. *Id.* The administrative law judge determined that from 1986 through 1991, the miner worked for employer, earning \$29,772.83 in 1986, \$20,732.94 in 1987, \$27,403.27 in 1988, \$13,189.40 in 1989, \$5,458.64 in 1990, and \$749.76 in 1991. *Id.* at 13-14. In addition, the administrative law judge considered a form on which Mr. Jack Bernosky, a supervisor for employer's parent corporation, indicated that the miner was a roof bolter from August 26, 1972 to December 5, 1972; a rockman from May 1, 1973 to March 14, 1975; on "rock crew" from May 23, 1975 to May 20, 1983, and April 18, 1984 to October 5, 1984; and a rock dust motorman from August 2, 1985 to February 1, 1990. *Id.* at 14. The administrative law judge noted that, beginning on January 18, 1991, the miner received a disability pension, effective from August 1989. *Id.*

Based on a consideration of the evidence, "taken together," the administrative law judge found that the miner's Social Security earnings report "reflects that for most of his coal mine employment, [the miner] consistently worked for four quarters each year, earning above \$50.00 each quarter." Decision and Order at 14. The administrative law judge also found that the employer's records indicate that, although employer paid the miner until early 1991, he received a disability pension, effective August 1989. *Id.* at 15. The administrative law judge determined that this finding was consistent with the miner's claim application, which reflected that his work in the mines ended in 1989, due to an accident. *Id.* Taking into account that the miner terminated his coal mine employment in August 1989, the administrative law judge concluded that the miner had a total of

⁵ The chart prepared by the administrative law judge reflects that claimant worked for: two quarters in 1969; two quarters in 1971; two quarters in 1972; three quarters in 1973; and four quarters in each year from 1974 through 1977. Decision and Order at 13.

seventeen and three-quarters years of coal mine employment. *Id.* The administrative law judge specifically rejected employer's request that she apply the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) for calculating a year of coal mine employment, noting that it was inapplicable, based on her computations and because it "goes solely to the issue of the identification of the responsible operator." *Id.*

On appeal, employer asserts that the administrative law judge properly found that the miner had no coal mine employment in 1970 and quit working as a coal miner effective August 1989. Employer maintains that, although the miner remained on its books as an employee after July 31, 1989, "he did not incur any actual working days during this period." Employer's Brief in Support of Petition for Review at 21 n.10. Employer argues that the remainder of the administrative law judge's findings cannot be affirmed, however, as she shifted the burden to employer to prove that the miner had less than fifteen years of coal mine employment and used a method of calculation that resulted in the miner being credited with more years of coal mine employment than he actually worked.

In support of employer's allegations, it maintains that the administrative law judge erred in crediting the miner with four quarters of work in 1969 and 1971, and in failing to apply the formula described in 20 C.F.R. §725.101(a)(32)(iii) to these two years. Employer also argues that the administrative law judge erred in finding that the miner's Social Security earnings report showed that claimant worked for four quarters in each year of his coal mine employment, as the report did not list earnings by quarter after 1977. Employer further argues that the form on which Mr. Bernosky listed the miner's exact dates of employment is the best evidence for the period between 1972 and 1990, and that it establishes that the miner did not work during the third and fourth quarters of 1983, the first quarter of 1984, and the first and second quarters of 1985. Employer contends that, at best, the record supports a finding of 14.96 years of underground coal mine employment, thereby precluding invocation of the amended Section 411(c)(4) presumption.

In response, the Director asserts that the administrative law judge did not consider the miner's Social Security earnings of \$554.80 for the first quarter of 1970 with Black Diamond Fuel Company, and of \$541.25 in the third quarter of that year with Premium Coal Company. Director's Brief at 3 n.3; Miner's Director's Exhibit 4. The Director contends that, because employer concedes 14.96 years of underground coal mine employment, the two quarters of coal mine employment omitted by the administrative law judge, "clearly puts [the miner] over the 15 year hurdle." *Id.* The Director further argues that, contrary to the administrative law judge's and employer's conclusions, the period that the miner remained on the payroll after his injury in August 1989 constitutes a period of coal mine employment. Director's Brief at 3, *citing* 65 Fed. Reg. 79,959 (Dec. 20, 2000).

Although the allegations of error raised on appeal have merit, in part, the administrative law judge's determination that the miner had at least fifteen years of underground coal mine employment does not contain error requiring remand. As an initial matter, the administrative law judge stated incorrectly that the formula at 20 C.F.R. §725.101(a)(32)(iii) "goes solely to the issue of the identification of the proper responsible operator." Decision and Order at 14. The Department of Labor has stated that the definition of one year of coal mine employment is the same for identification of a responsible operator and application of the presumptions under the Act. *See* 65 Fed. Reg. 79,951 (Dec. 20, 2000) (20 C.F.R. §725.101(a)(32) contains a "single definition with general applicability."). However, there is no regulatory requirement that an administrative law judge apply the formula at 20 C.F.R. §725.101(a)(32)(iii) in determining the length of a miner's coal mine employment. Rather, the use of the formula is discretionary such that an administrative law judge may rely on any credible evidence to determine the dates and length of coal mine employment, and any reasonable method of computation will be upheld, if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In this case, for the period from 1969 through 1977, the administrative law judge permissibly relied on the Social Security earnings report and reasonably credited the miner with coal mine employment for each quarter that he earned above \$50.00 while performing the work of a miner, including: two quarters in 1969 for Glenn Coal Company; two quarters in 1971 for Star Coal Company and Skeens Coal Company; and two quarters in 1972, three quarters in 1973 and four quarters in each year from 1974 through 1977 for Island Creek Coal Company. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 335, 24 BLR 2-1, 2-24-25 (4th Cir. 2007); *Muncy*, 25 BLR at 1-27; *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); Decision and Order at 13. We, therefore, affirm the administrative law judge's reliance on the Social Security earnings report for the period from 1969 through 1977 to credit the miner with six and one-quarter years of coal mine employment.⁶

With respect to the period from 1978 through 1989, employer is correct in asserting that the Social Security earnings report does not provide a quarterly breakdown of earnings after 1977. Miner's Director's Exhibit 8. Nevertheless, the administrative law judge reasonably relied on the Social Security earnings report, and the form completed by Mr. Jack Bernosky, which employer has deemed the best evidence, to find

⁶ Based upon our affirmance of the administrative law judge's finding, we decline to address the Director's contentions regarding the period between August 1989 and January 1991, and the two quarters of coal mine employment in 1970. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Brief at 3.

that the miner had at least fifteen years of qualifying coal mine employment. The information on the form indicates that the miner worked for employer from: May 23, 1975 to May 20, 1983; April 18, 1984 to October 5, 1984; and August 2, 1985 to February 1, 1990. *Id.* This evidence, considered in conjunction with the Social Security earnings report, supports the administrative law judge's determination that, from 1978 through 1989, the miner had at least: four quarters of coal mine employment for each year from 1978 through 1982; one quarter in 1983; two quarters in 1984; one-quarter in 1985; four-quarters in each year from 1986 to 1988; and two quarters in 1989 for a total of nine and one-half years of coal mine employment. Decision and Order at 13-14; Miner's Director's Exhibits 7-8. Adding this figure to the six and one-quarter years of coal mine employment that the administrative law judge found from 1969 through 1977 results in a total of fifteen and three-quarter years of coal mine employment. We affirm, therefore, the administrative law judge's finding that claimant invoked the presumption at amended Section 411(c)(4) as substantial evidence supports the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

III. Rebuttal of the Amended Section 411(c)(4) Presumption and Entitlement

We affirm, as unchallenged on appeal, the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption in the miner's claim. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2-3. Based upon this finding, and the administrative law judge's correct determinations that the miner's claim was filed after January 1, 2005 and was pending on March 23, 2010, we further affirm the award of benefits in the miner's claim. In light of the award of benefits in the miner's claim, and the administrative law judge's accurate findings that the survivor's claim was filed after January 1, 2005 and was pending on March 23, 2010, and employer's concession that claimant is an eligible survivor, we also affirm the administrative law judge's determination that claimant is automatically entitled to receive survivor's benefits pursuant to amended Section 932(l).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Living Miner's and Survivor's Claims is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge