BRB No. 12-0198 BLA

JAMES B. LANE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KOCH CARBON RAVEN DIVISION VA	)	DATE ISSUED: 12/18/2012
	)	
Employer-Petitioner	)	
	)	
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 of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (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 appeals the Decision and Order Awarding Benefits (2008-BLA-5564) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge), rendered on a subsequent claim[1] filed pursuant to the provisions of the Black

[1] Claimant's first claim for benefits was filed on December 1, 1997, and was denied by the district director on February 2, 1998. Director's Exhibit 1.

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[2] The administrative law judge credited claimant with more than fifteen years of coal mine employment in conditions substantially similar to those in an underground mine,[3] and adjudicated this claim, filed on June 7, 2007, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that the new evidence submitted in support of this subsequent claim was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and to invoke the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), *see* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the new evidence outweighed the earlier evidence, and that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to establish rebuttal of the presumption.[4] Accordingly, benefits were awarded.

Claimant's second claim, filed on October 21, 2002, was denied by the district director on June 17, 2003, because the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis. Director's Exhibit 2.

[2] 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), Public Law No. 111-148 (2010). Relevant to this living miner's claim, the amendments 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 if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[3] By Order dated August 17, 2011, the administrative law judge granted employer's motion to withdraw its stipulation to sixteen years of coal mine employment and granted its motion to depose claimant regarding the dust conditions of his coal mine employment.

[4] Upon invocation of the amended Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal*

On appeal, employer does not challenge the administrative law judge's findings on the merits of entitlement, but challenges the constitutionality of the PPACA and the severability of its non-health care provisions.[5] Employer also argues that the retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's constitutional arguments, and to affirm the award of benefits.

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.[6] 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).

Subsequent to the filing of employer's brief, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012). Additionally, the United States Court of Appeals for the Fourth Circuit has rejected employer's argument that retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Thus, the administrative law judge properly found that the provisions of amended Section 411(c)(4) are applicable to this claim.

Co., 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

[5] By Order issued on March 21, 2012, the Board denied employer's motion to hold this appeal in abeyance.

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

As employer raises no other legal issues, nor any substantive challenge to the administrative law judge's findings on the merits of entitlement, we affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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