BRB No. 09-0388 BLA

OKEY L. MAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AERO ENERGY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 06/30/2010
A.T. MASSEY	)	
	)	
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.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, 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 – Denial of Benefits (2007-BLA-5750) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim filed on July 17, 2006, pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] The administrative law judge accepted employer's concession to at least seventeen years of coal mine employment, and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined that the subsequent claim was timely filed and that employer is the responsible operator. The administrative law judge found that the medical evidence developed since the prior denial of benefits was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Upon review of the entire record, however, the administrative law judge found that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in response to claimant's appeal of the denial of benefits.

By Order dated May 19, 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.[2] *May v. Aero Energy, Inc.*, BRB No. 09-0388 BLA (May 19, 2010)(unpub. Order). Claimant, employer and the Director have responded.

[1] Claimant filed his initial claim on September 26, 2002. Director's Exhibit 1. On December 8, 2003, the district director denied benefits, finding the evidence insufficient to establish any element of entitlement. *Id.* Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 3. After the district director issued a Proposed Decision and Order – Award of Benefits, employer requested a formal hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 30. Administrative Law Judge Thomas F. Phalen, Jr., conducted a hearing on March 27, 2008, and issued his Decision and Order – Denial of Benefits on February 11, 2009, which is the subject of this appeal.

[2] Relevant to this living miner's claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year 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.

Both claimant and the Director state that Section 1556 affects this case, as it reinstated the "15-year presumption" set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The Director maintains that this case must be remanded for the administrative law judge to address whether claimant is entitled to the "15-year presumption." In contrast, claimant maintains that remand is not required, as he is entitled to the presumption and employer's evidence is insufficient to rebut it. Employer responds that, although Section 1556 may affect this case, a remand to the administrative law judge for reconsideration is necessary to allow employer to develop any evidence that it considers relevant to the new standards created by Section 1556. Employer also contends that the retroactive application of the "15-year presumption" is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property.[3]

Based upon the parties' responses, and our review, we agree 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 his claim after January 1, 2005, the administrative law judge credited him with seventeen years of coal mine employment, and determined that claimant has a totally disabling respiratory impairment.[4]

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

[3] Employer also notes that the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Employer therefore requests, "[p]otentially affected federal black lung claims . . . be held in abeyance until resolution of this legal challenge . . . ." Employer's Supplemental Brief 14. Employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the recent amendments to the Act. Employer's request to hold this case in abeyance, therefore, is denied.

[4] Employer has not challenged the finding of total disability, nor has it withdrawn its stipulation to seventeen years of coal mine employment.

[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).

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, it must be justified by a showing of good cause. 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, however, we decline to address, as premature, employer's argument that the retroactive application of that amendment to this claim is unconstitutional.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge