BRB No. 12-0578 BLA

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| ROGER D. RICHMOND | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| NO COAL, INCORPORATED | ) | |
| | ) | |
| and | ) | |
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| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | DATE ISSUED: 07/30/2013 |
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| Employer/Carrier-Petitioners | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (11-BLA-5388) of Administrative Law Judge Thomas M. Burke, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this claim for benefits on January 19, 2010. Director's Exhibit 2.

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 living miner's 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). 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 amended Section 411(c)(4), the administrative law judge credited claimant with 32.4 years of coal mine employment,[1] of which at least seventeen years were underground coal mine employment, and he found that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption. 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 application of amended Section 411(c)(4) to this claim. Further, employer contends that the administrative law judge erred in finding that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge applied an improper rebuttal standard, and erred in his analysis of the evidence in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds,

[1] Claimant's last coal mine employment was in West Virginia. Director's Exhibits 3, 6; Hearing Transcript at 21. 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).

urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge erred in considering claimant's last job as a federal mine inspector to be covered employment under the Act, both when he determined the length of claimant's coal mine employment, and when he found that claimant lacks the respiratory capacity to perform his last work as a federal mine inspector, but asserts that the error was harmless. Further, the Director urges the Board to reject employer's arguments that Section 411(c)(4) may not be applied to this claim, and that the administrative law judge applied an improper standard on rebuttal. Employer replied to both claimant and the Director, reiterating its arguments, and requesting that this case be held in abeyance.

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 objects to the application of amended Section 411(c)(4) to this claim brought against a responsible operator, as the language of this section only addresses claims filed against the Secretary of Labor. Employer's arguments are substantially similar to those rejected by the Board 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 for the reasons set forth in that decision. *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). We also reject employer's objection to the application of amended Section 411(c)(4) because the Department of Labor has not yet promulgated implementing regulations. 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). Finally, we deny employer's request to hold this case in abeyance pending the outcome of the appeal of the Board's decision in *Owens*. We, therefore, affirm the administrative law judge's application of amended Section 411(c)(4) to this claim.

## Invocation of the Section 411(c)(4) Presumption

### Qualifying Coal Mine Employment

The Director argues that the administrative law judge erred in finding that claimant's work as a federal mine inspector qualified as coal mine employment under the Act, but argues that the error was harmless, because the administrative law judge found

that, prior to his job as a federal mine inspector, claimant was employed in underground coal mining for seventeen years. We agree.

As we will discuss in greater detail below when addressing the issue of total disability, under the law of the United States Court of Appeals for the Fourth Circuit, the administrative law judge erred in considering claimant's work as a federal mine inspector from 1992 to 2009 to be covered coal mine employment under the Act. Therefore, we are unable to affirm the administrative law judge's determination that claimant had a total of 34.2 years of coal mine employment. The error is harmless, however, with respect to qualifying coal mine employment for purposes of the Section 411(c)(4) presumption, because it is undisputed that claimant worked for seventeen years in underground coal mine employment, from 1969 through 1986, before he became a federal mine inspector. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). Thus, we affirm the administrative law judge's determination that claimant had "at least 17 years of underground coal mine employment from 1969 to 1986," Decision and Order at 9, and therefore established sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption.

**Total Disability**

Employer argues that the administrative law judge erred in concluding that the three medical opinions of record established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[2] Specifically, employer contends that the administrative law judge failed to adequately account for the fact that Dr. Rasmussen addressed the wrong job, opining that claimant lacks the respiratory capacity to perform his former job as a section foreman, instead of addressing whether claimant could perform his last job as a federal mine inspector. Additionally, employer contends that, contrary to the administrative law judge's finding, the opinions of Drs. Repsher and Zaldivar, if considered in their entirety, indicate that claimant could perform his last job as a federal mine inspector.

The Director argues that the administrative law judge erred in finding that claimant's work as a federal mine inspector qualified as coal mine employment under the Act, and therefore erred in finding that claimant is totally disabled because he lacks the respiratory capacity to perform his last job as a federal inspector. Director's Brief at 2 n.2. The Director contends that the administrative law judge should have considered whether claimant has the respiratory capacity to perform his prior job duties in 1986, his last covered coal mine employment. The Director asserts, however, that the administrative law judge's error is harmless because, in the Director's view, claimant's

[2] The administrative law judge found that the other types of medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

1986 job duties were "at least as arduous as [those he] performed as a federal mine inspector," meaning that "if [claimant] is unable to perform his duties as a federal mine inspector due to his pulmonary impairment, he is unable to perform his prior coal mine job." Director's Brief at 3 n.2. Employer replies, asserting that the administrative law judge may correctly rely on claimant's work as a federal mine inspector in determining whether claimant is totally disabled.

The administrative law judge considered claimant's most recent work as a federal mine inspector, from 1992 to 2009, and stated:

> Claimant testified that his last job as a federal mine inspector required him "to inspect the mines in their entirety, meaning that [he] had to travel the entire mines, face areas, out-by areas, return entries, intake entries, belt conveyor entries, the entire mine." (Tr. 11-12). This required "a fair bit of walking" while carrying equipment, tools, and samples weighing anywhere from thirty to forty-five pounds. (Tr. 12). Claimant testified that he carried his equipment the entire time and that he had to crawl and climb on a daily basis. (Tr. 12). Such testimony is supported by Dr. Repsher's documentation that Claimant was required to work in 30 inch coal seams (EX 1) and the Department of Labor form indicating that Claimant inspected the entire mine, walked the face area, and crawled an average of two hours a day. (DX 4).

Decision and Order at 12.

Claimant described the above job as inspecting the mines "in their entirety, meaning that you had to travel the entire mines, face areas, out-by areas, return entries, intake entries, belt conveyor entries, the entire mines." Hearing Transcript at 11-12. He testified that the job required "very much" walking, and he carried equipment for the job, as well as "self-rescue" supplies, which weighed between thirty and forty-five pounds. According to claimant, he had to crawl and climb on a daily basis, and the job involved mostly carrying, but not much lifting. *Id*. at 12.

Claimant's prior mining job, which ended in 1986, was working as a section foreman. *Id*. at 8. Claimant described that job, stating:

> I'd fire boss the mines. . . before the men c[a]me in. Then when the men got on the section then I'd do whatever I had to the rest of the day to make sure production went – if I had to fill in [for] an employee, I did. If they just needed help supplying the section, whatever was needed I did it[,] and it was that way every day.

*Id.* at 19. The record also reflects that in his prior job as a foreman, claimant performed weekly inspections of the mines which he indicated required walking and "crawling. It was thirty (30) inches of coal, you crawled everywhere." *Id.* at 9. Claimant explained that when he filled in for other miners, he would set jacks, run the bolting machine, install line brattices and belt conveyors, rock dust the coal mines, and whatever else was needed. He further testified that the bags of rock dust weighed about fifty pounds. *Id.* at 10. Claimant agreed that it was "[p]retty heavy work," particularly when it was done "at thirty (30) inches." *Id.* at 11.

Dr. Rasmussen addressed claimant's prior job as a foreman, and stated that it required "considerable heavy and some very heavy manual labor." Director's Exhibit 15 at 3; Employer's Exhibit 3 at 19. Dr. Rasmussen opined that claimant lacks the respiratory capacity to perform heavy and very heavy manual labor. *Id.* Dr. Repsher addressed claimant's last job, as a federal mine inspector. Dr. Repsher opined in his report that claimant is "fully fit" from a respiratory standpoint to perform that job. Employer's Exhibit 1 at 8. When deposed, Dr. Repsher opined that claimant would have the respiratory capacity to perform moderate exertion, but whether he could perform the work of a federal mine inspector would depend on how steep the mine shafts were that he would have to climb. Employer's Exhibit 6 at 16. Dr. Zaldivar addressed both jobs. In his report, Dr. Zaldivar opined that claimant "is impaired and unable to perform heavy manual labor which he says that he was required to do at some points," and therefore "is disabled for his usual coal mining work." Employer's Exhibit 4 at 4. When deposed, Dr. Zaldivar opined that claimant could perform the work of a federal mine inspector "with no trouble at all," and, somewhat in contrast to the statement in his report, Dr. Zaldivar testified that claimant might also be able to perform "short st[i]nts" of heavy labor. Employer's Exhibit 7 at 15.

The administrative law judge found that "all three medical opinions support a finding that claimant is totally disabled from performing his last job as a mine inspector" because:

> Despite Dr. Rasmussen's mistaken understanding of Claimant's last job as a section foreman, he concluded that claimant is totally disabled from performing very heavy labor. This is consistent with the findings of Dr. Zaldivar and Dr. Repsher. Specifically, Dr. Zaldivar found Claimant to be unable to perform heavy labor such as crawling, particularly on a continuous basis. He stated that any longer than five minutes and Claimant would become short of breath. Dr. Repsher opined that claimant could "probably do work requiring moderate exertion. But [he] would guess that he'd be at least intermittently symptomatic." Likewise, Dr. Repsher testified that Claimant might have some difficulties depending on the mine and if he had to walk a lot of hills or climb steep shafts.

Decision and Order at 12 (citations omitted). Upon review of the above findings in light of the arguments raised by employer and the Director, we conclude that the administrative law judge's total disability findings cannot be affirmed.

Under 20 C.F.R. §725.202, there is a "rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a). The Board defines a miner's "usual coal mine work" as "the most recent job the miner performed regularly and over a substantial period of time," *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), and has held that a coal mine inspector is a miner under the Act. *Bartley v. Director, OWCP*, 12 BLR 1-89, 1-90-91 (1988)(Tait, J., concurring); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2, 1-43-44 (1981). The Fourth Circuit, however, has suggested that the work of a federal mine inspector is not the work of a miner under the Act. In *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989), the claimant first worked as a coal miner in Pennsylvania and subsequently worked as a federal mine inspector in the Commonwealth of Virginia. The claimant petitioned the Fourth Circuit to review the Board's decision affirming a denial of benefits. In holding that jurisdiction was in the Third Circuit because "all of claimant's coal mine employment and coal dust exposure" had occurred in Pennsylvania, the court stated that "any coal dust exposure that claimant suffered while working for the federal government in Virginia cannot qualify as an injury under the Black Lung Benefits Act."[3] *Kopp*, 877 F.2d at 309, 12 BLR at 2-302.

In an unpublished case, the Fourth Circuit, citing *Kopp*, agreed with the Director's argument that a claimant's employment as a federal mine inspector did not meet the statutory definition of a miner for the purposes of establishing eligibility for black lung benefits. *McGraw v. OWCP*, 908 F.2d 967 (Table), 1990 WL 101412 (4th Cir., July 10, 1990). Moreover, the Board, applying *Kopp*, has held that, where a claimant worked as a mine inspector for the state of Virginia, since Virginia cannot be a responsible operator, the length of claimant's tenure with the state should be subtracted from the length of coal mine employment to be credited to him by the administrative law judge. *Breeding v.*

[3] In reaching this conclusion, the court cited its holding in *Eastern Associated Coal Corp. v. Director, OWCP* [*Patrick*], 791 F.2d 1129, 1131 (4th Cir. 1986), that a federal mine inspector's exclusive remedy for on-the-job coal dust exposure was through the Federal Employees' Compensation Act, 5 U.S.C. §8116(c). In *Patrick*, however, the court expressly declined to decide the specific issue of whether a mine inspector is a miner under the Act, noting that that issue "will be critical when a claimant needs the time spent as an inspector to qualify for the provision in 20 C.F.R. §725.203 (1985) that one who has worked as a miner for 10 years may be presumed to be disabled from pneumoconiosis." 791 F.2d at 1131. From the context of the court's discussion, it appears that the court meant to refer to the presumption of 20 C.F.R. §718.203(b).

*Colley & Colley Coal Co.*, BRB No. 88-1072 BLA, slip op. at 5-6 (Oct. 13, 1994)(en banc recon.)(unpub.).

In this case, since claimant's last coal mine employment was not his work as a federal mine inspector, the administrative law judge erred by evaluating whether claimant is totally disabled by comparing his physical limitations to the exertional requirements of that job. Instead, the administrative law judge should have considered whether the evidence establishes that claimant is unable to perform his last coal mine employment, which, in this case, is the coal mine work he performed before he became a federal mine inspector. Accordingly, we must vacate the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and his finding that claimant established invocation of the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), and remand this case to the administrative law judge for further consideration.[4] In light of the foregoing, we also vacate the administrative law judge's finding that employer has not established rebuttal of this presumption.

On remand, the administrative law judge must determine the exertional requirements of claimant's usual coal mine employment and compare them with the medical opinions addressing claimant's abilities and limitations. The administrative law judge must consider the impact on the credibility of a medical opinion, where the physician's assessment of claimant's job duties differs from the administrative law judge's finding. *See Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190 (1989).

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

[4] We cannot agree with the Director's suggestion that the total disability finding should still be affirmed, because we should hold that claimant's "underground work [was] at least as arduous as the duties [he] performed as a federal mine inspector. . . . Thus, if [he] is unable to perform his duties as a federal mine inspector due to his pulmonary impairment, he is unable to perform his prior coal mine job." Director's Brief at 3 n.2. The administrative law judge, as the fact-finder, is charged with evaluating the evidence, and he must weigh the evidence and make determinations regarding all factual matters, including that nature of claimant's usual coal mine employment. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993). The Board cannot make findings of fact or reweigh the evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Employer argues that the administrative law judge's use of the "rule out" standard was improper pursuant to *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer may rebut the Section 411(c)(4) presumption if it disproves the existence of pneumoconiosis, or establishes 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). To establish that claimant's pulmonary or respiratory impairment did not arise out of his coal mine employment, employer must "rule out a relationship" between claimant's impairment and his coal mine employment. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Therefore, we reject employer's assertion that the administrative law judge applied the incorrect rebuttal standard. If, on remand, the administrative law judge finds the evidence sufficient to establish invocation of the Section 411(c)(4) presumption, he must then determine whether employer has established rebuttal of that presumption.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

For the reasons set forth by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), since there are no regulations currently in force applying the limitations on rebuttal set forth in 30 U.S.C. §921(c)(4) to employers, I would not instruct the administrative law judge to apply those

limitations to the instant case. However, because the Board has adopted precedent to the contrary, *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2010), I concur with my colleagues in all respects.

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JUDITH S. BOGGS
Administrative Appeals Judge