BRB Nos. 12-0174 BLA and
12-0174 BLA-A

VERNON R. MATNEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
McNAMEE RESOURCES, INCORPORATED	)	DATE ISSUED: 12/12/2012
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
Cross-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 Denying Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand Denying Benefits (2008-BLA-05542) of Administrative Law Judge Robert B. Rae, with respect to a subsequent claim filed on May 21, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] This case is before the Board for a second time. In its previous decision, the Board vacated Administrative Law Judge Jeffrey Tureck's finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), and the denial of benefits, and remanded the claim for consideration of whether claimant is entitled to invocation of the presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] *Matney v. McNamee Resources, Inc.*, BRB No. 09-0768 BLA, slip op. at 4 (Aug. 18, 2010)(unpub.).

On remand, Judge Rae (the administrative law judge) determined that claimant established over fifteen years of underground coal mine employment and that he has a totally disabling respiratory impairment. The administrative law judge found, therefore, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) and invoked the presumption at amended Section 411(c)(4). The administrative law judge further determined, however, that employer rebutted the presumption. Consequently, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that employer rebutted the amended Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. In employer's cross-appeal, it asserts that the administrative law judge erroneously applied amended Section 411(c)(4), as doing so

[1] Claimant filed an initial claim for benefits on May 17, 1990. Director's Exhibit 1. The district director denied benefits on November 9, 1990, because claimant did not establish any element of entitlement. *Id*. Claimant did not take any further action until he filed the present subsequent claim.

[2] On March 23, 2010, Congress adopted amendments to the Act, that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In pertinent part, the amendments reinstated Section 411(c)(4), 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

violated several principles of constitutional law.[3] The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.[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.[5] 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).

As an initial matter, we reject employer's contention that retroactive application of the amendments to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property. Employer's contentions are substantially similar to those that the Board held were without merit in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (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 Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *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.

Upon addressing the issue of rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge determined that "employer's medical evidence

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[3] Employer's request to hold the case in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant had at least fifteen years of underground coal mine employment and established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We also affirm, as unchallenged, the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), and that the CT scan evidence was negative for pneumoconiosis. *Id*.

[5] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 4, 11. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

has rebutted the presumption and shown that [claimant] does not have pneumoconiosis and that his respiratory impairment did not arise out of, or in connection with, his employment in the coal mines." Decision and Order on Remand at 12. Claimant argues that the administrative law judge's finding must be vacated, as "the mere fact the claimant had not established the presence of pneumoconiosis does not carry employer's burden of proving that he did not suffer from it." Claimant's Brief at [4] (unpaginated). Claimant also contends that the administrative law judge's determination is flawed because he was "impressed by the 'sheer weight'" of employer's evidence, which claimant asserts is not a legal or rational basis for making a finding. *Id*., *quoting* Decision and Order on Remand at 12. Claimant maintains that employer's physicians' opinions are entitled to little weight, as they are "ultimately based on their inability to diagnose the presence of [pneumoconiosis] by x-ray and it would be error to rely on such opinions as establishing that the claimant did not suffer from the disease." *Id*. at [5]. Claimant's allegations of error are without merit.

A review of the administrative law judge's Decision and Order on Remand reveals that he did not base his findings under 20 C.F.R. §§718.202(a) and 718.204(c) on the "sheer weight" of the evidence, but rather considered both the quantity and quality of the evidence in its entirety. *See* Decision and Order on Remand at 7-12. Although the administrative law judge's statement that "[c]laimant has not established the presence of pneumoconiosis or that his respiratory disability is caused in some part by his coal mine employment or coal dust exposure," suggests that he misplaced the burden of proof on rebuttal, he rendered these findings when addressing the issue of whether claimant could establish entitlement to benefits without benefit of the presumption.[6] *Id*. at 12. Rather, the administrative law judge properly put the burden on employer to prove "that the miner does not have pneumoconiosis . . . or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id*. at 6, *quoting* 20 C.F.R. §718.305 (2000); *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).

With respect to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge permissibly relied upon the negative interpretations of the x-rays obtained in 2007 to find that the x-ray evidence is negative for pneumoconiosis, particularly because, as the administrative law judge noted, the only positive x-ray interpretation in the record is from 1990. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Pursuant to 20 C.F.R. §718.202(a)(4), we reject claimant's argument that the administrative law

[6] Because claimant has not raised any error with respect to this finding, it is affirmed. *See Skrack*, 6 BLR at 1-711.

judge erred in determining that the opinions of Drs. McSharry and Castle, that claimant has neither clinical nor legal pneumoconiosis,[7] were based solely on the negative x-ray evidence. Drs. McSharry and Castle cited pulmonary function studies, blood gas studies, and a review of additional medical evidence, including other physicians' opinions, in explaining that claimant's totally disabling respiratory impairment was due solely to cigarette smoking. *See* Director's Exhibit 19; Employer's Exhibits 6, 9, 10, 11, 12. Because claimant has raised no other challenges to the administrative law judge's findings that employer established that claimant is not suffering from pneumoconiosis under 20 C.F.R. §718.202(a)(1), (4), these findings are affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Based upon our affirmance of the administrative law judge's weighing of the medical opinions of Drs. McSharry and Castle at 20 C.F.R. §718.202(a)(4), which the administrative law judge relied on in determining that employer proved that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment at 20 C.F.R. §718.204(c), this finding is also affirmed. We affirm, therefore, the administrative law judge's determination that employer rebutted the presumption at amended Section 411(c)(4).

[7] "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). "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

Although I recognize that there is now Benefits Review Board precedent to the contrary, for the reasons expressed in my dissent in *Snider v. Consolidation Coal Co.*, BRB No. 11-0727 BLA (July 30, 2012) (unpub.) (Boggs, J., concurring and dissenting), I continue to believe that the provisions limiting rebuttal, which are set forth in amended 30 U.S.C. §921(c)(4), do not apply to employers. Accordingly, I concur in the result only.

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JUDITH S. BOGGS
Administrative Appeals Judge