BRB Nos. 11-0169 BLA
and 11-0169 BLA-A

MAURICE MILES	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
OMAR MINING COMPANY	)	DATE ISSUED: 10/19/2011
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Richard A. Seid (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, and claimant cross-appeals, the Decision and Order – Awarding Benefits (2010-BLA-5063) of Administrative Law Judge Daniel L. Leland rendered 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 February 9, 2009.[1] After crediting claimant with twenty-two years and five months of underground 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 2009 claim on the merits.

In considering the merits of claimant's 2009 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.SC. §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. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that the evidence established that claimant has twenty-two years and five months of underground coal mine employment, and 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

[1] Claimant's prior claim, filed on April 7, 1980, was finally denied on June 26, 1987, because claimant did not establish any element of entitlement. Decision and Order at 2; Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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, 1-202 (1989) (*en banc*).

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 challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer also argues that the amended Section 411(c)(4) presumption does not apply to coal mine operators. 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 (the Director), has filed a limited response, requesting, *inter alia*, that the Board reject employer's contention that the amended Section 411(c)(4) presumption does not apply to coal mine operators. Employer filed a reply brief, reiterating its contentions on appeal. Claimant has filed a cross-appeal, asserting that the administrative law judge erred in evaluating the medical opinion evidence in finding that employer failed to rebut the presumption of total disability due to pneumoconiosis, because the administrative law judge failed to properly consider that employer's physicians reviewed inadmissible evidence.[3] Employer responds, urging the Board to reject claimant's arguments raised on cross-appeal. The Director has not filed a response brief regarding claimant's cross-appeal.[4]

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).

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

[3] On cross-appeal, claimant again urges affirmance of the award of benefits, and asks that the Board address the arguments raised in his cross-appeal only in the event that the award is not affirmed. Claimant's Cross-Appeal Brief at 10, 15.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-two years and five months of underground coal mine employment, and his findings pursuant to 20 C.F.R. §§725.309 and 718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer initially contends that the amended Section 411(c)(4) presumption applies only to claims brought against the Secretary of Labor, not to claims brought against coal mine operators. Employer's Brief at 6-7. We disagree. The courts have consistently ruled that Section 411(c)(4), including the language pertaining to rebuttal, applies to operators, despite the reference to "the Secretary." *See Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976)*; Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, BLR (6th Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 940, 2 BLR 2-38, 2-44 (4th Cir. 1980); *Colley & Colley Coal Co. v. Breeding*, 59 F. App'x 563, 567 (4th Cir. 2003); *U. S. Steel Corp. v. Gray*, 588 F.2d 1022, 1 BLR 2-168 (5th Cir. 1979). Therefore, we reject employer's contention that application of the rebuttal provisions of amended Section 411(c)(4) to a responsible operator is impermissible.

Employer also 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 10-16. 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*, 645 F.3d at 844, 24 BLR at 2-385. We also reject employer's argument that it is premature to apply the recent amendments to the Act pending a resolution of the legal challenges to Public Law No. 111-148. *See Fairman v. Helen Mining Co.*, 24 BLR 1-227, 1-229 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011).

We further reject employer's contention that the administrative law judge should not have adjudicated the claim until the Department of Labor issues guidelines or promulgates regulations implementing amended Section 411(c)(4). Employer's Brief at 7-10. The mandatory language of the amended portions of the Act supports the conclusion that the provision is self-executing. Therefore, there was no need to hold this case in abeyance pending the promulgation of new regulations, *see, e.g., Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Ala. Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998); *Gholston v. Hous. Auth. of Montgomery*, 818 F.2d 776, 784-87 (11th Cir. 1987), and it was not premature for the administrative law

judge to consider the case under amended Section 411(c)(4). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4).

Employer next asserts that the administrative law judge erred by "presuming the existence of clinical and legal pneumoconiosis" and by "failing to discuss the rebuttal standard" under amended Section 411(c)(4). Employer's Brief at 17, 20. 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 establishing that claimant "does not . . . have pneumoconiosis" or that claimant's "respiratory or pulmonary impairment did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Rose*, 614 F.2d at 938, 2 BLR at 2-41; Decision and Order at 6. The administrative law judge found that employer failed to establish either of these methods of rebuttal. *Id.* at 8.

Employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.[5] The administrative law judge considered the medical opinions of Drs. Ranavaya, Crisalli, and Zaldivar. Dr. Ranavaya diagnosed legal pneumoconiosis, in the form of chronic bronchitis and chronic obstructive pulmonary disease due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 13; Claimant's Exhibit 4 at 6, 16-17. Although Drs. Crisalli and Zaldivar also diagnosed a significant obstructive pulmonary impairment, they opined that it is due entirely to claimant's cigarette smoking. Employer's Exhibits 1, 7, 9.

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge accorded less weight to the opinions of Drs. Crisalli and Zaldivar, that claimant does not suffer from legal pneumoconiosis, because he found that the doctors failed to adequately explain their opinions that claimant's twenty-two years of coal mine dust exposure did not contribute to his disabling obstructive impairment. Decision and Order at 7-8. The administrative law

[5] "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).

judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Crisalli and Zaldivar. We disagree. The administrative law judge noted that Dr. Crisalli relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment.[6] Decision and Order at 4-5, 7. The administrative law judge found, as was within his discretion, that Dr. Crisalli did not adequately explain why claimant's response to bronchodilators necessarily eliminated a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *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 7. In addition, the administrative law judge found that Dr. Crisalli's opinion was refuted by Dr. Ranavaya, who stated that reversibility does not preclude that claimant's pulmonary impairment was contributed to by coal dust exposure. Decision and Order at 7; Claimant's Exhibit 4 at 20, 39-40. As the administrative law judge's basis for discrediting the opinion of Dr. Crisalli is rational and supported by substantial evidence, this finding is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000).

The administrative law judge also permissibly discredited Dr. Zaldivar's opinion, because Dr. Zaldivar did not adequately explain why claimant's more than twenty-two years of coal mine dust exposure did not contribute, along with claimant's smoking history, to his pulmonary impairment.[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge, therefore, properly accorded less weight to Dr. Zaldivar opinion. Decision and Order at 19-20.

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[6] Dr. Crisalli noted that claimant's pulmonary function studies showed severe expiratory airflow obstruction, with significant reversibility following the administration of bronchodilators. Employer's Exhibit 1. Dr. Crisalli opined that significant reversibility is not consistent with coal workers' pneumoconiosis. Employer's Exhibit 9 at 25, 27.

[7] Dr. Zaldivar opined that when he examined claimant in 1981, soon after claimant stopped working, he had very minimal airway obstruction. Employer's Exhibit 7 at 3. Dr. Zaldivar further stated that claimant's breathing capacity "worsened with time resulting from the combination of continuing smoking at least until the year 2008 and bronchospasm." Employer's Exhibit 7 at 4.

Because the opinions of Drs. Crisalli and Zaldivar 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. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See 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. Therefore, we need not address employer's additional contention that the administrative law judge erred in finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986).

Employer next argues that the administrative law judge failed to adequately address whether employer established rebuttal by showing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with, employment in a coal mine." Employer's Brief at 29-30. Employer's argument lacks merit. The administrative law judge accurately noted that all of the physicians agree that claimant's disability is due to his pulmonary impairment. Decision and Order at 6-7. The same reasons for which the administrative law judge discredited the opinions of Drs. Crisalli and Zaldivar, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Because the opinions of Drs. Crisalli and Zaldivar are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *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).

Consequently, we affirm the administrative law judge's award of benefits. In light of our affirmance of the administrative law judge's award of benefits, we need not address claimant's contentions of error raised in his cross-appeal.

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