

BRB No. 11-0858 BLA

JOSEPH K. McKNIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 09/13/2012
c/o WELLS FARGO DISABILITY	)	
	)	
and	)	
	)	
ISLAND CREEK COAL 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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2008-BLA-5930) of Administrative Law Judge Joseph E. Kane awarding benefits on a subsequent claim filed pursuant to the provisions of Title IV 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 request for modification of a subsequent claim.

The pertinent procedural history of this case is as follows: Claimant filed his first claim on June 12, 1973. Director's Exhibit 1. It was finally denied by a claims examiner on April 20, 1979 because claimant failed to establish any of the elements of entitlement. *Id.* Claimant filed his second claim (a subsequent claim) on January 23, 2003. Director's Exhibit 2. It was finally denied by the district director on January 21, 2004 because claimant failed to establish that he was totally disabled by pneumoconiosis. *Id.* Claimant filed his third claim on February 10, 2005. *Id.* By letter dated February 15, 2005, a claims examiner advised claimant to indicate whether he was pursuing a request for modification or a new claim, and that he had to wait until February 22, 2005 if he wished to pursue a new claim, rather than pursue modification. *Id.* Claimant filed this claim on February 25, 2005. Director's Exhibit 4. In a Decision and Order dated May 15, 2007, Administrative Law Judge Stephen L. Purcell found that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b). Director's Exhibit 51. Consequently, Judge Purcell found that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id.* On the merits, however, Judge Purcell found that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and denied benefits. *Id.* Claimant filed a request for modification on July 16, 2007. Director's Exhibit 53. In a Decision and Order dated August 25, 2011, Administrative Law Judge Joseph E. Kane (the administrative law judge) credited claimant with 34 years of coal mine employment and found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore determined that claimant invoked the rebuttable presumption that his total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the applicability of Section 1556 of the Patient Protection and Affordable Care Act (PPACA) to this case. Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of legal pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of

benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's constitutional and procedural arguments regarding the applicability of Section 1556 and employer's request to hold the case in abeyance.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>1</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we will address employer's challenges to the administrative law judge's application of Section 1556 of the PPACA to this case.<sup>2</sup> Employer contends that the

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<sup>1</sup> The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibit 7. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

<sup>2</sup> Employer argues that because the Patient Protection and Affordable Care Act (PPACA) is being litigated in the United States Supreme Court, adjudication of this claim should be held in abeyance pending resolution of the constitutionality of the PPACA, and the severability of non-health care provisions by the Court. Subsequent to the filing of employer's Brief in Support of Petition for Review, the Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Thus, employer's argument that this claim should be held in abeyance pending resolution of the constitutionality of the PPACA is moot.

rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. Employer also contends that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's contentions are substantially similar to the ones that the Board rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA, slip op. at 4 (Oct. 28, 2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision. *See also Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Consequently, we affirm the administrative law judge's application of Section 1556 to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

We further affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on his unchallenged findings that claimant established more than fifteen years of qualifying coal mine employment and total respiratory disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, we affirm the administrative law judge's unchallenged finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack*, 6 BLR at 1-711.

Furthermore, with regard to rebuttal of the amended Section 411(c)(4) presumption, we affirm the administrative law judge's unchallenged findings that employer established the absence of clinical pneumoconiosis, but failed to establish the absence of disability causation. *See Skrack*, 6 BLR at 1-711.

Next, we address employer's contention that the administrative law judge erred in finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of legal pneumoconiosis. In considering rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge considered the reports of Drs. Baker, Houser, Holder, Repsher, Selby, and Basheda, as well as the treatment records of Dr. Chavda. The opinions of Drs. Baker, Houser, Holder, and Chavda, that claimant has legal pneumoconiosis,<sup>3</sup> would not support rebuttal of the presumption. By

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<sup>3</sup> Dr. Baker opined that claimant has chronic obstructive pulmonary disease (COPD) and hypoxemia related to coal dust exposure. Director's Exhibit 15. Dr. Houser opined that claimant has COPD and chronic bronchitis related to coal dust exposure. Claimant's Exhibit 5. Drs. Holder and Chavda opined that claimant has legal pneumoconiosis. Director's Exhibits 17, 42 (Dr. Holder's Deposition at 11-12); Claimant's Exhibit 6.

contrast, the opinions of Drs. Repsher, Selby, and Basheda, that claimant does not have legal pneumoconiosis,<sup>4</sup> would support rebuttal of the presumption. The administrative law judge gave full probative weight to the opinions of Drs. Baker<sup>5</sup> and Houser because he found that they are reasoned and documented. Decision and Order at 37, 46. The administrative law judge also gave little probative weight to Dr. Holder's opinion because he found that it is not reasoned. *Id.* at 38. In addition, the administrative law judge gave less weight to Dr. Chavda's opinion, "as I cannot determine the reliability of the PTF Dr. Chavda relied upon when rendering his opinion." *Id.* at 46. Further, the administrative law judge gave little probative weight to the opinions of Drs. Repsher, Selby, and Basheda because he found that they are not well-reasoned. *Id.* at 39. Hence, the administrative law judge found that employer failed to rebut the presumption that claimant has legal pneumoconiosis.

Employer asserts that the administrative law judge erred in discrediting Dr. Repsher's opinion because the doctor's explanation of the role that the FEV1/FVC ratio had in determining disease and disability causation was contrary to the preamble to the amended regulations. Specifically, employer asserts that, "[r]ather than apply the scientific testimony to the facts of this case where there has not been a decrement of the ratio showing that coal dust exposure is not responsible for the obstructive impairment, [the administrative law judge] ignores the medical testimony in favor of his own interpretation of the meaning of the scientific articles described by the Department of Labor's legal community in the Federal Register." Employer's Brief at 18. Contrary to employer's assertion, the administrative law judge permissibly found that Dr. Repsher's opinion was inconsistent with the preamble to the amended regulations, based on the doctor's explanation of the role that the FEV1/FVC ratio had in determining disease.<sup>6</sup>

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<sup>4</sup> Drs. Repsher and Selby opined that claimant does not have legal pneumoconiosis. Director's Exhibit 43; Employer's Exhibits 6, 7. Dr. Basheda opined that claimant's COPD was due entirely to cigarette smoking. Employer's Exhibit 1.

<sup>5</sup> The administrative law judge found that Dr. Baker's opinion that claimant has COPD related to coal dust exposure is reasoned and documented. Decision and Order at 37. In contrast, the administrative law judge found that Dr. Baker's opinion that claimant has chronic bronchitis is not reasoned. *Id.* at 36. The administrative law judge also found that Dr. Baker's diagnosis of hypoxemia does not fall within the regulatory definition of legal pneumoconiosis because it is not a chronic lung disease. *Id.*; 20 C.F.R. §718.201(a).

<sup>6</sup> In a report dated June 3, 2010, Dr. Repsher stated: "His PTFs showed a marked disproportionate decrease in FEV1 compared with the FVC, which is characteristic of cigarette smoking induced COPD and is not seen with legal pneumoconiosis." Employer's Exhibit 6.

*A&E Coal Co. v. Adams*, \_\_\_ F.3d \_\_\_, No. 11-3926, 2012 WL 3932113 (6th Cir. Sept. 11, 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3rd Cir. 2011); 65 Fed. Reg. 79,940-1, 79,943 (Dec. 20, 2000). Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Repsher's opinion on this ground. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's findings that employer failed to establish that claimant does not have legal pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>7</sup>

Furthermore, because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing either that claimant does not have pneumoconiosis, or that claimant's total disability was not due to pneumoconiosis, we affirm the administrative law judge's award of benefits.

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In a supplemental report dated August 16, 2010, Dr. Repsher stated: "His PTFs also show no evidence of either medical or legal CWP. There is a markedly disproportionate decrease in FEV1, compared with his FVC which is characteristic of cigarette smoking-induced COPD and is not seen in medical or legal CWP." Employer's Exhibit 11.

<sup>7</sup> Employer also asserts that the administrative law judge erred in crediting the opinions of Drs. Baker and Houser that claimant has legal pneumoconiosis. In view of our holding that the administrative law judge permissibly gave little probative weight to Dr. Repsher's opinion, that claimant does not have legal pneumoconiosis, because it was inconsistent with the preamble to the amended regulations, *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3rd Cir. 2011); 65 Fed. Reg. 79,940-1, 79,943 (Dec. 20, 2000), we need not address employer's assertion that the administrative law judge erred in crediting the opinions of Drs. Baker and Houser. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge