

BRB Nos. 11-0278 BLA
and 11-0386 BLA

SANDRA K. WHITE)
(Widow of and on behalf of NORMAN E.)
WHITE))
)
Claimant-Respondent)
)
v.)
)
TENNESSEE COAL COMPANY) DATE ISSUED: 01/26/2012
)
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 Award of Benefits and Decision and Order on Reconsideration Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits and Decision and Order on Reconsideration Award of Benefits (2009-BLA-05165 and 2009-BLA-05166) of Administrative Law Judge Daniel F. Solomon, rendered on a miner's subsequent claim and a survivor's claim filed pursuant to 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).¹ The relevant procedural history of these claims is as follows. In 2001 and 2003, the miner initially filed, and withdrew, two claims for benefits. Director's Exhibits 1, 2. He then filed a claim on June 9, 2005, which was denied by the district director because the evidence did not establish any of the requisite elements of entitlement. Director's Exhibit 3. The miner filed a subsequent claim on October 3, 2007, which is the subject of this appeal. While his claim was pending before the district director, the miner died on November 30, 2007. Director's Exhibits 5, 46. Claimant, the miner's widow, filed her survivor's claim on January 22, 2008. Director's Exhibit 38. The district director awarded benefits in both claims on September 8, 2008. Director's Exhibits 32, 64. Employer requested a hearing, which was held on March 18, 2010. Director's Exhibits 33, 65.

On March 23, 2010, amendments to the Act were enacted, which 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 (PPACA), Public Law No. 111-148 (2010). The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), 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). The amendments also revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

By Order dated April 1, 2010, the administrative law judge requested briefing from the parties as to the applicability of amended Sections 411(c)(4) and 422(l) to this case. In response, claimant and the Director, Office of Workers' Compensation Programs (the Director), asserted that claimant established entitlement in the miner's claim, pursuant to amended Section 411(c)(4), and that she was derivatively entitled to benefits in her survivor's claim, pursuant to amended Section 422(l). Employer, however, argued that retroactive application of the recent amendments is unconstitutional, and that claimant was not eligible for benefits pursuant to either Sections 411(c)(4) or 422(l). In addition, employer requested that the case be held in abeyance, pending the promulgation of new regulations to address the changes in the law. In an Interim Order issued on May 19, 2010, the administrative law judge denied employer's request to hold the case in abeyance.

¹ Employer's appeal of the award of benefits in the miner's claim, BRB No. 11-0278 BLA, and in the survivor's claim, BRB No. 11-0386 BLA, have been consolidated for purposes of decision only. *See White v. Tennessee Coal Co.*, BRB Nos. 11-0278 BLA and 11-0386 BLA (Apr. 13, 2011) (upub. Order).

In his Decision and Order Award of Benefits issued on July 13, 2010, the administrative law judge found that the miner worked at least fifteen years in underground coal mine employment. With regard to the miner's subsequent claim, the administrative law judge found that the newly submitted evidence established that the miner was totally disabled, and thus found that the evidence established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309. The administrative law judge further determined that the miner invoked the presumption at amended Section 411(c)(4), and that employer failed to rebut that presumption. Thus, the administrative law judge awarded benefits in the miner's subsequent claim. With regard to the survivor's claim, the administrative law judge found that claimant was derivatively entitled to benefits pursuant to amended Section 422(l). In a Decision and Order on Reconsideration issued on December 1, 2010, the administrative law judge awarded benefits in the miner's claim, as of October 2007, the month in which the miner filed his subsequent claim. The administrative law judge also awarded benefits in the survivor's claim, commencing January 22, 2008, the date of filing of the survivor's claim.

On appeal, employer asserts that the administrative law judge erred in applying the recent amendments, as employer argues that the operative date for determining eligibility for invocation of the amended Section 411(c)(4) presumption is the date of filing of the miner's initial claim for benefits, not the date of filing of the miner's subsequent claim. Employer also contends that the administrative law judge erred in weighing the evidence relevant to rebuttal of that presumption. In the survivor's claim, employer argues that the operative date for determining eligibility for benefits, pursuant to amended Section 422(l), is also the date on which the miner's initial claim was filed, not the date of filing of the survivor's claim. Employer also asserts that claimant is not eligible for derivative benefits, as the miner was not finally awarded benefits during his lifetime. Alternatively, employer requests that the case be held in abeyance pending resolution of the constitutional challenges to the PPACA in federal court. Claimant and the Director respond, urging affirmance of the award of benefits in both claims. Employer has also filed a reply brief, reiterating its arguments.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² Because the miner's coal mine employment was in Tennessee, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

I. THE MINER'S CLAIM

A. Invocation of the Amended Section 411(c)(4) Presumption

Employer asserts that claimant is not eligible to invoke the amended Section 411(c)(4) presumption because the operative date for determining eligibility for application of the recent amendments is the date on which the miner filed his first claim for benefits, May 14, 2001. Employer's Brief in Support of Petition for Review at 18. Contrary to employer's assertion, because the May 14, 2001 claim was withdrawn by the miner, it is considered never to have been filed and cannot serve as the "operative" claim for determining eligibility for application of amended Section 411(c)(4). *See* 20 C.F.R. §725.306(b). Because the miner's June 9, 2005 claim and his October 3, 2007 subsequent claim were filed after January 1, 2005, they satisfy the filing requirements of Section 1556(c) of the PPACA.³ Therefore, employer's argument is rejected.

We also reject employer's assertion that amended Section 411(c)(4) is not applicable to subsequent claims. A subsequent claim is an entirely new assertion of entitlement to benefits, distinct from any prior claim. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861, 23 BLR 2-124, 2-159 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). In *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012) (en banc) (McGranery, J. concurring and dissenting, Boggs, J., dissenting), the Board agreed with the Director's position that nothing in Section 1556(b) of the PPACA prohibited application of its provisions to a *subsequent* survivor's claim. *Id.* Moreover, the plain language of Section 1556(c) mandates the application of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), to all claims filed by either a miner or a survivor after January 1, 2005, that are pending on or after March 23, 2010.⁴ *See Stacy v. Olga Coal*

³ Section 1556 of the PPACA contains three subsections. Section 1556(a) restores the 15-year presumption. *See* 30 U.S.C. § 921(c)(4). Section 1556(b) reinstates automatic survivors' benefits by removing limiting language from 30 U.S.C. § 932(l). *See* 30 U.S.C. § 932(l). Finally, Section 1556(c) limits the applicability of both Sections 1556(a) and 1556(b) to "claims filed . . . after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least fifteen years of underground coal mine employment, that claimant established total disability at 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that she invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Co., 24 BLR 1-207, 1-214 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *pet. for reh'g filed Jan. 20, 2012*.

B. Rebuttal of the Presumption

In considering whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge stated that employer was required to prove either that the miner did not have pneumoconiosis or that his “respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.” Decision and Order at 3. The administrative law judge determined that the first method of rebuttal was not available, as employer conceded that the miner had simple coal workers’ pneumoconiosis. *Id.* at 10-11; *see* Employer’s Post-Hearing Brief at 5. With regard to the second method of rebuttal, the administrative law judge considered medical opinions by Drs. Caffrey, Oesterling, Dahhan, Baker, Dennis, Perper and Crouch. Decision and Order at 6. The administrative law judge found that Drs. Caffrey and Oesterling were not “specifically requested to comment on [the miner’s] lifetime disability.” *Id.* at 8; *see* Employer’s Exhibits 4, 6. The administrative law judge noted that employer’s “primary expert on causation,” Dr. Dahhan, opined that the miner’s respiratory disability and death were due to sarcoidosis and smoking. Decision and Order at 10; *see* Employer’s Exhibits 2, 3. The administrative law judge, however, found that Dr. Dahhan did not specifically explain why coal dust exposure did not contribute to, or aggravate, the miner’s disability and therefore found that it was insufficient to establish rebuttal. Decision and Order at 8, 10. The administrative law judge also determined that Dr. Baker’s opinion failed to establish rebuttal, as Dr. Baker did not exclude coal dust exposure as a causative factor in the miner’s respiratory impairment.⁵ *Id.* at 11; Director’s Exhibit 3. The administrative law judge concluded that employer “has not submitted a well reasoned opinion to *rule out* pneumoconiosis as a cause of total disability.”⁶ Decision and Order at 13 (emphasis added).

⁵ Dr. Baker examined the miner on July 25, 2005 and diagnosed a mild respiratory impairment that he attributed to a combination of factors, including sarcoidosis, coal workers’ pneumoconiosis, and smoking. Director’s Exhibit 3.

⁶ The administrative law judge summarized the medical opinions of Drs. Dennis, Perper and Crouch. The administrative law judge noted that Dr. Dennis, the autopsy prosector, diagnosed complicated pneumoconiosis, that Dr. Perper specifically opined that the miner was disabled due to pneumoconiosis, and that Dr. Crouch did not address the etiology of the miner’s respiratory disability. Director’s Exhibit 49; Claimant’s Exhibit 1; Employer’s Exhibit 14.

Employer contends that the administrative law judge applied an incorrect legal standard in considering Dr. Baker's opinion and requiring that employer "rule out" a causal connection between the miner's respiratory disability and his coal mine employment.⁷ Employer's Brief in Support of Petition for Review at 19-21. We disagree.

The United States Court of Appeals for the Sixth Circuit has held that "rebuttal requires an *affirmative showing* . . . that [the miner] does not suffer from pneumoconiosis, or that the disease is not related to coal mine work." *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, BLR (6th Cir. 2011) (emphasis added), quoting *Hatfield v. Sec'y of Health and Human Servs.*, 743 F.2d 1150, 1157 (6th Cir. 1984), overruled on other grounds by *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135 (1987). The administrative law judge reasonably concluded that Dr. Baker's opinion fails to establish rebuttal, as Dr. Baker indicated that the miner's respiratory impairment was related, in part, to coal workers' pneumoconiosis Director's Exhibit 3; see *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989). Because employer has not identified error with regard to the administrative law's judge's determinations that the opinions of Drs. Caffrey, Oesterling and Dahhan are insufficient to establish that the miner's disability was not due to his coal mine employment, we affirm the administrative law judge's credibility findings with regard to those physicians. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13.

Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer did not rebut the amended Section 411(c)(4) presumption by proving either that the miner did not have pneumoconiosis, or that the miner's disability did not arise out of, or in connection with, his coal mine employment. *See* 30 U.S.C. §921(c)(4); Decision and Order at 13. Thus, we affirm the award of benefits with respect to the miner's subsequent claim.

⁷ The Director, Office of Workers' Compensation Programs (the Director), notes that the administrative law judge "confused matters somewhat" by also considering whether employer established that the miner's death was unrelated to pneumoconiosis. Director's Brief at 3. We agree with the Director, that the administrative law judge's "superfluous" finding that employer failed to prove that the miner's death was not hastened by pneumoconiosis, does not detract from the administrative law judge's specific finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) by ruling out coal dust exposure as a causative factor in the miner's respiratory disability. *Id.*; see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

II. THE SURVIVOR'S CLAIM

We reject employer's contention that claimant is not entitled to benefits pursuant to amended Section 422(l), based on the filing date of the miner's initial claim. As discussed *supra*, the Board has held that the operative date for determining eligibility for survivors' benefits under amended Section 422(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *See Stacy*, 24 BLR at 1-214.

Furthermore, we reject employer's argument that the administrative law judge erred in awarding benefits in the survivor's claim, pursuant to amended Section 422(l), because the miner was not finally awarded benefits "during his own lifetime." Employer's Brief in Support of Petition for Review at 25 (emphasis added). We agree with the Director that the only prerequisite for entitlement pursuant to amended Section 422(l) is that the miner "was eligible to receive benefits . . . at the time of his or her death." Director's Brief at 3 quoting 30 U.S.C. §932(l); *see* 20 C.F.R. §725.212(a)(3)(ii); *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). Finally, we reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law Number. 111-148. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

As employer does not raise any additional arguments, we affirm the administrative law judge's determination that claimant is entitled to benefits pursuant to Section 422(l), as the miner was awarded benefits on his lifetime claim, claimant is an eligible survivor of the miner, and her claim was filed after January 1, 2005, and was pending on or after March 23, 2010. *See* 30 U.S.C. §932(l); *Stacy*, 24 BLR at 1-207.

The administrative law judge determined that as to the survivor's claim, claimant is entitled to benefits from the date of filing, January 22, 2008. Decision and Order on Reconsideration Award of Benefits at 2. Subsequent to the administrative law judge's ruling and the briefing by the parties in this appeal, the Board held in *Dotson v. McCoy Elkhorn Coal Corp.*, BLR , BRB No. 10-0706 BLA (Nov. 15, 2011) (*en banc*) that benefits under amended Section 422(l) shall commence as of the month in which the miner died. *Id.*; *see also* 20 C.F.R. §725.503(c). We, therefore, modify the administrative law judge's onset determination in the survivor's claim to reflect that claimant is entitled to benefits, pursuant to amended Section 422(l), commencing November 2007, the month in which the miner died.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed and the Decision and Order on Reconsideration Award of Benefits is affirmed in part and modified in part.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge