

BRB No. 12-0476 BLA

LEWIS ARMES, JR.)
)
 Claimant-Respondent)
)
 v.)
)
 GEX OF KENTUCKY, INCORPORATED) DATE ISSUED: 06/12/2013
)
 and)
)
 AETNA/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 Awarding Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Rita Roppolo (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 Awarding Benefits on Remand (2007-BLA-5192) of Administrative Law Judge Alice M. Craft rendered on a subsequent claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This claim is before the Board for the second time. In a Decision and Order dated March 10, 2009, Administrative Law Judge Thomas F. Phalen, Jr. credited claimant with 15 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Phalen found that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, Judge Phalen 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, Judge Phalen found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). Judge Phalen also found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). However, Judge Phalen found that the evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Judge Phalen further found that the Director, Office of Workers' Compensation Programs (the Director), provided claimant with a complete pulmonary evaluation. Accordingly, Judge Phalen denied benefits.

In response to claimant's appeal, the Board affirmed Judge Phalen's finding that the Director provided claimant with a complete pulmonary evaluation. The Board also affirmed Judge Phalen's finding that Dr. Baker's disability causation opinion was entitled to diminished weight because Dr. Baker relied on an understated smoking history. However, the Board vacated Judge Phalen's denial of benefits and remanded the case to Judge Phalen for consideration of whether claimant was entitled to the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The Board instructed Judge Phalen to determine whether employer rebutted the presumption by establishing that claimant does not have pneumoconiosis or that his respiratory impairment did not arise out of, or in connection with, employment in a coal mine, if reached. The Board also instructed Judge Phalen to allow for the submission of additional evidence by the parties to address the change in law. The Board noted that any additional evidence had to be consistent with the evidentiary limitations set forth at 20 C.F.R. §725.414, and that good cause had to be established pursuant to 20 C.F.R. §725.456(b)(1) for the admission of evidence that exceeded the limitations. Further, the Board declined to address employer's argument that application of amended

¹ Claimant filed his first claim on December 19, 1987. Director's Exhibit 1. It was finally denied by Administrative Law Judge Paul H. Teitler in a Decision and Order issued on January 25, 2005. *Id.* Judge Teitler's denial was based on claimant's failure to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, and, thus, his failure to establish modification. *Id.* Claimant filed this claim (a subsequent claim) on January 30, 2006. Director's Exhibit 3.

Section 411(c)(4) was unconstitutional as premature, given that Judge Phalen had not yet considered the claim under that amendment. *Armes v. GEX of Kentucky, Inc.*, BRB No. 09-0488 BLA (July 16, 2010) (unpub.).

On remand, the case was transferred to Judge Craft (the administrative law judge), who found that the new evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Further, the administrative law judge credited claimant with at least 15 years of qualifying coal mine employment² and found that the evidence established total respiratory disability at 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge also found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 411(c)(4), and its application to this case. Claimant and the Director respond, urging affirmance of the administrative law judge's award of benefits. Employer filed a brief in reply to the response briefs of claimant and the Director, reiterating its prior contentions.³

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.⁴ 33 U.S.C. §921(b)(3), as incorporated into the

² After noting that the record supported the conclusion that claimant had at least 15 years of coal mine employment, Administrative Law Judge Alice M. Craft (the administrative law judge) further stated that, "while only nine years were spent in an underground mine, I have found that the conditions of the [c]laimant's above-ground employment were 'substantially similar' to those of an underground mine." Decision and Order on Remand at 45.

³ Because the administrative law judge's length of coal mine employment finding and her findings that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Claimant’s prior claim was denied because he failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director’s Exhibit 1. Consequently, claimant had to submit evidence establishing the existence of pneumoconiosis or that his total respiratory disability is due to pneumoconiosis in order to obtain review on the merits of this claim. 20 C.F.R. §725.309(d).

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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(l)). 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 claimant is 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 contention that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of its due process rights, in violation of the Fifth Amendment to the United States Constitution. Employer’s contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the reason set forth in that decision. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

Next, we address employer’s contention that the presumption at amended Section 411(c)(4) does not apply to subsequent claims. Employer argues that the date that the initial claim was filed should be the controlling date for applying the amended statute. Contrary to employer’s contention, the plain language of Section 1556(c) of the PPACA mandates the application of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *See Stacy*, 671 F.3d at 388, 25 BLR at 2-82-83; *see also Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J.,

dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Thus, we reject employer's assertion that the presumption at amended Section 411(c)(4) does not apply to subsequent claims.

In light of our affirmance of the administrative law judge's finding that the new evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a), we affirm the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Further, in view of our affirmance of the administrative law judge's findings that claimant established at least 15 years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Finally, because employer does not challenge the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's award of benefits. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge