BRB No. 12-0017 BLA

ALBERT F. MINK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CATENARY COAL COMPANY	)	DATE ISSUED: 10/18/2012
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jonathan 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5821) of Administrative Law Judge Richard A. Morgan 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 request for modification of a subsequent claim.

The pertinent procedural history of this case is as follows: Claimant filed his first claim on March 16, 1998. Director's Exhibit 1A. It was finally denied by a claims examiner on July 22, 1998 because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed his second claim (a duplicate claim) on July 28, 1999. Director's Exhibit 1B. The district director denied benefits on December 15, 1999 because claimant failed to establish that he was totally disabled by pneumoconiosis and, thus, because he failed to establish a material change in conditions. *Id*. Additionally, the district director denied claimant's request for reconsideration on January 8, 2001. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his third claim (a subsequent claim) on January 30, 2002. Director's Exhibit 1C. By letter dated January 28, 2005, however, claimant requested the withdrawal of his claim. *Id*. On March 25, 2005, Administrative Law Judge Michael P. Lesniak issued an Order noting that the parties had the option of withdrawing controversion of any or all issues that were set for hearing pursuant to 20 C.F.R. 725.462 and remanding the case to the district director for entry of an appropriate order. *Id*.

Claimant filed this claim (a subsequent claim) on May 1, 2006. Director's Exhibit 2. It was denied by a claims examiner on December 19, 2006 and January 18, 2007 because claimant failed to establish any of the elements of entitlement. Director's Exhibits 27, 30. Claimant filed a request for modification on March 12, 2007. Director's Exhibit 31. On November 6, 2008, Administrative Law Judge Robert D. Kaplan issued a Decision and Order Denying Benefits because claimant failed to establish any of the elements of entitlement. Director's Exhibit 41. By letter dated November 6, 2009, claimant filed another request for modification. Director's Exhibit 42.

In a Decision and Order dated September 15, 2011, Judge Morgan (the administrative law judge) credited claimant with at least 44 years of coal mine employment, finding that at least 26 of those years were in underground mines or in conditions substantially similar to underground mines. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, based on employer's concession that claimant has clinical pneumoconiosis and a total respiratory disability. Further, the administrative law judge found that claimant established a change in

conditions and a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.

On the merits, the administrative law judge found that, while the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.203(b). The administrative law judge also found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore determined that claimant invoked the rebuttable presumption that his total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). However, in considering rebuttal of the presumption, the administrative law judge found that "[i]t is not established [that claimant's] total respiratory disability is due to pneumoconiosis." Decision and Order at 41. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in applying the amended Section 411(c)(4) presumption, as he determined that claimant invoked the presumption, but then considered whether claimant's exposure to coal dust was a substantially contributing cause of his total disability. Claimant maintains that "[o]nce [claimant] established that he was eligible for the presumption, [the administrative law judge] should have considered whether [e]mployer ruled out coal-dust exposure as a causative agent to [claimant's] pulmonary impairment." Claimant's Brief at 3. Alternatively, claimant contends that the evidence of record is insufficient to establish rebuttal of the presumption at amended Section 411(c)(4) by showing the absence of disability causation, as "[n]one of [e]mployer's experts sufficiently rules out coal-dust exposure as causative." *Id*. at 4. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds by letter, arguing that the administrative law judge erred because he failed to apply the correct rebuttal standard when determining whether employer rebutted the amended Section 411(c)(4) presumption by showing the absence of disability causation.[1]

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 the applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into

[1] Claimant filed a brief in reply to employer's response brief, reiterating his prior contentions.

[2] This case arises within the jurisdiction of the United States Court of Appeals for

the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. In order to rebut the Section 411(c)(4) presumption, it must be shown that the miner did not have pneumoconiosis or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

Initially, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. 30 U.S.C. §921(c)(4). We also affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on his unchallenged finding that claimant established at least 26 years of qualifying coal mine employment and employer's concession that claimant has total respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, we affirm the administrative law judge's unchallenged finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack*, 6 BLR at 1-711. Furthermore, we affirm the administrative law judge's unchallenged finding that claimant established a change in conditions and a mistake in a determination of fact at 20 C.F.R. §725.310. *Id*.

Additionally, because we affirm the administrative law judge's unchallenged finding that claimant established the existence of clinical pneumoconiosis, *see Skrack*, 6 BLR at 1-711, we hold that rebuttal of the amended Section 411(c)(4) presumption by

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the Fourth Circuit, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 1A, 1B, 1C, 4.

showing the absence of pneumoconiosis is precluded as a matter of law. 30 U.S.C. §921(c)(4).

Finally, we address claimant's contention that the administrative law judge erred in applying the amended Section 411(c)(4) presumption with regard to the issue of disability causation. Specifically, claimant asserts that the administrative law judge applied an incorrect legal standard in evaluating the medical opinion evidence.

After finding that claimant established invocation of the amended Section 411(c)(4) presumption, the administrative law judge stated that "[claimant] will be entitled to benefits unless the employer proves that his respiratory impairment did not arise out of coal mine employment."[3] Decision and Order at 37. However, the administrative law judge also stated that "[t]he revised regulations, 20 C.F.R. §718.204(c)(1), require [that] a claimant establish [that] his pneumoconiosis is a 'substantially contributing cause' of his totally disabling respiratory or pulmonary disability." *Id*. (footnotes omitted). Further, based on his weighing of the medical evidence, the administrative law judge found that "[i]t is not established [that] his total respiratory disability is due to pneumoconiosis." *Id*. at 41.

Contrary to the administrative law judge's finding, claimant is not required to establish total disability due to pneumoconiosis under the amended Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4). Rather, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis under amended Section 411(c)(4), if a miner establishes at least 15 years of qualifying coal mine employment and that he has a totally disabling respiratory impairment. *Id*. To rebut the presumption, the employer is required to affirmatively rule out any connection between the miner's disabling respiratory impairment and his coal mine employment. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980). Thus, because the administrative law judge applied an incorrect rebuttal standard under amended Section 411(c)(4) with regard to the issue of disability causation, we vacate the administrative law judge's finding that rebuttal of the amended Section 411(c)(4) presumption was established on this basis, and remand the case for further consideration of the evidence.

[3] The administrative law judge noted that the amended Section 411(c)(4) presumption may be rebutted by establishing that the respiratory or pulmonary impairment did not arise out of coal mine employment. The administrative law judge also noted, "[i]n cases arising in the Fourth Circuit, it has been held, under [Section] 718.305 (2001), that the employer must 'rule out' any causal relationship between a miner's disability and his coal mine employment by a preponderance of the evidence." Decision and Order at 36.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the cases is remanded for further proceedings in accordance with this opinion.

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