

BRB No. 12-0354 BLA

CLAYTON R. WILES)
)
 Claimant-Respondent)
)
 v.)
)
 CUMBERLAND RESOURCES) DATE ISSUED: 03/13/2013
 CORPORATION)
)
 and)
)
 NATIONAL UNION FIRE INSURANCE)
 COMPANY/CHARTIS)
)
 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 - Approval of Modification Request & Award of Benefits and Supplemental Decision and Order - on Reconsideration Awarding Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Richard A. Seid (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, McGRANERY,
and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Approval of Modification Request & Award of Benefits and Supplemental Decision and Order - on Reconsideration (2010-BLA-5450) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a subsequent claim filed on March 30, 2007,¹ 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 found that claimant worked as a coal miner for over thirty years, with over twenty-four years of underground coal mine employment and six years at a surface preparation plant. The administrative law judge determined that the evidence on modification, considered along with the evidence submitted in conjunction with the subsequent claim, established total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on his consideration of all of the record evidence, the administrative law judge found that, because claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis, set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² See Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). The administrative law judge further found that employer failed to rebut the presumption

¹ Claimant filed two prior claims for benefits on October 13, 1998 and March 23, 2004, each of which was denied by the district director for failure to establish any of the requisite elements of entitlement. Director's Exhibits 1, 2. With respect to the current subsequent claim, Administrative Law Judge Paul C. Johnson, Jr. issued a Decision and Order denying benefits on August 11, 2009, finding that claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibits 4, 54. On September 21, 2009, claimant requested modification and the case was assigned to Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) for consideration. Director's Exhibit 55.

² On March 23, 2010, amendments to the Act, contained in Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment are established.

by establishing either that claimant did not have pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, his coal mine employment. Accordingly, the administrative law judge found that claimant established a basis for modification pursuant to 20 C.F.R. §725.310, and awarded benefits, commencing March 1, 2005. Following a request for reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge revised his decision to reflect that the proper date for commencement of benefits was March 1, 2007.

On appeal, employer does not challenge the administrative law judge's findings relevant to the evidence establishing claimant's entitlement to benefits. Rather, employer asserts that amended Section 411(c)(4) is not a severable provision of the PPACA; hence, that provision will be inapplicable if any part of the statute is held to be constitutionally defective. Employer argues that the retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005, results in a due process violation and an unconstitutional taking of private property. Claimant and the Director respond, urging the Board to affirm the award of benefits.

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.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).

Employer's arguments with respect to the constitutionality of the PPACA are now moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. _____, 132 S.Ct. 2566 (2012). Additionally, the United States Court of Appeals for the Fourth Circuit has rejected arguments similar to those raised in this appeal that retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005, constitutes a due process violation and an unconstitutional taking of private property. *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 Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 5.

Because employer raises no substantive challenge to the administrative law judge's findings that claimant invoked the amended Section 411(c)(4) presumption and that employer did not establish rebuttal of that presumption, we affirm the award of benefits.⁴ *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order - Approval of Modification Request & Award of Benefits and his Supplemental Decision and Order - on Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ We affirm, as unchallenged by claimant on appeal, the administrative law judge's determination that benefits commence, beginning March 1, 2007. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).