BRB Nos. 12-0404 BLA
and 12-0404 BLA-A

CARL R. EPLING, JR.	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	DATE ISSUED: 04/16/2013
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	
	)	
Employer/Carrier- Petitioners Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Sarah M. Hurley (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:

Employer appeals, and claimant cross-appeals, the Decision and Order on Remand (08-BLA-5203) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case, involving a miner's claim filed on January 24, 2007, is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with at least twenty-one years of coal mine employment,[1] and found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

While claimant's appeal was before the Board, Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). In light of the potential applicability of the Section 411(c)(4) presumption, the Board vacated the denial of benefits, and remanded the case to the administrative law judge for further consideration. *Epling v. Hobet Mining, Inc.*, BRB No. 09-0672 BLA (June 28, 2010) (unpub.).

Applying Section 411(c)(4) on remand,[2] the administrative law judge found that claimant established at least fifteen years of qualifying coal mine employment, and that

[1] Claimant's last coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] On remand, the administrative law judge reopened the record so that the parties could submit additional evidence in response to the change in the law. Claimant submitted interpretations of four CT scans, Dr. Marzouk's treatment records, and Dr. Ranavaya's deposition testimony. Claimant's Exhibits 7, 8, 10, 11, 13-16. Employer submitted deposition testimony and medical reports from Drs. Hippensteel and Crisalli, as well as an interpretation of a CT scan. The administrative law judge admitted all of this evidence into the record. Decision and Order on Remand at 2-3.

he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis. The administrative law judge further found 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 claim.[3] Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contentions that Section 411(c)(4) may not be applied in this case, and that the administrative law judge applied an improper rebuttal standard. In a reply brief, employer reiterates its previous contentions. In his cross-appeal, claimant asserts that the administrative law judge erred in denying his motion to compel employer to provide x-ray and CT scan interpretations rendered by its non-testifying medical experts. Claimant also contends that the administrative law judge erred in finding that he did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Finally, claimant argues that the administrative law judge erred in determining that benefits should commence as of November 2007. Employer responds in support of the denial of claimant's motion to compel discovery, the finding that claimant did not establish invocation of the irrebuttable presumption, and the finding regarding the benefits commencement date. The Director has not filed a brief in response to claimant's cross-appeal.

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).

Application of Amended Section 411(c)(4)

Employer contends that the retroactive application of amended Section 411(c)(4)

[3] To the extent employer requests that this case be held in abeyance pending the outcome of challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, that were not resolved by *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012), its request is denied. Employer's Brief at 13-18.

is unconstitutional. Employer further contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contentions are substantially similar to the ones 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), and we reject them here for the reasons set forth in that decision. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

Employer also argues that the application of Section 411(c)(4) is premature, because the Department of Labor has not yet promulgated regulations implementing the amendments to the Act. We reject this argument. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to this claim. Because employer does not challenge the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

Employer initially asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 6-13. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order on Remand at 11, 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Moreover, the United States Court of Appeals for the Fourth Circuit has stated, explicitly, that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case. Decision and Order on Remand at 11, 17-18.

With respect to whether employer disproved the existence of pneumoconiosis, the administrative law judge found that the x-ray, CT scan, and medical opinion evidence

affirmatively established the existence of clinical pneumoconiosis,[4] a finding that employer does not challenge on appeal. Decision and Order on Remand at 8-10; *see Skrack*, 6 BLR at 1-711. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

With respect to whether employer rebutted the Section 411(c)(4) presumption by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, 30 U.S.C. §921(c)(4), the administrative law judge considered the opinions of Drs. Crisalli and Hippensteel. Dr. Crisalli opined that claimant's totally disabling respiratory impairment is due to obesity and sleep apnea. Employer's Exhibits 12, 14 at 27-28. Dr. Hippensteel opined that claimant suffers from hypoxia at rest, and agreed with Dr. Crisalli that claimant's gas exchange impairment is not due to an intrinsic lung disease, but is due to obesity and sleep apnea. Employer's Exhibit 4. Both Drs. Crisalli and Hippensteel opined that claimant's pulmonary impairment is unrelated to his coal mine dust exposure. Employer's Exhibits 11, 14 at 26.

The administrative law judge discounted the opinions of Drs. Crisalli and Hippensteel because, contrary to the administrative law judge's finding, they did not diagnose claimant with clinical pneumoconiosis. Decision and Order on Remand at 18. Thus, the administrative law judge concluded that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant's disability is unrelated to coal mine dust exposure. *Id.* at 19.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Crisalli and Hippensteel. We disagree. The administrative law judge rationally discounted the opinions of Drs. Crisalli and Hippensteel, that claimant's pulmonary impairment did not arise out of his coal mine employment, because these doctors, contrary to the administrative law judge's finding, did not diagnose clinical pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 18.

[4] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Employer contends that the administrative law judge erred, however, because, although Dr. Hippensteel questioned whether pneumoconiosis was present, he ultimately diagnosed claimant with clinical pneumoconiosis in his final two reports submitted in this case. Specifically, employer notes that Dr. Hippensteel prepared a report dated February 4, 2012, wherein he interpreted a January 7, 2011 CT scan as revealing findings suggestive of clinical pneumoconiosis. Employer's Exhibit 15. Employer further notes that Dr. Hippensteel subsequently diagnosed clinical pneumoconiosis in a medical report dated February 19, 2012. Employer's Exhibit 16. The record reflects, however, that Dr. Hippensteel's opinion as to the cause of claimant's pulmonary impairment is set forth in reports and discussed during depositions that predate the doctor's acceptance of a diagnosis of clinical pneumoconiosis.[5] Employer's Exhibits 4, 7, 11, 13. Further, contrary to employer's contention, Dr. Hippensteel's assumption of the existence of clinical pneumoconiosis at his deposition did not necessarily render his opinion on the issue of disability causation any more credible. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004) (Roth, J., dissenting) (holding that a superficial, hypothetical assumption of pneumoconiosis made by a physician, is insufficient to reconcile his contrary opinion with the administrative law judge's finding of the disease).

Because the administrative law judge permissibly exercised his discretion in weighing the evidence, we affirm his finding that employer failed to prove that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Accordingly, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis and further affirm the award of benefits.[6] 30 U.S.C. §921(c)(4).

[5] As late as March 25, 2011, Dr. Hippensteel opined that it was more likely, than not, that claimant did not suffer from clinical pneumoconiosis. Employer's Exhibit 13 at 25. Dr. Hippensteel did not address the cause of claimant's total disability in his February 19, 2012 medical report. Employer's Exhibit 16.

[6] In light of our affirmance of the award of benefits, we need not address claimant's contentions that the administrative law judge erred in denying claimant's motion to compel employer to provide x-ray and CT scan interpretations from its non-testifying medical experts, or that the administrative law judge erred in finding that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Commencement Date of Benefits

On cross-appeal, claimant challenges the administrative law judge's determination regarding the commencement date for benefits. In this case, the administrative law judge found that claimant was entitled to benefits as of November 2007:

> This claim was filed on January 24, 2007. I previously found the evidence had not established the existence of pneumoconiosis and total disability [sic]. For the reasons discussed above, I now have found both established, based on evidence submitted in 2007. Given [that] Dr. Ranavaya's March 2007 exercise ABG was non-conforming and his resting ABG non-qualifying, the fact that Dr. Crisalli's November 26, 2007 resting ABG was "qualifying," and that Dr. Crisalli found total disability, I find an onset date of November 26, 2007. [Claimant] clearly suffered from clinical pneumoconiosis due to his coal mine dust exposure by November 26, 2007.

Decision and Order on Remand at 19 (footnote omitted). Claimant argues that, contrary to the administrative law judge's analysis, he did not become totally disabled due to pneumoconiosis on November 26, 2007, but became totally disabled due to pneumoconiosis at some time before that date. Claimant's Brief at 19. Because the administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis subsequent to the filing date, claimant contends he is entitled to benefits as of January 2007, the month in which he filed his claim. *Id.*

Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

As noted above, the administrative law judge found that the evidence supported a finding that claimant became disabled due to pneumoconiosis in November 2007, the month of claimant's qualifying resting blood gas study results.[7] Employer's Exhibit 1.

[7] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-

However, the medical evidence credited by the administrative law judge establishes only that claimant became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985). Consequently, we hold that the administrative law judge erred in designating November 2007 as the commencement date of benefits.

We further hold that a remand to the administrative law judge for reconsideration of this issue is not required. The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim.[8] Since the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, benefits are payable from the month in which he filed this claim. 20 C.F.R. §725.503(b). Therefore, we modify the date of commencement of benefits from November 2007 to January 2007, the month and year in which claimant filed his claim. 20 C.F.R. §725.503(b); *Owens*, 14 BLR at 1-49.

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qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[8] Dr. Ranavaya examined claimant on March 14, 2007, and opined that, based upon moderate hypoxemia demonstrated by claimant's qualifying exercise blood gas study, claimant suffered from a moderate pulmonary impairment. Director's Exhibit 12. The administrative law judge found that claimant's March 14, 2007 exercise blood gas study was non-conforming because the blood was drawn after exercise. Although claimant's March 14, 2007 blood gas study produced non-qualifying values at rest, the administrative law judge did not find that this evidence established that claimant was not totally disabled due to pneumoconiosis on that date. The administrative law judge relied, in part, on Dr. Ranavaya's March 14, 2007 medical opinion to find that claimant is totally disabled. Decision and Order on Remand at 14.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, as modified to reflect January 2007 as the date from which benefits commence.

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