BRB No. 13-0123 BLA

ELMER G. CASEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL	)	
	)	DATE ISSUED: 11/21/2013
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Micah S. Blankenship (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-05585) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed pursuant to the provisions of 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 April 8, 2010.[1] Director's Exhibit 4.

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.[2] 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

The administrative law judge credited claimant with thirty-three years of underground coal mine employment,[3] and found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). Decision and Order at 4, 5. Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) (2013).[4] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

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[1] Claimant's prior claim, filed on April 7, 2003, was finally denied on March 26, 2009. Director's Exhibit 2.

[2] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[3] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 5. 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).

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth in 20 C.F.R. §725.309(d) (2013) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also asserts that the administrative law judge erred in finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) (2013). Further, employer challenges the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that employer's argument regarding 20 C.F.R. §725.309(d) (2013) is without merit, requesting that the Board reject employer's contentions regarding the application of amended Section 411(c)(4), and urging the Board to reject employer's contentions regarding the weighing of the medical opinion evidence on rebuttal. Employer filed a combined reply brief, reiterating its contentions on appeal.[5]

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 contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 20-23. This argument was rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *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, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Employer's Brief at 25. Moreover, as discussed *supra* n.2, the Department of Labor (DOL) recently promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 20 C.F.R. §718.305(d)(1).

[5] As employer does not challenge the administrative law judge's findings that claimant established thirty-three years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We also reject employer's assertion that the administrative law judge's application of amended Section 411(c)(4) to this case was premature, because the DOL had yet to promulgate implementing regulations. Employer's Brief at 26-28. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Moreover, the DOL's recently promulgated regulations are consistent with the provisions applied by the administrative law judge. Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

20 C.F.R. §725.309

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203 (2013), 718.204 (2013). Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c)(1); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's last claim was denied because he did not establish that his totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) (2013). Director's Exhibit 2. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing disability causation. 20 C.F.R. §725.309(c)(1), (3).

Employer argues that the administrative law judge erred in failing to consider whether claimant affirmatively established disability causation based on the new evidence, and thus demonstrated a change in the applicable condition of entitlement under 20 C.F.R. §725.309(c)(1). Employer's Brief at 7-19. Contrary to employer's contention, because claimant is presumed to be totally disabled due to pneumoconiosis under Section 411(c)(4), if he can invoke the presumption, he will have satisfied his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309. 20 C.F.R. §718.204(c)(2) (2013); *see Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, BLR (7th Cir. 2013) (holding that disability causation may be established by the fifteen-year presumption for the purpose of showing a change in an applicable condition of entitlement at 20 C.F.R. §725.309 (2013)); Director's Brief at 1-2. Accordingly, we reject employer's allegation of error, and turn to the administrative law judge's analysis of invocation under Section 411(c)(4).

In light of our affirmance of the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, and that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order at 4-5.

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

Employer initially asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 23-25. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of clinical[6] and legal[7] pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 5; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); 65 Fed Reg. 59,102, 59,106 (Sept. 25, 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the United States Court of Appeals for the Fourth Circuit has stated, explicitly, that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure.[8] *Rose*, 614 F.2d at 939, 2

[6] "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) (2013).

[7] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2) (2013). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (2013).

[8] Similarly, the implementing regulation that was promulgated after the administrative law judge's decision requires the party opposing entitlement in a miner's

BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. McSharry and Castle. Dr. McSharry opined that claimant's disabling airflow obstruction is compatible with chronic obstructive pulmonary disease (COPD) and may represent asthma, but is not due to coal mine dust exposure. Director's Exhibit 15 at 2. Dr. Castle opined that claimant has disabling airway obstruction compatible with bronchial asthma, and unrelated to coal mine dust inhalation. Employer's Exhibit 2 at 11.

The administrative law judge found neither Dr. McSharry, nor Dr. Castle, adequately accounted for claimant's thirty-three years of coal mine dust exposure, and therefore did not persuasively rule out coal mine dust exposure as a cause of claimant's impairment. Decision and Order at 6. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id*.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. McSharry and Castle did not disprove the existence of pneumoconiosis. Employer's Brief at 17-29. We disagree. As set forth below, the administrative law judge permissibly found that the reasons given by Drs. McSharry and Castle for excluding coal mine dust exposure as a cause of claimant's COPD were not persuasive. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In assessing the credibility of the physicians' opinions, the administrative law judge accurately noted that Dr. McSharry eliminated coal mine dust exposure as a source of claimant's COPD, in part, because it would be "extremely unusual" for coal mine dust exposure to cause a purely obstructive impairment, such as that demonstrated on claimant's objective testing. Decision and Order at 5 n.7; Director's Exhibit 15 at 2; Employer's Exhibit 7 at 23. The administrative law judge also correctly noted that Dr. Castle eliminated coal mine dust exposure as a source of claimant's obstructive impairment, in part, because he opined that if coal mine dust exposure causes an impairment, it generally causes a mixed, irreversible obstructive and restrictive ventilatory defect, which was not the finding in this case. Decision and Order at 6; Employer's Exhibit 2 at 11. The administrative law judge permissibly discounted the

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claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(ii).

opinions of Drs. McSharry and Castle as inconsistent with the regulations, which define legal pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2) (2013); Decision and Order at 6.

Additionally, the administrative law judge noted that Dr. Castle relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration, to exclude coal mine dust exposure as a cause of claimant's COPD. Decision and Order at 6. The administrative law judge found, as was within his discretion, that Dr. Castle did not adequately explain why the irreversible portion of claimant's pulmonary impairment was unrelated to coal mine dust exposure, or why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's COPD. *See* 20 C.F.R. §718.201(a)(2) (2013); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); Decision and Order at 6.

Therefore, contrary to employer's contentions, the administrative law judge provided valid reasons for discounting the opinions of Drs. McSharry and Castle, that claimant's COPD is unrelated to his years of coal mine dust exposure. Substantial evidence supports the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[9]

Having found that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge next addressed whether employer established rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). The administrative law judge reasonably found that the same reasons that he provided for discrediting the opinions of Drs. McSharry and Castle, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling obstructive impairment is unrelated to his coal mine employment. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 7. Therefore, we affirm the administrative law judge's finding that employer failed to meet its burden to

[9] Thus, we need not address employer's arguments regarding the administrative law judge's additional finding that employer did not disprove the existence of clinical pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer' Brief at 14-18.

establish rebuttal by this method. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 7.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge