BRB Nos. 11-0817 BLA,
11-0817 BLA-A and 12-0032 BLA

PATRICIA MAYNARD (Widow of, and on behalf of, HARMON MAYNARD)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	DATE ISSUED: 10/31/2012
LAUREL RUN MINING COMPANY	)	
Employer-Petitioner Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Tiffany B. Davis and Ashley M. Harman (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[1] cross-appeals, the Decision and Order Awarding Benefits (2008-BLA-05204) of Administrative Law Judge Richard A. Morgan, rendered on a miner's subsequent claim, filed on February 27, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Employer also appeals the Decision and Order Awarding Benefits (2009-BLA-05136) of the administrative law judge, rendered on a survivor's claim, filed on February 27, 2008, pursuant to the provisions of the Act.

The administrative law judge initially adjudicated the miner's claim pursuant to 20 C.F.R. Part 718 and issued a Decision and Order Denying Benefits on May 28, 2009. In his Decision and Order, the administrative law judge found that the record established at least thirty-four years of coal mine employment. The administrative law judge also found that the newly submitted medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, however, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits in the miner's claim.

The administrative law judge also adjudicated the survivor's claim pursuant to 20 C.F.R. Part 718 and issued a separate Decision and Order Denying Benefits on May 28, 2009. The administrative law judge found that claimant failed to establish that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On March 23, 2010, Congress enacted the Patient Protection and Affordable Care Act (PPACA), which contained amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). These amendments reinstated the presumption of Section 411(c)(4), 30 U.S.C. §921(c)(4),

[1] Claimant is the widow of a miner, Harmon Maynard (the miner), who died on December 28, 2007. Claimant is pursuing the miner's pending lifetime claim on his behalf, as well as her own survivor's claim. On November 4, 2011, the Board issued an Order consolidating employer's appeals of the awards of benefits in the miner's claim and the survivor's claim, and claimant's cross-appeal of the award of benefits in the miner's claim, for the purpose of decision only. *Maynard v. Laurel Run Mining Co.*, BRB Nos. 11-0817 BLA, 11-0817 BLA-A, and 12-0032 BLA (Nov. 4, 2011)(unpub. Order).

which provides that 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. The amendments also revived Section 422(*l*), 30 U.S.C. §932(*l*), which provides that the 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.

Upon consideration of claimant's appeal and employer's cross-appeal in the miner's claim, the Board vacated the denial of benefits and remanded the claim to the administrative law judge for consideration of whether the miner was entitled to invocation of the rebuttable presumption at amended Section 411(c)(4). *Maynard v. Laurel Run Mining Co.*, BRB Nos. 09-0671 BLA and 09-0671 BLA-A (July 29, 2010)(unpub.). Pursuant to claimant's appeal in the survivor's claim, the Board vacated the denial of benefits and remanded the claim to the administrative law judge for consideration of whether claimant was entitled to invocation of the rebuttable presumption that the miner died due to pneumoconiosis at amended Section 411(c)(4). *Maynard v. Laurel Run Mining Co.*, BRB No. 10-0298 BLA (Dec. 30, 2010)(unpub.).

In the miner's claim, the administrative law judge issued an Order on remand allowing the parties to submit additional evidence and briefs in light of the changes in the law. Following the admission of the parties' supplemental evidence, the administrative law judge issued the Decision and Order that is the subject of the present appeal, and cross-appeal. The administrative law judge determined that claimant invoked the rebuttable presumption pursuant to amended Section 411(c)(4) because the miner worked for more than fifteen years in underground coal mine employment and had a totally disabling respiratory or pulmonary impairment. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

Subsequent to the award of benefits in the miner's claim, while the survivor's claim was pending before the administrative law judge under the Board's remand order, claimant filed a motion for summary judgment, asserting that no material issue of fact existed, as she was entitled to receive benefits under amended Section 932(*l*). Employer opposed claimant's motion, arguing that the award of benefits in the miner's claim was not yet final and that the case should be held in abeyance pending the final determination of the constitutionality of the PPACA and amended Section 932(*l*). In the Decision and Order that is the subject of the present appeal, the administrative law judge rejected employer's argument that amended Section 932(*l*) is inapplicable because the miner's claim was not yet final and declined to hold the case in abeyance. Accordingly, the administrative law judge granted claimant's motion and awarded benefits on her survivor's claim, pursuant to amended Section 932(*l*).

Employer argues on appeal that, in the miner's claim, the administrative law judge erred in finding that the evidence was sufficient to establish the existence of pneumoconiosis and insufficient to rebut the presumption that the miner's total disability was due to pneumoconiosis. Employer also alleges that the administrative law judge erred in applying the rebuttal provisions set forth in amended Section 411(c)(4) to employer. In addition, employer maintains that amended Section 411(c)(4) cannot be applied to any claim until the Department of Labor (DOL) promulgates implementing regulations. Regarding the survivor's claim, employer challenges the constitutionality of amended Section 932(*l*), and its application to the survivor's claim.

Claimant responds, urging affirmance of the administrative law judge's award of benefits in both the miner's claim and the survivor's claim. On cross-appeal in the miner's claim, claimant contends that the administrative law judge erred in assessing the relative qualifications of Drs. Rasmussen, Zaldivar and Hippensteel and also erred in his credibility determinations with respect to their opinions. The Director, Office of Workers' Compensation Programs, has submitted a limited response, opposing the constitutional arguments raised by employer in the survivor's claim. Employer has replied, reiterating its allegations of error in both claims. Employer has also responded to claimant's cross-appeal, urging rejection of claimant's 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.[2] 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).

I. Application of the Amendments

Employer argues that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. Employer further asserts that amended Section 411(c)(4) cannot be applied until the DOL promulgates implementing regulations. In addition, employer challenges the constitutional validity of both amended Section 411(c)(4) and amended Section 932(*l*).

[2] The record reflects that the miner's coal mine employment was in West Virginia. Miner's Claim (MC) Director's Exhibit 2. 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).

Employer's arguments are without merit. 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." *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1975); *Keene v. Consolidation Coal Co*., 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980). Further, there is no merit to employer's claim that application of Section 411(c)(4) is barred pending the promulgation of regulations implementing the amendments. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *DeFore v. Alabama By-Products*, 12 BLR 1-27 (1988); *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.); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987).

We also hold that employer's contention, that retroactive application of amended Section 411(c)(4) and amended Section 932(*l*) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property has no merit. Employer's arguments are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit rejected in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89 (4th Cir. 2011), 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012) and that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We affirm, therefore, the administrative law judge's determination that amended Section 411(c)(4) is applicable in the miner's claim and that amended Section 932(*l*) is applicable in the survivor's claim.

II. The Miner's Claim

A. Rebuttal of the Amended Section 411(c)(4) Presumption – The Existence of Pneumoconiosis

The administrative law judge first considered whether employer established rebuttal by proving that the miner did not have clinical pneumoconiosis.[3] Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered ten readings of four x-

[3] "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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

rays dated December 5, 2000, July 31, 2002, May 22, 2007 and October 31, 2007. Miner's Claim (MC) Decision and Order Awarding Benefits at 3-5, 11. The administrative law judge found that the December 5, 2000 film was positive for pneumoconiosis, based upon the uncontradicted positive readings by Drs. Ranavaya, a B reader, and Dr. Navani, who is dually-qualified as a Board-certified radiologist and a B reader. *Id*. at 11; MC Director's Exhibit 1. The administrative law judge determined that the x-ray obtained on July 31, 2002, was also positive for pneumoconiosis, based upon the uncontradicted positive reading by Dr. Hussain, whose qualifications are not in the record. MC Decision and Order Awarding Benefits at 11; MC Director's Exhibit 2. Regarding the film dated May 22, 2007, the administrative law judge found that the positive readings by Dr. Alexander, a dually-qualified radiologist, and Dr. Ranavaya, outweighed the negative reading by Dr. Wiot, a dually-qualified radiologist. MC Decision and Order Awarding Benefits at 11; MC Director's Exhibit 11; MC Claimant's Exhibit 1; MC Employer's Exhibit 1. Similarly, the administrative law judge determined that the October 31, 2007 x-ray was positive, as the positive readings by Dr. Alexander and Dr. Miller, also a dually-qualified radiologist, outweighed the negative readings by Dr. Wiot and Dr. Zaldivar, a B reader. MC Decision and Order Awarding Benefits at 11; MC Claimant's Exhibits 2, 5; MC Employer's Exhibits 3, 4. The administrative law judge concluded that, because each x-ray was positive for pneumoconiosis and the overall preponderance of readings by dually-qualified physicians was also positive, the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). MC Decision and Order Awarding Benefits at 11.

Employer contends that the administrative law judge's consideration of the qualifications of the physicians who read the x-rays was incorrect, as "Dr. Wiot had superior qualifications to Drs. Alexander and Miller." Employer's Brief at 16. Employer also argues that the administrative law judge erred in failing to take the medical opinion evidence into account when weighing the x-ray evidence. We disagree.

Contrary to employer's argument, the administrative law judge properly found that employer failed to disprove the existence of clinical pneumoconiosis, as the preponderance of readings by physicians who were both B readers and Board-certified radiologists was positive for the disease. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1993). Further, while an administrative law judge may accord greater weight to x-ray readings provided by physicians who are dually-qualified as B readers and Board-certified radiologists, and who possess additional radiological qualifications, he or she is not required to do so. *See Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Thus, we reject employer's assertion that the administrative law judge's consideration of the physicians' qualifications was improper and affirm the administrative law judge's finding

that the preponderance of the x-ray evidence is positive for clinical pneumoconiosis.[4] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Under 20 C.F.R. §718.202(a)(4), the administrative law judge considered whether the medical opinions of Drs. Zaldivar and Hippensteel were sufficient to establish that the miner did not have either clinical or legal pneumoconiosis.[5] MC Decision and Order Awarding Benefits at 12-13; MC Employer's Exhibits 11-14. The administrative law judge noted that Dr. Zaldivar diagnosed severe hypoxemia, a mild restrictive impairment, and a severe diffusion capacity impairment and attributed these conditions to idiopathic pulmonary fibrosis, unrelated to coal dust exposure. MC Decision and Order Awarding Benefits at 11-12. The administrative law judge further indicated that, although Dr. Zaldivar acknowledged that coal dust exposure can cause a restrictive impairment, he stated that it does so only in the presence of complicated pneumoconiosis. MC Decision and Order Awarding Benefits at 12. The administrative law judge found that, "Dr. Zaldivar's statements foreclose any consideration of simple coal workers' pneumoconiosis or coal dust exposure causing a restrictive impairment, and as such are contrary to the Act." *Id*. at 12-13. The administrative law judge determined, therefore, that Dr. Zaldivar's opinion was entitled to diminished weight. *Id*. at 13.

Regarding Dr. Hippensteel's opinion, that the miner had a totally disabling pulmonary impairment due to interstitial pneumonitis or idiopathic pulmonary fibrosis, both unrelated to coal dust exposure, the administrative law judge stated, "Dr.

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[4] Employer preserves for appeal the issue of whether the administrative law judge erred in considering Dr. Alexander's positive reading of the film dated May 22, 2007. Employer alleges that, because claimant designated this reading as rebuttal evidence, it had to be contrary to Dr. Rasmussen's positive interpretation of the film, which was submitted in conjunction with the examination of the miner performed at the request of the Department of Labor. Employer acknowledges that, in *Sprague v. Freeman United Coal Mining Co.*, BRB No. 05-1020 BLA (Nov. 28, 2006) (unpub.), the Board concurred with the position of the Director, Office of Workers' Compensation Programs, that rebuttal evidence submitted by a party pursuant to 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), need not contradict the specific item of evidence to which it is responsive but, rather, need only refute the case presented by the opposing party. Employer questions the correctness of that holding. Employer's Brief at 16-17.

[5] "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "[T]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*.

Hippensteel's opinion, while credible and well-reasoned, does not rule out coal dust exposure as a cause. Rather, he attributes the miner's interstitial fibrosis to idiopathic causes." MC Decision and Order Awarding Benefits at 13. The administrative law judge concluded, based on the x-ray evidence and "the inability of Drs. Zaldivar and Hippensteel to rule out coal dust exposure as a cause of the miner's pulmonary fibrosis," that the miner had both clinical and legal pneumoconiosis. *Id*. Accordingly, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis. *Id*.

Employer argues that the administrative law judge did not provide valid reasons for discrediting the opinions of Drs. Zaldivar and Hippensteel. Employer maintains that Dr. Zaldivar's opinion is not in conflict with the Act and that the positive x-ray interpretations by Drs. Alexander and Miller do not conflict with Dr. Hippensteel's opinion as, contrary to the administrative law judge's finding, they did not diagnose coal workers' pneumoconiosis. We hold that employer has not identified error requiring remand in the administrative law judge's consideration of the opinions of Drs. Zaldivar and Hippensteel.

With respect to Dr. Zaldivar's opinion, employer acknowledges that Dr. Zaldivar stated that coal dust exposure can cause a restrictive impairment, or a mixed impairment, but he "explained that occurs in cases of complicated coal workers' pneumoconiosis and that there was no evidence of that in this case." Employer's Brief at 23-24, *citing* MC Employer's Exhibit at 19-20. Based upon these statements, the administrative law judge rationally found that Dr. Zaldivar's opinion conflicts with the amended definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2), which includes chronic restrictive *or* obstructive pulmonary disease arising out of coal mine employment and does not require a diagnosis of complicated pneumoconiosis. 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. at 79,937 (Dec. 20, 2000); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117 (2009). Similarly, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Hippensteel's opinion was insufficient to rebut the presumption that the miner had pneumoconiosis, because Dr. Hippensteel could not affirmatively rule out coal dust exposure as a contributing cause of the miner's totally disabling pulmonary impairment.[6] *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *accord*

[6] We decline to address employer's allegations regarding the administrative law judge's reliance, in part, upon the x-ray evidence to discredit Dr. Hippensteel's opinion, as the administrative law judge provided a valid, alternative rationale for determining that Dr. Hippensteel's opinion was insufficient to establish that the miner did not have pneumoconiosis as defined in 20 C.F.R. §718.201(a). *See Searls v. Southern Ohio Coal*

Morrison, 644 F.2d at 479-80, 25 BLR at 2-8-9. We, therefore, affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

B. Rebuttal of the Amended Section 411(c)(4) Presumption – Total Disability Due to Pneumoconiosis

As previously indicated, Drs. Hippensteel and Zaldivar diagnosed a totally disabling pulmonary impairment due to idiopathic pulmonary fibrosis or interstitial pneumonitis unrelated to coal mine employment. MC Employer's Exhibits 13, 14. The administrative law judge considered whether these opinions established that the miner's totally disabling pulmonary impairment did not arise out of, or in connection with, coal mine employment and stated:

> Drs. Zaldivar and Hippensteel are unable to "rule out" clinical or legal pneumoconiosis as causes of this miner's disability. They attribute his lung disease to idiopathic causes. When weighed against the presumption that the miner is totally disabled due to pneumoconiosis, a conclusion that the disease is of an unknown cause cannot rebut the presumed causation.

MC Decision and Order Awarding Benefits at 17.

Employer asserts that the administrative law judge relied on erroneous reasons to discount the opinions of Drs. Zaldivar and Hippensteel, that the miner's disabling respiratory impairment did not arise out of coal mine employment. Contrary to employer's argument, the administrative law judge rationally found that the opinions of Drs. Zaldivar and Hippensteel were insufficient to rebut the amended Section 411(c)(4) presumption, as their attribution of the miner's totally disabling impairment to a disease of unknown origin did not constitute an affirmative exclusion of coal mine employment as a contributing cause of the miner's total disability. *See Rose* 614 F.2d at 939, 2 BLR at 2-43. Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by either method available to it and further affirm the award of benefits in the miner's claim.[7]

Co., 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[7] Because we have affirmed the award of benefits in the miner's claim, it is not necessary to address claimant's arguments on cross-appeal.

III. The Survivor's Claim

Employer asserts that the administrative law judge erred in applying amended Section 932(*l*) to determine that claimant is automatically entitled to receive benefits as a consequence of the award of benefits in the miner's claim. Employer maintains that the prerequisites for the application of amended Section 932(*l*) were not met, as the award of benefits in the miner's claim has not become final. We disagree. The application of amended Section 932(*l*) does not depend upon whether the award of benefits in the miner's claim has become final. Rather, it provides that a survivor is derivatively entitled to receive benefits if the miner *was eligible to receive benefits* at the time of his or her death. 30 U.S.C. §932(*l*).

Because the survivor's claim was filed after January 1, 2005 and was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death, we affirm the administrative law judge's award of benefits in the survivor's claim pursuant to amended Section 932(*l*). Survivor's Claim Decision and Order Awarding Benefits at 5.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in the miner's claim and the administrative law judge's Decision and Order Awarding Benefits in the survivor's claim are 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