BRB No. 11-0822 BLA

HELEN F. CHURCH (Widow of LENVIL L. CHURCH)	)	
Claimant-Respondent	)	
v.	)	
BRENT COAL CORPORATION	)	
and	)	
	)	DATE ISSUED: 09/20/2012
TRAVELERS INSURANCE COMPANY	)	
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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Sarah M. Hurley (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/carrier (employer) appeals the Decision and Order Granting Benefits (2009-BLA-05287) of Administrative Law Judge Pamela J. Lakes, rendered on a survivor's 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). Claimant[1] filed this claim on October 12, 2007. Director's Exhibit 2.

The administrative law judge 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 survivor'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 amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and establishes that the miner had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 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 rebut the presumption by establishing either that the miner did not have pneumoconiosis, or that the miner's death did not arise out of his coal mine employment.[2] *Id*.; *Copley v. Buffalo Mining Co.*, BLR , BRB No. 11-0713 BLA, slip op. at 7-8 (July 31, 2012).

Applying amended Section 411(c)(4),[3] the administrative law judge credited the miner with thirty-nine years of underground coal mine employment and found, pursuant

[1] Claimant is the widow of the miner, who died on April 14, 2007. Director's Exhibit 9.

[2] Another amendment to the Act reinstated the automatic entitlement provision of Section 422(*l*), 30 U.S.C. §932(*l*), for the eligible survivors of a miner who was determined to be eligible to receive benefits at the time of his death. Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). That amendment does not affect this case, because the miner's claim for benefits was denied. Director's Exhibit 2.

[3] In view of the potential applicability of revised Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge issued an order directing the parties to file briefs addressing the application of Section 411(c)(4), and offering the parties the opportunity to request that the record be reopened for the submission of additional evidence. Claimant, employer, and the Director, Office of Workers' Compensation Programs,

to 20 C.F.R. §718.204(b)(2), that the miner suffered from a totally disabling respiratory or pulmonary impairment.[4] The administrative law judge thus determined that claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to disprove the existence of pneumoconiosis, or establish that the miner's death was unrelated to pneumoconiosis. Therefore, having found that employer failed to rebut the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 411(c)(4) and its application in this case. Employer also argues that the administrative law judge erred in finding that the miner was totally disabled, that employer failed to disprove the existence of legal pneumoconiosis, and that employer failed to rule out pneumoconiosis as a cause of the miner's death.[5] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's constitutional challenges to amended Section 411(c)(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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Application of Amended Section 411(c)(4)

Employer argues that retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as a taking of employer's property, in violation of the Fifth Amendment to the United States

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submitted briefs in response. No party requested that the record be reopened.

[4] The miner's last coal mine employment was in Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] The administrative law judge's findings, that the miner had thirty-nine years of underground coal mine employment, that his usual coal mine employment as a foreman required him to regularly perform heavy manual labor, and that a preponderance of the evidence established that the miner had clinical coal workers' pneumoconiosis, are unchallenged on appeal. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Constitution.[6] Employer's Brief at 19-28. The Board rejected substantially similar arguments in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject employer's arguments here for the reasons set forth in that decision. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-91, 25 BLR 2-65, 2-74-82 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012) (No. 11-1342) (rejecting due process and takings challenges to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*)); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011) (rejecting due process and takings challenges to amended Section 411(c)(4)). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as the claim was filed after January 1, 2005, and was pending on March 23, 2010.

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

Employer argues that the administrative law judge erred in finding that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), the administrative law judge found that the two pulmonary function studies and two blood gas studies of record, dated October 28, 1998 and July 21, 2000, were non-qualifying.[7] The administrative law judge, however, found that those studies were too remote in time to be probative of whether the miner was totally disabled by a respiratory or pulmonary impairment near the time of his death in 2007. The administrative law judge further found that the record contained no evidence of cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the pathology reports of Drs. Dennis and Crouch, the medical reports of Drs. McSharry and Fino, and the miner's medical treatment records. Dr. Dennis, who conducted the miner's autopsy, diagnosed, among other conditions, "[p]rogressive massive fibrosis with coal workers[']s pneumoconiosis manifest[ed] by anthracosilicosis, macular development

[6] Employer also contends that the amendments to the Act are not severable from the challenged provisions of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148, and therefore would not apply to this case if the PPACA were found to be unconstitutional. That contention is now moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (June 28, 2012).

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

greater than 5 cms in diameter, emphysema, and pulmonary congestion and edema in all sections of the pulmonary system submitted." Director's Exhibit 10 at 4. Dr. Dennis opined that the miner "was . . . a pulmonary cripple secondary to this progressive massive fibrosis and coal workers[']s pneumoconiosis." *Id*. at 5. Dr. Crouch reviewed the miner's autopsy tissue slides and autopsy report, and diagnosed "severe" simple coal workers' pneumoconiosis with associated emphysema, and opined that it was "possible" that the degree of pneumoconiosis present "caused some degree of functional impairment." Director's Exhibit 12. When deposed, Dr. Crouch stated that she did not believe that the degree of clinical pneumoconiosis that was present would have caused a respiratory deficiency, but stated that the miner's emphysema could have caused him respiratory insufficiency. Employer's Exhibit 18 at 24, 27.

Dr. McSharry examined and tested the miner on July 21, 2000, and opined that he had, at most, a mild impairment and was not totally disabled. Employer's Exhibit 7 at 3. Dr. Fino reviewed the miner's medical records and concluded that the miner had "normal lung function on all of the lung function studies that were performed," and therefore, was not totally disabled. Employer's Exhibit 8 at 6-7. Finally, as summarized by the administrative law judge, medical treatment records from Dr. Sutherland indicated that by 2006 and 2007, the miner was oxygen dependent, and that he was prescribed home oxygen. Claimant's Exhibit 3.

The administrative law judge found Dr. Dennis's opinion, that the miner was "a pulmonary cripple secondary to . . . progressive massive fibrosis and coal workers[']s pneumoconiosis," to be "tantamount to a finding of pulmonary or respiratory disability." Decision and Order at 7. The administrative law judge further found that Dr. Crouch did not "squarely address" whether the miner was totally disabled. *Id*. at 7-8. The administrative law judge discounted Dr. McSharry's opinion that the miner was not totally disabled, because it addressed the miner's pulmonary condition in July 2000, almost seven years before he died. *Id*. at 8. Additionally, the administrative law judge discounted Dr. Fino's opinion, because Dr. Fino based his opinion on pulmonary function and blood gas studies "taken six or more years prior to the miner's death," and because Dr. Fino did not address the miner's documented oxygen dependency in 2006 and 2007.

Considering all of the above evidence, and taking into account the "routinely heavy nature" of the miner's usual coal mine employment as a foreman, which regularly required him to carry fifty to seventy-five pounds, the administrative law judge found that the miner was incapable of performing his usual coal mine employment, from a respiratory standpoint, near the time of his death.[8] Therefore, the administrative law

[8] The administrative law judge reiterated that the miner's non-qualifying pulmonary function and blood gas study results were "simply too remote in time to be probative on the issue of whether the [m]iner was capable of performing his last or usual

judge determined that the miner was totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2).

Employer contends that Dr. Dennis's opinion, that the miner was "a pulmonary cripple," was premised on his conclusion that the miner had progressive massive fibrosis, or complicated pneumoconiosis, and that the administrative law judge erred in crediting that opinion without determining whether the miner, in fact, had complicated pneumoconiosis.[9] Employer's Brief at 6-8. Employer maintains that the weight of the evidence does not support a finding that the miner had complicated pneumoconiosis. Therefore, employer argues, Dr. Dennis's opinion is entitled to no weight, and no other evidence in the record supports a finding of total disability. *Id*.

We disagree with employer's characterization of both Dr. Dennis's opinion and the record. Dr. Dennis did not state that the miner was totally disabled because of progressive massive fibrosis alone; instead, he opined that the miner was "a pulmonary cripple" secondary to both progressive massive fibrosis and coal worker's pneumoconiosis. Director's Exhibit 10. Moreover, the record contains other evidence that the administrative law judge found relevant to whether the miner was totally disabled. The administrative law judge considered, and employer does not dispute, that the miner was oxygen-dependent in 2006 and 2007, and that the miner's usual coal mine employment as a foreman routinely required him to perform heavy labor. Based on that evidence, the administrative law judge reasonably inferred that by 2006 or 2007, the miner lacked the respiratory capacity to perform the heavy labor that was required by his work as a foreman and thus, he was totally disabled. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245, 1-246-47 (1985).

Further, we reject employer's argument that the administrative law judge failed to consider all relevant evidence because she did not discuss a 1997 hospital admission note, or 2003 pulmonary function results that a treating physician discussed in a medical

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coal mine employment from a pulmonary or respiratory standpoint." Decision and Order at 9.

[9] If a survivor establishes that a miner suffered from complicated pneumoconiosis, it is irrebuttably presumed that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Here, the administrative law judge stated that, "as the evidence of complicated pneumoconiosis in the instant case is probably insufficient to establish the significant burdens imposed by the case law (*e.g.*, *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240 (4th Cir. 1999)), I will initially consider the application of the [Section 411(c)(4)] presumption." Decision and Order at 5.

treatment note. Employer's Brief at 9. The administrative law judge reasonably focused on the medical evidence of the miner's pulmonary condition near the time of his death in 2007 to determine whether he was totally disabled. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc). Additionally, we reject employer's contention that the administrative law judge erred by failing to determine whether the miner had the respiratory capacity to perform comparable and gainful employment, pursuant to 20 C.F.R. §718.204(b)(1)(ii). Employer's Brief at 9-10. Once claimant established that the miner was unable to perform his usual coal mine employment, the burden shifted to employer to go forward with evidence to prove that the miner was able to perform comparable and gainful employment. *See Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-87 (1988). Employer presented no evidence on that issue.

Based on the foregoing discussion, we affirm, as supported by substantial evidence, the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). In light of our affirmance of the administrative law judge's findings that the miner had thirty-nine years of underground coal mine employment, and was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis, pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Employer first argues that the administrative law judge erred in finding that employer failed to rule out the existence of legal pneumoconiosis. Employer's Brief at 10-12. Initially, we note that, to rebut the Section 411(c)(4) presumption, employer must disprove the existence of both clinical and legal pneumoconiosis.[10] *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, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). As employer does not dispute the existence of clinical pneumoconiosis, n.5, *supra*, it cannot rebut the presumption by disproving the existence of pneumoconiosis. Moreover, in any event, substantial evidence supports the administrative law judge's finding that employer did

[10] "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." 20 C.F.R. §718.201(a)(1). "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).

not disprove the existence of legal pneumoconiosis. The record reflects that employer's physician, Dr. Crouch, specifically opined that the miner's emphysema detected on autopsy was due, in part, to his coal mine dust exposure. Employer's Exhibit 18 at 24. Further, Dr. Fino stated that there was "sufficient objective medical evidence to justify a diagnosis of clinical or legal coal workers' pneumoconiosis based on the pathology." Employer's Exhibit 8 at 7. Therefore, we affirm the administrative law judge's determination that employer did not disprove the existence of clinical and legal pneumoconiosis.

Employer next contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner's death was unrelated to pneumoconiosis.[11] Employer's Brief at 13-14. The administrative law judge cited Dr. Dennis's opinion that the miner had "significant progressive massive fibrosis of the coal workers pneumoconiosis variety which contributed to and caused his death." Decision and Order at 11; Director's Exhibit 10. While Dr. Crouch did not agree that the miner had complicated pneumoconiosis, or that clinical pneumoconiosis contributed to his death, the administrative law judge took note of Dr. Crouch's deposition testimony that the miner's emphysema, which Dr. Crouch testified was due to both coal mine dust exposure and smoking, could have contributed to the development of the miner's pneumonia, which was severe enough to have caused the miner's death.[12] Decision and Order at 11; Director's Exhibit 12; Employer's Exhibit 18 at 17, 27. Dr. Fino opined that the miner's death was due to pneumonia and that the miner's clinical pneumoconiosis did not contribute to, or hasten, his death, but the administrative law judge observed that Dr. Fino failed to address whether the miner's coal mine dust-related emphysema contributed to the development of his pneumonia. Decision and Order at 11; Employer's Exhibit 8 at 6-8. Accordingly, the administrative

[11] The Board recently held that an employer can rebut the Section 411(c)(4) presumption in a survivor's claim only by establishing that the miner did not have pneumoconiosis, or that the miner's death did not arise out of his coal mine employment. *Copley v. Buffalo Mining Co.*, BLR , BRB No. 11-0713 BLA, slip op. at 7-8 (July 31, 2012). Therefore, we need not consider employer's argument that the administrative law judge erred in finding that employer failed to rule out pneumoconiosis as a cause of the miner's total disability.

[12] Dr. Crouch testified that the miner's emphysema was related to both coal mine dust exposure and cigarette smoke, and opined that patients with emphysema are at an increased risk of developing pneumonia. Employer's Exhibit 18 at 24. Dr. Crouch testified that therefore, she "could not exclude emphysema playing a role" in the miner's death due to pneumonia. Employer's Exhibit 18 at 28.

law judge found that the evidence did not rule out that pneumoconiosis caused or contributed to the miner's death. Decision and Order at 11-12.

Employer argues that the administrative law judge erred in not finding that the miner's death was due to aspiration pneumonia, unrelated to coal dust exposure. Employer's Brief at 13-14. This argument lacks merit. Drs. Dennis and Fino both opined that the miner died of aspiration pneumonia, but disagreed as to whether pneumoconiosis also contributed to his death. Director's Exhibit 10; Employer's Exhibit 8 at 7. Employer, however, bears the burden of establishing that the miner's death did not arise out of his coal mine employment. *Copley*, BLR at , BRB No. 11-0713 BLA, slip op. at 7-8. With that standard in mind, it was reasonable for the administrative law judge to find that employer failed to rule out the miner's coal mine employment as a contributing factor in his death. As noted, Dr. Crouch opined that she could not rule out a contribution by coal dust-related emphysema. Employer's Exhibit 18 at 24, 28. Because Dr. Fino failed to address whether emphysema related to coal mine dust exposure contributed to the miner's death from pneumonia, the administrative law judge permissibly discounted his opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner's death did not arise out of his coal mine employment. Consequently, we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Decision and Order Granting 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