

BRB No. 09-0488 BLA

LEWIS ARMES, JR.)
)
 Claimant-Petitioner)
)
 v.)
)
 GEX OF KENTUCKY, INCORPORATED) DATE ISSUED: 07/16/2010
)
 and)
)
 AETNA/TRAVELERS INSURANCE)
 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 - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

James M Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Rita Roppolo (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (2007-BLA-5192) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim filed on January 30, 2006, pursuant to the provisions of 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).¹ Decision and Order at 5; Director’s Exhibit 3. The administrative law judge credited the parties’ stipulation to fifteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, demonstrated a change in applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant proved that he has clinical pneumoconiosis arising out of coal mine employment under 20 C.F.R. §718.202(a)(1) and that he is totally disabled under 20 C.F.R. §718.204(b)(2). The administrative law judge further found, however, that claimant did not establish that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in considering evidence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(4). Claimant also challenges the administrative law judge’s finding that he did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant further argues that the Department of Labor (DOL), did not provide him with a complete pulmonary evaluation as required by 20 C.F.R. §725.406. Employer responds, urging affirmance of the administrative law judge’s denial of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has filed a limited response in which he urges the

¹ Claimant filed his first application for benefits on December 19, 1987. Director’s Exhibit 1. Administrative Law Judge Bernard J. Gilday, Jr., denied benefits, finding that the evidence was insufficient to establish total disability causation. *Id.* After the Board remanded the case on three occasions, the denial of benefits, on the grounds that claimant failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis, was ultimately affirmed by the United States Court of Appeals for the Sixth Circuit. *Id.* Claimant subsequently filed a timely request for modification, which was denied by Administrative Law Judge Daniel Roketenetz. Director’s Exhibit 2. Claimant filed a second request for modification, which Administrative Law Judge Paul H. Teitler denied. *Id.* Claimant took no further action until he filed the current subsequent claim. Director’s Exhibit 3.

Board to reject claimant's allegation that he did not receive a complete pulmonary evaluation.

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.² 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).

By Order dated March 31, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims and became effective on March 23, 2010. *Armes v. Gex of Kentucky, Inc.*, BRB No. 09-0488 BLA (Mar. 31, 2010) (unpub. Order). The Board received responses from claimant and the Director. On May 7, 2010, the Board granted employer's request for an extension of time within which to respond to the Board's Order. *Armes v. Gex of Kentucky, Inc.*, BRB No. 09-0488 BLA (May 7, 2010) (unpub. Order). The Board has now received employer's response.

Claimant and the Director assert that remand to the administrative law judge is required, as Section 1556 reinstated the "15-year presumption" set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Employer responds that Section 1556 does not apply in cases, such as the present one, involving subsequent claims and requests for modification. Employer also contends that the retroactive application of the "15-year presumption" is unconstitutional, as it violates employer's right to due process.

Based upon the parties' responses, and our review, we agree with claimant and the Director that this case is affected by Section 1556. Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed the relevant claim after January 1, 2005, the administrative law judge credited him with fifteen years of coal mine employment, and determined that claimant

² The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

has a totally disabling respiratory impairment.³ Contrary to employer's contention, a subsequent claim, such as the present one, in which the claimant has established a change in an applicable condition of entitlement, is treated as a newly filed claim for the purposes of adjudication.⁴ 20 C.F.R. §725.309(b), (d). Thus, the date on which claimant submitted his subsequent claim – January 30, 2006 – is the relevant date of filing, thereby meeting the requirement, set forth in Section 1556, that the filing date of the claim at issue is after January 1, 2005.

Accordingly, we must remand this case to the administrative law judge for consideration of whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).⁵ If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption by establishing that claimant does not have pneumoconiosis or that his “respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.” 30 U.S.C. §921(c)(4). On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *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). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, the proponent of this evidence must establish good cause for its admission. 20 C.F.R. §725.456(b)(1). Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

³ Employer has not challenged the finding of total disability, nor has it withdrawn its stipulation to fifteen years of coal mine employment.

⁴ Under the terms of 20 C.F.R. §725.309(b), a subsequent claim merges with a prior claim, and loses its separate procedural history, only when the prior claim is still pending. Pursuant to 20 C.F.R. §725.309(d), a subsequent claim must be processed under the same provisions as an initial claim for benefits.

⁵ We also decline to hold, as claimant urges, that he is entitled to the presumption as a matter of law. The administrative law judge, in his role as fact-finder, must initially consider this issue in light of any additional evidence admitted on remand. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Finally, we reject claimant's assertion that because the administrative law judge discredited Dr. Baker's opinion at 20 C.F.R. §718.204(c), the Director did not provide him with a complete pulmonary evaluation. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; see *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1984). The United States Court of Appeals for the Sixth Circuit recently set forth the standard for determining whether a pulmonary evaluation is complete:

In the end, DOL's duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, 24 BLR 2-202, 2-221 (6th Cir. 2009). In *Greene*, the court held that while the physician who performed the DOL-sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given that the physician's report addressed all of the elements of entitlement, "even if lacking in persuasive detail." 575 F.3d at 641, 24 BLR at 2-220. The record reflects that Dr. Baker conducted an examination and the full range of testing required by the regulations, and that he addressed each element of entitlement.⁶ 20 C.F.R. §§718.101(a), 718.104,

⁶ Dr. Baker examined claimant, at the request of the Department of Labor (DOL), on March 20, 2006, and obtained a chest x-ray, a pulmonary function study, a blood gas study and an EKG. Director's Exhibit 16. On DOL Form CM-988, Dr. Baker noted that claimant smoked two to three cigarettes per day and that claimant "alleges only a few years of smoking when he was young, perhaps only six years total and just a few cigarettes a day, perhaps as low as two cigarettes per day." *Id.* Dr. Baker diagnosed coal workers' pneumoconiosis (CWP), based on a positive x-ray reading and claimant's history of coal dust exposure. *Id.* Dr. Baker also diagnosed chronic obstructive pulmonary disease (COPD), with a severe obstructive defect, mild to moderate resting arterial hypoxemia and chronic bronchitis. *Id.* Dr. Baker identified coal dust exposure as the cause of claimant's CWP, COPD, hypoxia and bronchitis. *Id.* Dr. Baker further stated that smoking made a minimal contribution to these conditions. *Id.* Dr. Baker

725.406(a); Director's Exhibit 16. Contrary to claimant's contention, the administrative law judge explicitly stated that he did not find Dr. Baker's opinion to be devoid of probative value at 20 C.F.R. §718.204(c). Decision and Order at 32. Rather, he determined that it was entitled to diminished weight, not due to any failure by the Director, but because claimant provided Dr. Baker with a smoking history considerably shorter in duration than that found by the administrative law judge.⁷ See *Hodges*, 18 BLR at 1-93; see also *Greene*, 575 F.3d at 641-42, 24 BLR at 2-221. Accordingly, we reject claimant's request that this case be remanded to the district director for a complete pulmonary evaluation.

concluded that claimant's impairment is significantly related to and substantially aggravated by, dust exposure in his coal mine employment. *Id.*

⁷ Contending that "DOL has recognized that cigarette smoking and coal dust exposure cause relatively equal amounts of decrease in FEV1 of an individual," claimant maintains that the administrative law judge should have found that Dr. Baker's opinion on the issue of total disability causation was documented by claimant's fifteen years of coal mine employment and a twenty pack-year smoking history. Claimant's Brief at 20. Claimant's argument is essentially a request that the administrative law judge substitute his opinion for that of a medical expert, which the administrative law judge is not permitted to do. See *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986). Thus, the administrative law judge acted within his discretion in giving diminished weight to Dr. Baker's opinion at 20 C.F.R. §718.204(c), in light of his reliance on an understated smoking history. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494, 2-513 (6th Cir. 2002). This finding is, therefore, affirmed.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge