

BRB No. 11-0346 BLA

HENRY R. SWEENEY)
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 Claimant-Respondent)
)
 v.)
)
 JIM WALTER RESOURCES,)
 INCORPORATED)
) DATE ISSUED: 02/16/2012
 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 Granting Request for Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe P.C.), Birmingham, Alabama, for employer.

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 Granting Request for Modification (09-BLA-5677) of Administrative Law Judge Theresa C. Timlin rendered on a miner'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). Claimant filed this claim for benefits on October 23, 2006. Director's Exhibit 2. His claim was denied on May 6, 2008, by Administrative Law Judge Adele Higgins Odegard, who found that, although claimant established that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 35. Thereafter, on December 11, 2008, claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 41. The district director denied modification and claimant requested a hearing, which was held on November 18, 2009, by Administrative Law Judge Theresa C. Timlin (the administrative law judge).

While the parties awaited the administrative law judge's decision on modification, on March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and establishes that 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. 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)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

In view of the potential applicability of amended Section 411(c)(4), the administrative law judge issued an Order on August 3, 2010, providing the parties with sixty days to file briefs addressing the change in law, and to submit additional medical evidence directed at the new legal standard, consistent with the evidentiary limitations of 20 C.F.R. §725.414. Both claimant and employer filed briefs with the administrative law judge; neither submitted any new evidence.

In her Decision and Order issued on December 23, 2010, the administrative law judge noted the parties' stipulation to twenty-nine years and nine months of coal mine

employment,¹ and she found that at least twenty-one years of that employment took place either in underground coal mines or in conditions that were substantially similar to those in an underground mine. Decision and Order at 2, 9-10.

Addressing claimant's request for modification, the administrative law judge found that because claimant had at least twenty-one years of underground or substantially similar coal mine employment, his claim was filed after January 1, 2005 and was pending on March 23, 2010, and claimant established that he is totally disabled by a respiratory or pulmonary impairment, claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. She further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits. Finding that claimant did not become totally disabled due to pneumoconiosis until March 23, 2010, the date upon which Congress reinstated the Section 411(c)(4) presumption by enacting Public Law No. 111-148, the administrative law judge determined that benefits were payable to claimant as of March 2010.

On appeal, employer contends that the administrative law judge's application of amended Section 411(c)(4) deprived employer of its due process rights, because it never had the opportunity to submit evidence in response to the change in the law. Employer further asserts that amended Section 411(c)(4) may not be applied to modification requests. Finally, employer argues that, even if amended Section 411(c)(4) applies, the administrative law judge erred by granting modification based on a change in the law. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's due process argument. Further, the Director urges affirmance of the administrative law judge's decision to grant modification, but not of her finding as to the date for the commencement of benefits. Employer has filed a reply brief reiterating its contentions.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose

¹ The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit, as claimant was last employed in the coal mining industry in Alabama. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 5, 6.

out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Section 725.310 permits the reopening and readjudication of a denied claim within one year of the order denying benefits, based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310; see *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *V.M. [Matney] v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008).

Employer initially argues that the administrative law judge denied it the right to submit evidence in response to the recent amendment to the Act, thus violating employer's right to due process. Employer's Brief at 6. Employer's argument lacks merit. The administrative law judge specifically afforded the parties the opportunity to submit evidence responding to the new legal standard, and she advised the parties of the requirements to be met if they chose to submit evidence in excess of the evidentiary limitations. Administrative Law Judge's Order, Aug. 3, 2010, at 2-3. On appeal, employer does not explain why it did not submit any new evidence. Under these circumstances, where employer was given an opportunity but chose not to submit new evidence, we reject employer's assertion that the administrative law judge deprived employer of the opportunity to respond to the change in the law. See *Betty B Coal Co. Director, OWCP [Stanley]*, 194 F.3d 491, 503, 22 BLR 2-1, 2-21 (4th Cir. 1999). Therefore, we hold that employer has not demonstrated that the administrative law judge violated its right to due process.

We also reject employer's assertion that amended Section 411(c)(4) does not apply to a claim that is pending because of a request for modification. Employer's Brief at 6. The plain language of Section 1556(c) mandates the application of the amendments to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *Mullins v. ANR Coal Co.*, BLR , BRB No. 11-0251 BLA, slip op. at 4 (Jan. 11, 2012). Here, because claimant filed his claim after January 1, 2005, and timely requested modification such that the claim was pending on March 23, 2010, amended Section 411(c)(4) applies to this claim. *Id.* Therefore, we reject employer's argument to the contrary.

On appeal, employer does not otherwise challenge the administrative law judge's findings that claimant established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that employer did not rebut the presumption. We therefore affirm the administrative law judge's determination that claimant established his entitlement to benefits. See *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710 (1983). We next address the administrative law judge's finding as to the date for the commencement of benefits.

The basis for granting modification, whether mistake in fact or change in conditions, affects the date from which benefits commence. If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, or if that date is not ascertainable, as of the date he requested modification.² 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake in fact, claimant is entitled to benefits from the date he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.3d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

Here, the administrative law judge found that, because claimant invoked the Section 411(c)(4) presumption and employer did not rebut “the presumption that [c]laimant suffers from legal pneumoconiosis [c]laimant has established the presence of pneumoconiosis,” that the pneumoconiosis “arose from his coal mine employment, and that his total disability is due to pneumoconiosis.” Decision and Order at 13. The administrative law judge found that claimant was totally disabled before he requested modification on December 11, 2008, but “did not become totally disabled **due to coal workers’ pneumoconiosis** until [Public Law No. 111-148] was enacted and the presumption became applicable to him,” on March 23, 2010. Decision and Order at 14. The administrative law judge therefore ordered employer to pay benefits to claimant as of March 2010.

Employer argues that the administrative law judge erred in granting modification on the ground that the Act was amended since the initial decision, as modification is not available based on a change in law. Employer’s Brief at 2-5; Employer’s Reply at 2-3. We disagree with employer’s characterization of the administrative law judge’s decision. Since the administrative law judge found that there was no mistake in fact, but that claimant had now “established the presence of pneumoconiosis” through invocation of the Section 411(c)(4) presumption, and employer did not rebut the presumption, it follows that claimant established a change in conditions. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

² Section 1556 of Public Law No. 111-148, which reinstated the Section 411(c)(4) presumption, is silent as to the commencement date for the payment of benefits awarded pursuant to Section 411(c)(4). *See Dotson v. McCoy Elkhorn Coal Corp.*, BLR , BRB No. 10-0706 BLA, slip op. at 5-6 (Nov. 16, 2011)(*en banc*), *appeal docketed*, No. 12-3037 (6th Cir. Jan. 12, 2012).

Further, because claimant established a change in conditions, the administrative law judge erred in setting the date for the commencement of benefits as March 23, 2010, the effective date of Public Law No. 111-148. Since a change in conditions was established, benefits are payable to claimant as of the month of onset of total disability due to pneumoconiosis or, if the evidence does not establish the month of onset, as of the month during which he requested modification, unless medical evidence that was credited by the administrative law judge establishes that he was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(d)(2); *see Owens*, 14 BLR at 1-50; *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Here, the medical evidence credited by the administrative law judge establishes only that claimant became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985). Further, the administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his request for modification. Since the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, benefits are payable from the month in which he requested modification. Consequently, we modify the administrative law judge's determination and hold that benefits shall commence as of December 2008, the month and year in which claimant requested modification. 20 C.F.R. §725.503(d)(2); *Owens*, 14 BLR at 1-50; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Accordingly, the administrative law judge's Decision and Order Granting Request for Modification is affirmed, but modified as to the date from which benefits commence from March 2010 to December 2008.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge