BRB No. 11-0142 BLA

GEORGE R. BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 10/27/2011
	)	
WELLS FARGO DISABILITY MANAGEMENT	)	
	)	
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 Paul C. Johnson. Jr., Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Maia S. Fisher (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5996) of Administrative Law Judge Paul C. Johnson, Jr., awarding benefits on a claim filed pursuant to the provisions of 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). This case involves a subsequent claim filed on October 11, 2007.[1] After crediting claimant with twenty-eight years of coal mine employment,[2] the administrative law judge found that the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 2007 claim on the merits.

In considering the merits of claimant's 2007 claim, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living 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 qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 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 claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[3] 30 U.S.C. §921(c)(4).

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[1] Claimant's two previous claims, filed on February 22, 2000 and March 18, 2003, were finally denied because claimant failed to establish any of the elements of entitlement. Director's Exhibits 1, 2.

[2] The record indicates that claimant's coal mine employment was in Illinois. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] In a March 31, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements.

Applying amended Section 411(c)(4), the administrative law judge found that claimant worked more than fifteen years in surface mining employment, where he was exposed to coal dust in conditions substantially similar to those of an underground coal mine. The administrative law judge also found that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, and, therefore, he found that employer failed to rebut this presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer also argues the administrative law judge erred in finding that claimant established invocation of the Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting, *inter alia*, that the Board reject employer's contentions that the administrative law judge erred in finding a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and in finding invocation of the Section 411(c)(4) presumption. In a reply brief, employer reiterates its previous contentions.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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

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Employer and the Director, Office of Workers' Compensation Programs, submitted position statements.

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(d); *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(d)(2). Claimant's last claim was denied because he failed to establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment.[4] Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

Employer contends that the administrative law judge erred in finding that the new pulmonary function study evidence established the existence of a totally disabling pulmonary impairment. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered four new pulmonary function studies conducted on January 17, 2005, November 19, 2007, February 27, 2008, and May 23, 2008.[5] Director's Exhibit 11; Employer's Exhibits 6, 10, 11. In assessing whether the reported values for these pulmonary function studies were qualifying[6] for total disability, the administrative law judge noted that claimant's height was "variously recorded as 68", 69", and 71"." Decision and Order at 11. The administrative law judge determined, however, that there was no need for him to resolve the discrepancy in claimant's height, because, with the exception of two post-bronchodilator tests,[7] claimant's pulmonary function studies were qualifying for any of the recorded heights.

[4] To the extent that employer contends that claimant's prior claim was not denied based on a finding that claimant did not establish total disability, *see* Employer's Brief at 6, its contention lacks merit. In denying claimant's 2003 claim, the district director found that the evidence did not establish that claimant had "a breathing impairment of sufficient degree to establish total disability within the meaning of the Act." Director's Exhibit 2.

[5] The administrative law judge also considered the results of a December 4, 2002 pulmonary function study. However, because this study predates the denial of claimant's 2003 claim, it is not relevant to determining whether claimant has demonstrated a change in an applicable condition of entitlement in this claim. *See* 20 C.F.R. §725.309(d)(2), (3).

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] The administrative law judge noted that the post-bronchodilator portions of claimant's January 17, 2005 and November 19, 2007 pulmonary function studies are non-qualifying at any height. Decision and Order at 11.

Employer contends that the administrative law judge erred because he did not make a factual finding regarding claimant's height before determining whether the recorded values for the new pulmonary function studies were qualifying. Where there are substantial differences in the recorded heights among the pulmonary function studies of record, an administrative law judge must make a factual finding to determine claimant's actual height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). In this case, however, employer has failed to demonstrate how the administrative law judge's failure to make a determination regarding the miner's height calls into question his ultimate determination that the new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).

Specifically, the record reflects that, of the four new pulmonary function studies, the only study the qualifying nature of which is dependent upon a resolution of claimant's height is the study that was conducted on February 27, 2008.[8] Director's Exhibit 11; Employer's Exhibits 6, 10, 11. The administrative law judge accurately determined that the pre-bronchodilator portions of claimant's January 17, 2005 and November 19, 2007 pulmonary function studies, as well as the pre-bronchodilator and post-bronchodilator portions of claimant's May 23, 2008 pulmonary function study, are qualifying at any of claimant's listed heights.[9] Decision and Order at 11. Moreover, the administrative law judge found that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), noting that all of the physicians who addressed the issue opined that claimant suffers from a totally disabling pulmonary impairment. *Id.* Notably, Dr. Westerfield, one of employer's physicians, opined that claimant suffers from a totally disabling respiratory impairment, an opinion based in part upon his review of the results

[8] Utilizing the values specified in the tables at 20 C.F.R. Part 718, Appendix B, if claimant's height is 68.5 inches or less, the pre-bronchodilator portion of his February 27, 2008 pulmonary function study is non-qualifying. At a height of 68.9 inches or less, the post-bronchodilator portion is also non-qualifying. However, at a height of 69.3 inches, both portions of the February 27, 2008 pulmonary function study become qualifying.

[9] Contrary to employer's contention, there is no indication that the administrative law judge did not consider the post-bronchodilator portions of the four new pulmonary function studies. The administrative law judge noted that, while the post-bronchodilator portions of claimant's January 17, 2005 and November 19, 2007 pulmonary function studies were non-qualifying, the pre-bronchodilator portion of these studies were qualifying, as were the pre-bronchodilator and post-bronchodilator portions of claimant's most recent pulmonary function study conducted on May 23, 2008. Decision and Order at 11.

of all four of the new pulmonary function studies.[10] Employer's Exhibit 7 at 11, 19. Given the substance of the new medical evidence regarding total disability, the administrative law judge's error, if any, in failing to resolve the discrepancies in claimant's listed heights, was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). We, therefore, also affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement since the date upon which the denial of claimant's prior claim became final.[11] 20 C.F.R. §725.309(d).

Section 411(c)(4)

Employer asserts that retroactive application of amended Section 411(c)(4) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 21. The arguments made by employer are substantially similar to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject them here for the reasons set forth in that decision. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after

[10] Dr. Tuteur, employer's other physician, also opined that claimant suffers from a totally disabling respiratory impairment. Employer's Exhibit 8 at 11-12. Dr. Tuteur based his opinion, in part, upon his review of the pulmonary function studies conducted on January 17, 2005 and May 23, 2008. *Id.* at 8-10.

[11] Employer argues that the administrative law judge erred in not comparing the evidence in the prior claim to the new evidence in the subsequent claim to ensure that the new evidence differed qualitatively. Employer's Brief at 7. Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in conditions;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based. *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Consequently, we reject employer's contention that the administrative law judge was required to conduct a qualitative comparison of the old and new evidence pursuant to 20 C.F.R. §725.309.

January 1, 2005, and was pending on March 23, 2010.

Employer next contends that the administrative law judge erred in finding that claimant established invocation of the Section 411(c)(4) presumption. In order to establish invocation, a claimant must establish 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 suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4). Employer initially contends that amended Section 411(c)(4) does not contain language allowing invocation in the event of above-ground coal mine employment. Employer specifically argues that the words "substantially similar to those in an underground mine" are not included in amended Section 411(c)(4). Employer's Brief at 8. Contrary to employer's argument, Section 411(c)(4) provides for invocation of the rebuttable presumption if claimant establishes fifteen years of underground coal mine employment, or coal employment in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4).

Employer next challenges the administrative law judge's finding that claimant established that he worked for fifteen years in a surface mine with dust conditions substantially similar to those found in underground mines. The United States Court of Appeals for the Seventh Circuit has held that, while a claimant bears the burden of establishing comparability, he is "required only to produce sufficient evidence of the surface mining conditions under which he worked." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). In this case, the administrative law judge found that claimant proved that, during his twenty-eight years as a surface miner, he was exposed to dust conditions substantially similar to those existing underground:

> [Claimant] testified that he was exposed to dust in his work as a dozer operator and as a backhoe operator. He further testified that as a backhoe operator, he was exposed to dust not only when he was digging, but as he was dumping the coal on the coal truck. As a dozer operator, he was exposed to coal dust coming up to him on coal cars, which were within 2-3 feet of him and the fan on which "kept blowing it right back in [his] face." [Claimant] testified that as a drag line operator, he was exposed to coal dust while performing maintenance on and cleaning the machine while digging coal. He described the dust control program at the mine where he worked as consisting of a single water truck tha[t] ran by itself on an eight-mile run, and said it was "pretty well insufficient to take care of any dust," and controlled the dust for only about five minutes. Based on the foregoing, I find that even [though] claimant's employment was not at an underground

> mine, the conditions were substantially similar to conditions in an underground mine.

Decision and Order at 4 (citations omitted).[12]

Because it is based upon substantial evidence, the administrative law judge's finding, that claimant established more than fifteen years of employment in a surface mine with dust conditions substantially similar to those found in underground mines, is affirmed. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192, (7th Cir. 1995).

We also reject employer's contention that the administrative law judge, in finding that the evidence established total disability, erred in not considering evidence submitted in connection with claimant's prior claims. Although the administrative law judge noted that the record contains medical evidence submitted in connection with claimant's prior claims, he reasonably relied upon the more recent medical evidence, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 17. We, therefore, affirm the administrative law judge's finding that the overall evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's findings that claimant established 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), we also affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 17. The administrative law judge found that employer failed to establish either method of rebuttal. *Id.* at 20.

[12] Claimant's characterization of the conditions of his surface coal mine employment is uncontradicted.

Employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.[13] The administrative law judge considered the medical opinions of Drs. Houser, Tuteur, and Westerfield.[14] Dr. Houser diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 11. Although Dr. Tuteur also diagnosed COPD, he explained that the etiology of claimant's COPD was dependent upon the extent of claimant's smoking history. Employer's Exhibit 6. If claimant's smoking history was only ten pack-years, Dr. Tuteur opined that it would not be a "meaningful etiologic factor" for the development of his COPD. *Id.* However, if claimant's actual smoking history was closer to twenty-seven pack years, Dr. Tuteur opined that claimant's COPD would be caused by his cigarette smoking. *Id.* Dr. Tuteur further opined that coal mine dust exposure was not responsible for claimant's COPD because the disease did not progress until nine years after claimant ceased his coal mine employment. Employer's Exhibit 8 at 17-18. Ultimately, Dr. Tuteur opined that he was uncertain as to the cause of claimant's COPD. *Id.* at 20. Dr. Westerfield also diagnosed COPD in the form of emphysema. Dr. Westerfield opined that claimant's thirty-year smoking history was "adequate for him to develop emphysema due to . . . smoking."[15] Employer's Exhibit 13. Dr. Westerfield found "less evidence" that claimant's coal mine dust exposure caused his lung disease, noting that claimant's pulmonary function studies were "more consistent with cigarette-smoking induced emphysema than injury due to mineral dust." *Id.*

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge found that claimant had a cigarette smoking history of 8.75 pack years. Decision and Order at 3. The administrative law judge discredited the opinions of Drs. Tuteur and Westerfield regarding the etiology of

[13] "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).

[14] In light of the applicability of amended Section 411(c)(4), the administrative law judge reopened the record, and allowed the parties an opportunity to submit additional evidence. In response, employer submitted a supplemental report from Dr. Westerfield, which the administrative law judge admitted into evidence. Decision and Order at 2; Employer's Exhibit 13.

[15] In regard to the effect of smoking on lung disease, Dr. Westerfield explained that a smoking history below ten pack-years would probably result in "little harm," a ten to twenty-pack-year history would cause respiratory injury and "more harm," and a history of greater then twenty pack-years would be "more likely" to cause respiratory injury. Employer's Exhibit 7 at 17.

claimant's COPD because they did not base their opinions upon accurate smoking histories. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 20.

Employer argues that the administrative law judge erred in finding that claimant's smoking history was only 8.75 pack years. Employer specifically argues that the administrative law judge failed to adequately address the conflicting evidence regarding the extent of claimant's smoking history. Employer's contention lacks merit. The administrative law judge explained how he resolved the conflicting evidence regarding the extent of claimant's smoking history:

> At the hearing, claimant testified that he had smoked three to four cigarettes each day beginning at age 20 or 22, and ending in 1999. Although Dr. Eisenstein reported a smoking history of ½ pack per day, [claimant] testified that he told Dr. Eisenstein that he smoked 2-4 cigarettes per day, and Dr. Eisenstein recorded it incorrectly. Claimant further testified that Dr. Le incorrectly recorded his smoking history as 1½ packs per day for 35-40 years, and that Dr. Miller incorrectly recorded his smoking history as one pack per day for 30 years. I credit claimant's trial testimony. It was taken under oath, and his demeanor persuades me of his credibility. His testimony was consistent with the histories recorded by other physicians, and I find that he smoked ¼ pack of cigarettes per day for 35 years, for a smoking history of 8.75 pack years.

Decision and Order at 3 (citations omitted).[16]

In his role as fact-finder, the administrative law judge is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). In this case, the administrative law judge's determination, that claimant's testimony was credible in light of claimant's demeanor as a witness, was entirely within the administrative law judge's discretion as fact-finder, and legitimately informed his consideration of the remaining evidence. *See Zyskoski v. Director, OWCP*, 12 BLR 1-

[16] The administrative law judge's finding, that claimant's smoking history is consistent with histories recorded by other physicians, is supported by the record. In 2008, Dr. Tuteur indicated that claimant reported to him that he "never smoked more than 3 or 4 cigarettes daily." Employer's Exhibit 6. In 2007, Dr. Houser listed a similar smoking history of one-third to one-half pack of cigarettes a day. Director's Exhibit 11. Dr. Sanjabi also recorded a similar smoking history in 2003, noting that claimant smoked five cigarettes a day. Director's Exhibit 2.

159, 1-161 (1989). Because it was not an abuse of his discretion, the administrative law judge's finding of an 8.75 pack-year smoking history is affirmed.[17] *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (holding that the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable).

The administrative law judge discredited the opinions of Drs. Tuteur and Westerfield regarding the etiology of claimant's COPD because the doctors did not base their opinions upon an accurate smoking history. Decision and Order at 20. An administrative law judge may properly discredit the opinion of a physician which is based upon an inaccurate or incomplete picture of the miner's health. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). Because the opinions of Drs. Tuteur and Westerfield are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988), *aff'd sub nom., Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989) (unpub.); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988).

Because employer does not raise any other contentions of error regarding the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption,[18] this finding is affirmed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

[17] Contrary to employer's contention, the administrative law judge considered the smoking histories listed by claimant's treating physicians, Drs. Le and Pineda. Decision and Order at 14-15. The administrative law judge, however, permissibly credited claimant's testimony over their reported histories.

[18] Citing *Peabody Coal Co. v. Vigna*, 2 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), employer contends that that claimant's back injury took him outside of the scope of the Act. In *Vigna*, the Seventh Circuit held that a claimant's preexisting condition precluded an award of benefits. Employer's reliance on *Vigna* is misplaced. Because this claim was filed after January 19, 2001, *Vigna* does not apply to this case. *See* 20 C.F.R. §718.204(a); *Gulley v. Director, OWCP*, 397 F.3d 535, 23 BLR 2-242 (7th Cir. 2005).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge