BRB No. 11-0115 BLA

GARY KEITH LOWERY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES,	)	
INCORPORATED	)	DATE ISSUED: 08/03/2011
	)	
and	)	
	)	
RAG AMERICAN COAL COMPANY c/o	)	
WELLS FARGO DISABILITY	)	
MANAGEMENT	)	
	)	
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Gary Keith Lowery, Beards Fork, West Virginia, *pro se*.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Maia S. Fisher (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:

Claimant appeals, without the assistance of counsel, the Decision and Order (09-BLA-5331) of Administrative Law Judge Janice K. Bullard denying 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 involves a subsequent claim filed on August 23, 2007.[1] After crediting claimant with at least eighteen years of coal mine employment,[2] at least fifteen years of which were underground, the administrative law judge found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus, established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner'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 Section 411(c)(4), 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. 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 disprove the existence of pneumoconiosis, or to establish 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). Applying amended Section 411(c)(4),[3] the administrative law judge found

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[1] Claimant filed a previous claim for benefits on March 24, 1994. Director's Exhibit 1. The district director denied the claim on March 13, 1995, because claimant failed to establish any of the elements of entitlement. *Id.* There is no indication that claimant took any further action in regard to his 1994 claim.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 4. 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 (1989) (*en banc*).

[3] In light of the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge reopened the record, and allowed the parties an opportunity

invocation of the rebuttable presumption established. However, the administrative law judge found that, because claimant failed to establish the existence of pneumoconiosis, employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits.[4] The Director, Office of Workers' Compensation Programs (the Director), contends that the administrative law judge applied an incorrect rebuttal standard in finding that employer established rebuttal of the Section 411(c)(4) presumption. Therefore, the Director requests that the case be remanded to the administrative law judge for further consideration.[5]

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to submit additional evidence and argument. In response, employer submitted supplemental reports from Drs. Zaldivar and Crisalli, which the administrative law judge admitted into evidence. Decision and Order at 18; Employer's Exhibits 9, 10.

[4] Employer argues that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's due process rights, as set forth in the Fifth Amendment to the United States Constitution. Employer's Brief at 17-20. Employer also argues that retroactive application of amended Section 411(c)(4) constitutes an unconstitutional taking of its property. *Id.* at 20-22. The arguments employer makes are substantially similar to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106, at *5 (7th Cir. 2011).

[5] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established at least eighteen years of coal mine employment, with at least fifteen years underground, and that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and, thus, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, the administrative law judge's finding, on the merits, that claimant established the existence of a totally disabling respiratory impairment, and, thus, established invocation of the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

Because claimant established invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); Decision and Order at 18. Despite articulating the correct standard, the administrative law judge nevertheless concluded that employer established rebuttal of the Section 411(c)(4) presumption "because *claimant* . . . failed to establish the presence of pneumoconiosis." Decision and Order at 19. The Director correctly notes that, in applying this standard, the administrative law judge "essentially negate[d] the [Section 411(c)(4)] presumption and the [e]mployer's rebuttal requirement." Director's Brief at 7.

We agree with the Director, and hold that the administrative law judge erred in failing to impose on employer the burden of establishing rebuttal of the Section 411(c)(4) presumption. *See Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, F.3d , 2011 WL 2739770, at *4 (6th Cir. 2011). Claimant's failure to establish the existence of pneumoconiosis does not preclude his entitlement. Because claimant established invocation of the Section 411(c)(4) presumption, it is presumed that he has pneumoconiosis and is totally disabled by the disease. It becomes employer's affirmative burden to rebut the presumption by disproving the existence of pneumoconiosis, or 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 failure of the administrative law judge to properly apply the Section 411(c)(4) presumption compels a remand. Consequently, we vacate the denial of benefits, and remand this case to the administrative law judge for reconsideration of whether employer has satisfied its burden to establish rebuttal of the Section 411(c)(4) presumption. *See Barber*, 43 F.3d at 900, 19 BLR at 2-65; *Rose*, 614 F.2d at 939, 2 BLR at 2-43.

On remand, when considering whether the evidence establishes rebuttal of the Section 411(c)(4) presumption, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge