BRB No. 11-0150 BLA

THADDEUS STYKA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEDDO-HIGHLAND COAL COMPANY	)	
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	DATE ISSUED: 02/27/2012
	)	
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 Modification of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Maureen E. Herron, Wilkes-Barre, Pennsylvania, for employer/carrier.

Jeffrey S. Goldberg (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 on Modification (2009-BLA-5313) of Administrative Law Judge Adele Higgins Odegard rendered on a subsequent claim[1] filed pursuant to 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). Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

On May 13, 2010, the administrative law judge issued an Order informing the parties of the enactment of Public Law No. 111-148, and allowing the parties to submit additional evidence or argument regarding the applicability of Section 1556 to this case. On June 4, 2010, the Director, Office of Workers' Compensation Programs (the Director), submitted a response. Claimant and employer did not respond.

The administrative law judge credited claimant with seventeen years of coal mine employment, as stipulated by the parties, and determined that claimant worked 3.66 of

[1] This case has a lengthy procedural history. The record indicates that claimant filed an application for benefits on September 24, 1987, which was denied on April 11, 1989 by Administrative Law Judge Robert D. Kaplan, who found the evidence sufficient to establish the existence of pneumoconiosis but insufficient to establish total respiratory disability. Director's Exhibits 1, 35. Claimant's second claim, filed on October 1, 1996, was denied on May 18, 1998 by Administrative Law Judge Ralph A. Romano for failure to establish total disability and a material change in conditions. Director's Exhibit 1. Claimant filed an appeal with the Board on June 15, 1998, but subsequently requested that the case be remanded for modification proceedings, Director's Exhibits 55, 59, 61, and on June 19, 2000, Administrative Law Judge Paul H. Teitler denied benefits. Claimant filed another claim on April 5, 2001, which was considered a request for modification. Judge Kaplan ultimately denied modification on December 15, 2003, and the Board affirmed the denial of benefits on November 30, 2004. *Styka v. Jeddo-Highland Coal Co.*, BRB No. 04-0336 BLA (Nov. 30, 2004)(unpub.). The present claim, filed on January 13, 2006, was denied by Administrative Law Judge Janice K. Bullard on July 13, 2007, for failure to establish total disability. Director's Exhibits 3, 43. Claimant requested modification on July 11, 2008. Director's Exhibit 52.

those years underground and 13.34 years on the surface in substantially similar dust exposure conditions. The administrative law judge found that new evidence submitted after the denial of the claim was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in conditions sufficient to support modification pursuant to 20 C.F.R. §725.310, and a change in an applicable condition of entitlement in this subsequent claim pursuant to 20 C.F.R. §725.309(d). Applying amended Section 411(c)(4), the administrative law judge found that claimant was entitled to invocation of the presumption, and that employer was bound by a prior stipulation to the existence of pneumoconiosis. The administrative law judge further found that employer failed to establish rebuttal by proving that claimant's disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment or comparable surface coal mine employment. Employer also contends that claimant is not entitled to invocation of the presumption at amended Section 411(c)(4), arguing that the administrative law judge failed to properly evaluate the pulmonary function study evidence and medical opinion evidence in finding total disability established at Section 718.204(b)(2)(i), (iv). Further, employer challenges the administrative law judge's rebuttal findings, arguing that employer did not enter into a binding stipulation as to the presence of pneumoconiosis, and that the opinion of Dr. Hertz is well-reasoned and sufficient to establish rebuttal. Claimant has not responded.[2] The Director responds, urging affirmance.

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.[3] 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).

Turning first to the procedural issue, employer contends that the administrative law judge erred in finding that employer is bound by a prior stipulation to the presence of

[2] On September 12, 2011, the Board granted the motion of claimant's counsel for an extension of time to file a response, but counsel subsequently failed to submit a brief.

[3] The record reflects that claimant's last coal mine employment was in Pennsylvania. Director's Exhibit 3 at 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

pneumoconiosis and, consequently, is precluded from establishing rebuttal under amended Section 411(c)(4) with proof that claimant does not suffer from clinical and legal pneumoconiosis. While the administrative law judge found that a stipulation had been entered into, based upon the plain language contained in a Proposed Decision on Behalf of Employer dated May 2, 2002,[4] and that employer had never attempted to set aside the stipulation, employer asserts that its May 2, 2002 submission does not constitute a formal and binding stipulation. In this regard, employer argues that it relied on Administrative Law Judge Janice K. Bullard's statement at the January 12, 2007 hearing on this subsequent claim, that "whatever a party says in its brief is argument . . . but a stipulation would be something that at the hearing the parties would stipulate to." 2007 Hearing Transcript at 9; Employer's Brief at 8. Because employer did not believe it had formally stipulated to the presence of pneumoconiosis, employer maintains that it did not attempt to withdraw an "erroneous stipulation," but merely contested the issue of pneumoconiosis before Judge Bullard and before the administrative law judge on modification. Employer's Brief at 8. Employer's arguments have merit.

In order for a stipulation to be binding, it must be determined that the stipulation was fairly entered into by all of the parties. *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996). Under the facts of this case, however, we are unable to conclude that a stipulation was fairly entered into by the parties, and that the record contains a binding stipulation of fact conceding the issue of the existence of pneumoconiosis. Employer contested the issue of pneumoconiosis in claimant's initial 1987 claim, and the issue was never reached in claimant's 1996 duplicate claim, as the evidence failed to establish total disability and a material change in conditions. The record does not reflect that employer's proposed decision of May 2, 2002, submitted following a hearing on modification with regard to the 1996 claim, was accepted or relied upon by the adjudicator as a formal stipulation to the existence of pneumoconiosis. Consequently, the administrative law judge's finding, that employer never filed a motion to correct or retract an "erroneous stipulation" to the existence of pneumoconiosis, is not dispositive of the matter. Moreover, fundamental fairness and due process would require relief from even a formal stipulation made prior to the change in law effectuated by the

[4] The Proposed Decision on Behalf of Employer, dated May 2, 2002, was submitted to Administrative Law Judge Ainsworth H. Brown following the March 12, 2002 hearing on claimant's request for modification of his 1996 duplicate claim. While the hearing transcript reflects that the parties stipulated to 17 years of coal mine employment, 2002 Hearing Transcript at 7, it does not reflect a stipulation to the presence of pneumoconiosis. Employer's May 2, 2002 submission states, in pertinent part, that "[t]he parties have further stipulated that the Claimant suffers from coal worker's [sic] pneumoconiosis, which he contracted during his seventeen years of employment in the anthracite coal industry."

passage of Public Law No. 111-148, and the reallocation of the burden of proof to employer on rebuttal under amended Section 411(c)(4), if applicable. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986); *see also Sturgill v. Old Ben Coal Co.*, 22 BLR 1-314, 1-318 (2003)(relitigation of an issue is not barred when the allocation of the burden of proof and/or the substantive legal standards have changed). Thus, the administrative law judge's finding of a binding stipulation to the existence of pneumoconiosis is vacated.

Turning to the merits of entitlement, employer contends that the administrative law judge erred in finding that the weight of the pulmonary function study evidence was sufficient to establish total respiratory disability at Section 718.204(b)(2)(i). Because the table values at Appendix B end at age 71, and claimant was 76 and 77, respectively, at the time he performed the October 13, 2008 test for Dr. Kraynak and the July 28, 2009 test for Dr. Hertz, employer asserts that the administrative law judge should not have credited these tests as qualifying,[5] based on the values for a 71-year-old. Rather, employer maintains that the administrative law judge should have extrapolated the table values to reflect claimant's age, and/or should have considered the reliability of claimant's tests. Employer's Brief at 3-5. Employer's arguments are without merit. The administrative law judge found that both pulmonary function tests produced qualifying values, but that Dr. Kraynak's test was not valid, as Dr. Levinson, who possessed superior qualifications as a pulmonary specialist, reviewed the tracings and opined that the test was improperly performed. Decision and Order at 9; Employer's Exhibit 3. As Dr. Hertz's test was of unquestioned validity, and as employer submitted no evidence to show that this test, which produced qualifying values for age 71, was actually normal or otherwise did not demonstrate a totally disabling pulmonary impairment, we affirm the administrative law judge's finding that the evidence at Section 718.204(b)(2)(i) was sufficient to establish total disability, as supported by substantial evidence. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co*., 24 BLR 1-40 (2008); Decision and Order at 9-10.

Employer next argues that the administrative law judge failed to properly consider Dr. Hertz's opinion in finding it sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). Specifically, employer asserts that the administrative law judge incorrectly stated that "both Dr. Kraynak and Dr. Hertz agree that the Claimant is totally disabled, from a respiratory perspective. . . . [t]here is no contrary medical opinion, submitted since [Judge] Bullard's [denial of benefits]." Decision and Order at

[5] A "qualifying" pulmonary function test yields results that are equal to, or less than, the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" test yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

15. Employer maintains that Dr. Hertz did not affirmatively testify at his deposition that claimant's respiratory impairment, standing alone, was totally disabling; rather, Dr. Hertz opined that the combination of claimant's respiratory condition and his cardiac condition disabled him. Employer's Brief at 5. A review of the deposition testimony reveals the following exchange between claimant's counsel and Dr. Hertz:

> Q. Doctor, do you agree [claimant] has a disabling respiratory condition?
>
> A. I think [claimant] is disabled. Again, I don't have complete records of his cardiac history. But my best judgment would be he is disabled both from a pulmonary and cardiac condition.
>
> Q. As a result of the pulmonary component of his condition, would he be able to return to his work in the anthracite coal industry?
>
> A. Again, given his whole picture, it would be hard to divide pulmonary versus cardiac without more information on his cardiac history. But the combination would prevent him from returning to work in the coal mine.

Employer's Exhibit 4 at 20-21. As the administrative law judge mischaracterized Dr. Hertz's opinion, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate her finding of total disability at Section 718.204(b)(2)(iv), and remand this case for a reassessment of Dr. Hertz's opinion and a determination of whether the weight of the evidence as a whole establishes total respiratory disability under Section 718.204(b), thereby establishing a ground for modification pursuant to Section 725.310, and a change in an applicable condition of entitlement in the underlying subsequent claim pursuant to Section 725.309(d).

Employer next challenges the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment and was entitled to invocation of the rebuttable presumption under amended Section 411(c)(4). While employer does not dispute the administrative law judge's calculation of 3.66 years of underground coal mine employment, employer argues that claimant failed to meet his burden of demonstrating comparability of conditions in his 13.34 years of surface employment at a strip mine. Employer's Brief at 6-7. We agree. The administrative law judge acknowledged that claimant "did not provide much detail about the level of his dust exposure during his non-underground coal mine employment." Decision and Order at 19. Relying on claimant's earlier hearing testimony before Judge Bullard, that claimant was "continually" exposed to dust in his surface employment, as well as claimant's indications of "exposure" on two CM-911a forms, and the administrative law judge's own generalized knowledge, that the jobs claimant held as an oiler, ramp worker and coal preparation plant worker would involve direct exposure to coal mine dust, the

administrative law judge concluded that claimant's surface mining conditions were substantially similar to conditions in his underground coal mine employment. Decision and Order at 17-20; Hearing Transcript at 23-27; Director's Exhibits 4, 40 at 58. However, as the evidence relied upon lacks sufficient specificity regarding claimant's dust exposure levels to support the administrative law judge's conclusion, we vacate her finding of at least fifteen years of qualifying coal mine employment. *See Wagahoff v. Freeman United Coal Mining Co.*, 10 BLR 1-100 (1987). Because the hearing took place before Congress revived the Section 411(c)(4) presumption, the administrative law judge must allow the parties, on remand, to submit additional evidence on the issue. *See Lamar*, 904 F.2d at 1047-50, 14 BLR at 2-7-11; *Tackett*, 806 F.2d at 642, 10 BLR at 2-95. Following her determinations as to whether claimant has carried his burden of proof on the issues of total respiratory disability at Section 718.204(b), and fifteen years of qualifying coal mine employment, the administrative law judge must determine whether claimant has successfully invoked the presumption under amended Section 411(c)(4), and, if so, whether employer has established rebuttal by either of the allowable methods.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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