

BRB No. 12-0053 BLA

MABEL LAYNE)
(Widow of GENE LAYNE))
)
Claimant-Respondent)
)
v.)
)
CHISHOLM COAL COMPANY,)
INCORPORATED)
)
and)
) DATE ISSUED: 09/25/2012
PIKEVILLE COAL COMPANY, C/O)
UNDERWRITERS SAFETY & CLAIMS)
)
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 On Remand of Larry S. Merck,
Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson,
Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for
employer/carrier.

Rita Roppolo (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision And Order on Remand (08-BLA-5497) of Administrative Law Judge Larry S. Merck awarding benefits on a 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, involving a survivor's claim filed on April 10, 2007, is before the Board for the second time.

In the initial decision, the administrative law judge found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On review of claimant's appeal,¹ the Board noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this survivor'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 amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.² 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

In light of the potential applicability of the Section 411(c)(4) presumption, the Board vacated the administrative law judge's denial of benefits, and remanded the case

¹ Claimant is the widow of the miner, who died on December 25, 2000. Director's Exhibit 9.

² Section 1556 of Public Law No. 111-148 also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that an eligible survivor of a miner who was receiving 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. 30 U.S.C. §932(*l*). However, claimant cannot benefit from this provision, as there is no indication in the record that the miner filed a claim for benefits during his lifetime.

for further consideration. *Layne v. Chisholm Coal Co.*, BRB No. 09-0827 BLA (Sept. 30, 2010). The Board instructed the administrative law judge, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption. *Id.*

On remand, the administrative law judge found that the claimant established that the miner had at least fifteen years of underground coal mine employment,³ and that the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also determined that employer failed to establish that the miner did not have pneumoconiosis, or that the miner's death was not due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4). Therefore, the administrative law judge held that employer did not rebut the presumption. 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. Claimant and the Director, Office of Workers' Compensation Programs, have filed responses, urging affirmance of the administrative law judge's application of amended Section 411(c)(4) to this claim. In a reply brief, employer reiterates its arguments regarding the administrative law judge's application of Section 411(c)(4).⁴

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).

Employer asserts that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States

³ The miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board 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).

⁴ Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

Constitution. Employer's contentions are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA, slip op. at 4 (Oct. 28, 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 Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to this claim.

Because they are unchallenged on appeal, we affirm the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and that employer did not rebut the presumption. 30 U.S.C. §921(c)(4); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's award of benefits.⁵

⁵ Employer has filed a motion for remand to reopen the record and allow the administrative law judge to consider whether Dr. Dennis's autopsy report, Director's Exhibit 11, should be stricken from the record in light of the Kentucky Board of Medical Licensure's recent suspension of Dr. Dennis's medical license. However, the administrative law judge did not rely on Dr. Dennis's autopsy report to find that the miner was totally disabled and that claimant invoked the Section 411(c)(4) presumption. Similarly, the administrative law judge did not rely on Dr. Dennis' autopsy report to find that employer failed to establish rebuttal of the presumption. Because employer has not challenged those findings on appeal, and has not explained how striking Dr. Dennis's autopsy report would affect the disposition of this case, we deny employer's motion. 20 C.F.R. §802.219; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge