

BRB No. 12-0408 BLA

JOHN M. MILBAUER )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 SOLID MINING COMPANY, )  
 INCORPORATED ) DATE ISSUED: 02/27/2013  
 )  
 and )  
 )  
 AMERICAN MINING INSURANCE )  
 COMPANY )  
 )  
 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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Helen H. Cox (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/carrier (employer) appeals the Decision and Order (10-BLA-5535) of Administrative Law Judge Richard T. Stansell-Gamm 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 involves a subsequent claim filed on July 20, 2009.<sup>1</sup>

In a Decision and Order dated April 5, 2012, the administrative law judge 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 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 underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 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 the miner'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 Section 411(c)(4), the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge found that claimant is entitled to benefits pursuant to Section 411(c)(4).<sup>2</sup> 30 U.S.C. §921(c)(4).

On appeal, employer challenges the administrative law judge's application of Section 411(c)(4) to this case. Claimant and the Director, Office of Workers' Compensation Programs, have filed responses, urging affirmance of the administrative

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<sup>1</sup> Claimant's previous claim, filed on December 29, 2000, was finally denied because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1.

<sup>2</sup> Based on his finding that claimant is entitled to benefits pursuant to Section 411(c)(4), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 26.

law judge's application of Section 411(c)(4) to this claim.<sup>3</sup>

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.<sup>4</sup> 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 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 Constitution. Employer's contentions are substantially similar to the ones that the Board rejected 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 Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010). We, therefore, affirm the administrative law judge's application of Section 411(c)(4) to this claim.

Because they are unchallenged on appeal, we further affirm the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption that claimant is totally disabled 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.

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<sup>3</sup> The Board previously rejected employer's request to hold this case in abeyance pending resolution of constitutional challenges to the Patient Protection and Affordable Care Act. *Milbauer v. Solid Mining Co.*, BRB No. 12-0408 BLA (Aug. 20, 2012) (Order) (unpub.).

<sup>4</sup> Claimant's last coal mine employment was in 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, 1-202 (1989) (en banc).

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

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