BRB Nos. 11-0380 BLA
and 11-0427 BLA

DARLENE WRIGHT (o/b/o and Widow of HURSCHEL WRIGHT) Claimant-Respondent v. PINNACLE PROCESSING, INCORPORATED and KENTUCKY EMPLOYERS MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2012 DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (2008-BLA-5089 and 2008-BLA-5090) of Administrative Law Judge Daniel F. Solomon rendered on a miner's claim, consolidated with 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).[1] The administrative law judge credited the miner with twenty-three years and ten months of coal mine employment, as stipulated by the parties, and adjudicated the claims pursuant to 20 C.F.R. Part 718. After determining that the miner worked on the surface at the location of an underground coal mine, the administrative law judge found that the weight of the evidence was sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and that claimant was entitled to invocation of the presumption under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), in the miner's claim.[2] Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits in the miner's claim, and found that claimant was derivatively entitled to survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).[3]

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[1] The miner filed his claim for benefits on December 12, 2005. Following the miner's death on July 18, 2006, claimant, the miner's widow, submitted the miner's autopsy report and requested modification of the district director's initial denial of the claim. Director's Exhibits 31, 35, 36. Claimant filed her survivor's claim on January 16, 2007. Director's Exhibit 39.

[2] Section 1556 of Pub. L. No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. In order to invoke the Section 411(c)(4) presumption, a miner must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). If a miner establishes at least fifteen years of qualifying coal mine employment, and 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. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 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)).

[3] Section 1556 also revived Section 422(l) of the Act, 30 U.S.C. §932(l), affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. Section 422(l) 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. 30 U.S.C. §932(l), amended

On appeal, employer challenges the administrative law judge's finding that claimant was entitled to invocation of the amended Section 411(c)(4) presumption, arguing that the evidence is insufficient to establish at least fifteen years of qualifying coal mine employment and the presence of a totally disabling respiratory impairment. Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the presumption that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Lastly, employer challenges the commencement date set by the administrative law judge for the payment of benefits in the miner's claim. Claimant responds in support of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this case.

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.[4] 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).

Employer first challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner was employed for at least fifteen years in qualifying coal mine employment. In this regard, employer argues that the administrative law judge erred in finding that claimant did not have to show that the dust exposure at the miner's job as a mechanic working on the surface[5] was equivalent to the dust exposure in an underground mining position. Employer's Brief at 10. We disagree. In finding that the miner had sufficient years of coal mine employment to invoke the amended Section 411(c)(4) presumption, the administrative law judge noted that employer stipulated to more than twenty-three years of coal mine employment, and determined that "the miner's coal mine employment, although on the surface [at the tipple], was at the location of an underground mine operation," and thus, "there is no requirement that claimant show dust equivalency to underground coal mining." Decision and Order at 2, 4-5, *citing Alexander*

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by Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).

[4] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Hearing Transcript at 9, 18.

[5] The miner's employment history form indicates that he worked on the surface as a plant mechanic. Director's Exhibits 3, 4.

v. Freeman United Coal Mining Co., 2 BLR 1-497 (1997). Because the administrative law judge permissibly credited claimant's testimony that the miner's surface mining work for his last two employers, totaling over fifteen years, was performed at the location of deep mines, and because a surface worker at an underground coal mine is not required to show comparability of environmental conditions in order to qualify for the Section 411(c)(4) presumption, we affirm the administrative law judge finding that claimant established at least fifteen years of qualifying coal mine employment. *Muncy v. Elkay Mining Co.*, F.3d , BRB No. 11-0187 BLA (Nov. 30, 2011), *citing Alexander*, 2 BLR at 1-504.

Employer next contends that the administrative law judge erred in finding total respiratory disability established at Section 718.204(b)(2), based on Dr. Rasmussen's opinion.[6] Employer asserts that the opinion does not constitute a reasoned medical judgment sufficient to support a finding of total disability because the pulmonary function studies and blood gas studies obtained by Dr. Rasmussen produced non-qualifying values that revealed, at most, a minimal loss of lung function attributable to coal dust exposure. Employer's Brief at 10-11. Employer's arguments lack merit. After finding that claimant failed to establish total disability under Section 718.204(b)(2)(i)-(iii), the administrative law judge summarized the medical opinions of record at Section 718.204(b)(2)(iv), and determined that "neither Dr. Dennis nor Dr. Caffrey rendered a medical opinion as to total disability;" that Dr. Broudy[7] failed to render a specific opinion

[6] Dr. Rasmussen, the only physician of record to examine the miner before he died, diagnosed legal pneumoconiosis with minimal loss of lung function. He opined that the miner did not retain the pulmonary capacity to perform his last regular coal mine employment involving heavy manual labor, and based his opinion on evidence of hypoventilation at rest, during and following exercise; qualifying arterial blood gas studies at rest; minimal impairment in gas exchange during exercise; minimally reduced diffusing capacity; and marked resting hypoxia. In Dr. Rasmussen's opinion, the bulk of the blood gas abnormalities did not result from coal dust exposure, but more likely resulted from the miner's narcotic prescription drug therapy. Director's Exhibit 13.

[7] Dr. Broudy provided consulting opinions in 2006 and in 2008. In 2006, he stated that he reviewed Dr. Rasmussen's findings, and agreed with most of them, stating that:

> If I disagree with any of [Dr. Rasmussen's] opinions, it would be that coal dust exposure was responsible for minimal loss of lung function. The reduction of the diffusing capacity is probably related to [the miner's] anemia. The spirometric study was normal. The change in the blood gases, as Dr. Rasmussen stated, is probably related to the narcotic medication given for his pain control due to cancer.

on the issue of total disability; and that Dr. Vuskovich's opinion, that the miner did not have a disabling respiratory impairment until his last days, was equivocal, at best. Decision and Order at 7; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge determined that Dr. Rasmussen, while not Board-certified in pulmonary medicine, was, nonetheless, "an acknowledged expert in the field of pulmonary impairments of coal miners" and was the best-qualified physician in this record to render an opinion on the issue of total disability, based on his extensive experience and his relatively current research on chronic obstructive pulmonary disease (COPD) and pneumoconiosis. Decision and Order at 8; *see Martin v. Ligon Preparations Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). The administrative law judge further determined that Dr. Rasmussen's opinion, that the miner did not retain the pulmonary capacity to perform his last regular coal mine job involving "considerable heavy manual labor," was consistent with the exertional requirements of the miner's usual coal mine employment, the abnormalities shown on the results of the miner's blood gas studies, and the miner's use of supplemental oxygen. Thus, the administrative law judge acted within his discretion in finding that Dr. Rasmussen's opinion was persuasive, well-reasoned, and entitled to determinative weight, notwithstanding the miner's non-qualifying test results. Decision and Order at 8-9; Director's Exhibit 13; *see* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000), *citing Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-555 (1989)(*en banc*); *Dillon v. Peabody Coal Co.* 11 BLR 1-113 (1988). As substantial evidence supports the administrative law judge's findings at Section 718.204(b)(2), and as employer has not identified any error in the administrative law judge's weighing of the evidence, we affirm the administrative law judge's finding of total respiratory disability thereunder, and his finding that claimant successfully invoked the presumption under amended Section 411(c)(4).

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal under amended Section 411(c)(4), arguing that Dr. Rasmussen diagnosed legal pneumoconiosis with minimal loss of lung function, and attributed the bulk of the miner's hypoventilation on blood gas studies to narcotic medications. Employer asserts that the reports of Drs. Broudy, Vuskovich and Caffrey contain a consensus of medical proof that the miner's minimal loss of lung function was attributable to narcotic medication and/or other diseases of the general public and not coal dust exposure. Therefore, employer maintains that the medical proof of record, including Dr. Rasmussen's opinion, supports a finding that "any pulmonary disability is

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Director's Exhibit 15. In 2008, Dr. Broudy opined that the miner died from metastatic carcinoma of the esophagus, and that there was nothing to suggest that the miner had pneumoconiosis except for a few abnormalities on a pathology report as described by Dr. Caffrey. Director's Exhibit 74-46.

not attributable to coal dust exposure." Employer's Brief at 11-12. Employer essentially seeks a reweighing of the evidence, which is beyond the scope of the Board's review. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). After evaluating the evidence relevant to rebuttal, the administrative law judge found that the record did not contain a well-reasoned medical opinion affirmatively showing that the miner did not have pneumoconiosis or that his disabling impairment was unrelated to coal dust exposure, thus employer failed to meet its burden of proof. Decision and Order at 9-11; *see Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, BLR (6th Cir. 2011). As employer has not identified any specific legal or factual errors in the administrative law judge's consideration of the medical evidence, we affirm his finding that employer failed to establish rebuttal of the presumption under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984);); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We also affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits under amended Section 422(l) of the Act, 30 U.S.C. §932(l). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Lastly, employer generally challenges the administrative law judge's award of benefits payable from December 2005, the month in which the miner filed his claim, arguing: "[a]t a minimum Employer states onset should be no earlier than December 10, 2006, the date the survivor filed for modification." Employer's Brief at 12. However, as employer has failed to adequately brief this issue, we affirm the administrative law judge's finding that benefits are payable from December 2005. *See Cox*, 791 F.2d at 446, 9 BLR 2-49; *Sarf*, 10 BLR at 1-120, 1-121.

Accordingly, the administrative law judge's Decision and Order - Award of 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