



BRB No. 19-0411 BLA

ARTHUR CLIFTON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	
)	DATE ISSUED: 08/27/2020
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 Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2017-BLA-05516) rendered on a claim filed on October 13, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 27.47 years of underground coal mine employment based on the parties' stipulation and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.¹ 30 U.S.C. §921(c)(4) (2012). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption.² Alternatively, it contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the Section 411(c)(4) presumption is constitutional.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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).

¹ Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

² Employer also challenges the constitutionality of Section 422(l) of the Act which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits. 30 U.S.C. §932(l) (2012). This provision is inapplicable to this case.

³ Because Claimant's last coal mine employment occurred in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. Hearing Transcript at 21; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer’s Brief at 5-6. Employer cites the district court’s rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id.* Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA is unconstitutional, but vacated and remanded the district court’s determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held the ACA amendments to the Black Lung Benefits Act are severable because they have “a stand-alone quality” and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. See *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer’s argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis,⁴ the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,⁵ or “no part of [his] respiratory or pulmonary total disability

⁴ We affirm, as unchallenged on appeal, the administrative law judge’s finding that Claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ “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). The definition includes “any chronic pulmonary disease or respiratory or pulmonary impairment

was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal by either method.

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

Dr. McSharry opined Claimant does not have “a chronic lung disease caused by or aggravated by coal [mine] dust exposure,” but has a disabling obstructive respiratory impairment due to “long-standing asthma.” Employer’s Exhibit 20 at 3-4. He explained Claimant “would have the same impairment and disability had he never worked around coal, assuming the remainder of his history was unchanged.” *Id.* Contrary to Employer’s argument, the administrative law judge permissibly found Dr. McSharry’s opinion unpersuasive because the record includes “no prior diagnosis or reported history of asthma.” Decision and Order at 14; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Employer’s Brief at 9-12. The administrative law judge also permissibly found Dr. McSharry did not adequately explain why Claimant’s obstructive respiratory impairment is not significantly related to, or substantially aggravated by, his more than twenty-seven years of coal mine dust exposure. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995); Decision and Order at 14.

We consider Employer’s arguments on appeal to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within her discretion in rejecting Dr. McSharry’s opinion, we affirm her finding Employer did not disprove legal pneumoconiosis⁶ and her determination it did not rebut the Section 411(c)(4)

significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b). “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.” 20 C.F.R. §718.201(a)(1).

⁶ Because we affirm the administrative law judge’s discrediting Dr. McSharry’s opinion, the only opinion supportive of Employer’s burden of proof, we need not address

presumption by establishing the absence of pneumoconiosis.⁷ See 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer established “no part of [Claimant’s] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(ii). She rationally found that the same reason she discredited Dr. McSharry’s opinion on legal pneumoconiosis also undercut his opinion that no part of Claimant’s disability was caused by legal pneumoconiosis. See *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (an administrative law judge may choose not to credit a physician’s opinion on causation absent “specific and persuasive reasons” for concluding it is independent of the physician’s mistaken belief the miner did not have pneumoconiosis); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 15. We therefore affirm the administrative law judge’s finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

Employer’s arguments regarding the opinions of Drs. Silman, Nader, and Green that Claimant has legal pneumoconiosis. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer’s Brief at 9-12.

⁷ Employer’s failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address Employer’s contentions of error regarding the administrative law judge’s finding it did not disprove clinical pneumoconiosis. See *Larioni*, 6 BLR at 1-1278; Employer’s Brief at 7-9.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge