

BRB No. 12-0325 BLA

RONNIE D. ENGLAND)
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 Claimant-Petitioner)
)
 v.)
)
 PEACHTREE RIDGE MINING COMPANY,)
 INCORPORATED)
)
 and)
)
 BRICKSTREET MUTUAL INSURANCE) DATE ISSUED: 02/27/2013
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Calculation of Payment of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle PLLC), Charleston, West Virginia, for employer.

Michelle S. Gerdano (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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Calculation of Payment of Benefits (2010-BLA-5838) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on a claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge determined that Section 422(g) of the Act, 30 U.S.C. §932(g), as implemented by 20 C.F.R. §725.536, precludes claimant from receiving benefits from March 1, 2006 through February 1, 2010, because his earnings completely offset his black lung benefits.

On appeal, claimant contends that the Act provides an exception in Section 413(d), 30 U.S.C. §923(d), as implemented by 20 C.F.R. §725.504, which allows for the payment of benefits when a miner with complicated pneumoconiosis continues to work.² Employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's Decision and Order.

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,

¹ Claimant filed a claim for benefits on July 19, 2007. Director's Exhibit 2. On January 29, 2008, the district director awarded benefits, payable from March 1, 2006, after finding that claimant established complicated pneumoconiosis and was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Director's Exhibits 17, 20. Upon determining that claimant engaged in full time employment in the coal mining industry until March 15, 2010, and that claimant received state workers' compensation benefits for occupational pneumoconiosis from February 1, 2008 to August 13, 2009, and from February 1, 2010 to June 20, 2010, the district director determined that any federal black lung benefits due during those periods are completely offset by the miner's earnings and by the receipt of state benefits. Director's Exhibits 25, 33, 40, 41, 70, 74, 77, 78, 81. Claimant then requested a formal hearing.

² Claimant concedes that his federal black lung benefits were properly offset during the periods he was receiving state workers' compensation benefits. Claimant's Brief at 4; Hearing Transcript at 5-6; Decision and Order at 3.

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).

Section 413(d) of the Act, 30 U.S.C. §923(d), as implemented by 20 C.F.R. §725.504, was enacted in 1978, and provides, in pertinent part, that “No miner who is engaged in coal mine employment shall (except as provided in Section 921(c)(3) of this title [Section 411(c)(3) of the Act]) be entitled to any benefits under this part while so employed.” Pub. L. No. 95-239, §5(d); 30 U.S.C. §923(d); 20 C.F.R. §725.504(a). Section 411(c)(3) of the Act provides that there is an irrebuttable presumption of total disability due to pneumoconiosis for miners who suffer from a chronic dust disease of the lung known as complicated pneumoconiosis. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

In his Decision and Order, the administrative law judge acknowledged that “Section 725.504(a) provides an exception to permit a miner with complicated pneumoconiosis to still qualify for benefits despite continued employment,” but that Section 725.504(b) “still requires [the] payment of benefits to be reduced according to applicable parts of the regulations.” Decision and Order at 5. The administrative law judge determined, therefore, that although a miner with complicated pneumoconiosis may establish entitlement to benefits while continuing to work, any benefits that he receives will be offset pursuant to Section 422(g) of the Act, 30 U.S.C. §932(g), by the amount of compensation that he received while working. *See* 20 C.F.R. §725.536; Decision and Order at 3-4. Section 725.536 states, in pertinent part:

In the case of a . . . miner whose claim was filed on or after January 1, 1982, benefit payments are reduced as appropriate by an amount equal to the deduction which would be made with respect to excess earnings under the provisions of sections 203(b), (f), (g), (h), (j), and (l) of the Social Security Act. . . , as if such benefit payments were benefits payable under section 202 of the Social Security Act. . . .

20 C.F.R. §725.536.

We agree with the Director’s position, that Section 422(g), as implemented by Section 725.536, does not allow for any exceptions to the offset to claims filed on or after

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. Director’s Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

January 1, 1982 and, therefore, while a miner may establish entitlement to benefits if he has complicated pneumoconiosis and continues to work, any benefit payments made to him will be reduced by the amount of income earned during the time that he is working. Section 422(g), as the most recent enactment of Congress, is controlling over Section 413(d). Director's Brief at 2-3; *see U.S. v. Posadas*, 296 U.S. 497, 503 (1936); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 389, 25 BLR 2-65, 2-85 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). Because claimant filed his claim after January 1, 1982, and does not challenge any other findings by the administrative law judge, we affirm the administrative law judge's determination that the excess earnings offset at Section 725.536 is applicable to preclude claimant from receiving payment of federal black lung benefits for the period from March 1, 2006 through February 1, 2010.

Accordingly, the administrative law judge's Decision and Order – Calculation of Payment of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge