

BRB No. 12-0284 BLA

CYNTHIA HOWARD)
(o/b/o GARY LEE HOWARD))
)
 Claimant-Respondent)
)
 v.)
)
 MARTIN COUNTY COAL) DATE ISSUED: 01/31/2013
 CORPORATION)
)
 and)
)
 A.T. MASSEY)
 c/o ACORDIA EMPLOYERS SERVICE)
)
 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 on Remand Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, 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 on Remand Awarding Benefits (2007-BLA-05351) of Administrative Law Judge Kenneth A. Krantz, rendered on a subsequent miner's claim filed on January 13, 2006,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for a second time. The procedural history of the case is set forth in *Howard v. Martin County Coal Corp.*, BRB No. 10-0117 BLA, slip op. at 4-5 (Sept. 29, 2010) (unpub.). The Board previously vacated the administrative law judge's finding that the miner did not establish total disability due to pneumoconiosis under 20 C.F.R. §718.204 (b), (c), and the denial of benefits, and remanded the claim for consideration of whether the miner was entitled to invocation of the presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *Id.* at 5. The Board also instructed that the administrative determine, as necessary, whether employer established rebuttal of that presumption. *Id.* The Board further instructed the administrative law judge to allow the parties the opportunity to submit additional evidence to address the change in the law, in compliance with the evidentiary limitations at 20 C.F.R. §725.414. *Id.*

On remand, the administrative law judge credited the miner with sixteen and three-quarters years of underground coal mine employment and determined that the new evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because the miner had at least fifteen years of underground coal mine employment, and suffered from a totally disabling respiratory or pulmonary impairment, the administrative law judge found that he was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4). The administrative law judge further found that employer failed to rebut the presumption by establishing either that the miner did not have pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. Accordingly, the administrative law judge awarded benefits.

¹ Claimant is the widow of the miner, who died on September 23, 2011. *See* Decision and Order on Remand at 2 n.1. Claimant is pursuing this claim on the miner's behalf. *Id.*

On appeal, employer does not challenge the administrative law judge's findings on the merits of entitlement.² Rather, employer argues that the case should be held in abeyance pending resolution of the legal challenges to the Patient Protection and Affordable Care Act (PPACA) and the severability of its non-health care provisions. Employer also argues that the retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005, violates employer's right to due process and constitutes an unlawful taking of private property in violation of the United States Constitution. Additionally, employer requests that the case be remanded for further evidentiary development, relevant to the economic impact of the amendments to the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's constitutional challenges to the PPACA and to the administrative law judge's application of amended Section 411(c)(4) to this case.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer's request to hold this case in abeyance pending resolution of the legal challenges to the PPACA and the severability of non-health care provisions by the United States Supreme Court is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012). We reject employer's contention that retroactive application of amended Section 411(c)(4) constitutes a violation of employer's right to due process. *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 B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, we deny employer's request to remand this case to the administrative law judge for development of evidence regarding the economic impact of amended Section 411(c)(4) to show that an unconstitutional taking has occurred. *See*

² We affirm, as unchallenged on appeal, the administrative law judge's determination that the miner had sixteen and three-quarters years of underground coal mine employment and established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and invoked the rebuttable presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm the administrative law judge's unchallenged finding that employer did not rebut the presumption set forth in amended Section 411(c)(4). *Id.*

Stacy, 671 F.3d at 387, 25 BLR at 2-80 (holding that “. . . the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause”).

As employer raises no other legal issues, nor any substantive challenge to the administrative law judge’s finding regarding the miner’s 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 on Remand Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge