

BRB No. 10-0490 BLA

JOHN E. WRIGHT)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 11/30/2010
)	
TUNNELTON MINING COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

Ann Marie Scarpino (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 – Awarding Benefits (2009-BLA-5183) of Administrative Law Judge Michael P. Lesniak with respect to a subsequent claim filed on October 24, 2007,¹ pursuant to the provisions of the Black Lung Benefits Act, 30

¹ Claimant filed his initial claim for benefits on August 30, 1995. That claim was denied by the district director on February 23, 1996 because claimant failed to establish

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(I)) (the Act). The administrative law judge considered this filing to be a subsequent claim and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge then credited claimant with thirty-two and one-half years of coal mine employment, based on a stipulation of the parties. Noting the applicability of the March 23, 2010 amendments to the Act,² the administrative law judge found the medical evidence of record sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Based on that finding and his finding that claimant had more than fifteen years of coal mine employment, the administrative law judge found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Weighing the evidence relevant to rebuttal of the Section 411(c)(4) presumption, the administrative law judge found that employer failed to establish that claimant did not suffer from clinical or legal pneumoconiosis or that his total disability was not due to pneumoconiosis. 30 U.S.C. §921(c)(4). Consequently, the administrative law judge found that employer failed to successfully rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis. In addition, the administrative law judge found that claimant established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

On appeal, employer requests that this case be held in abeyance pending the resolution of challenges to the constitutionality of Pub. L. No. 111-148. In particular, employer contends that this legislation does not contain a severability clause and, to date, twenty-one states have challenged its constitutionality, and, therefore, if any of the legislation is overturned, the entire law will fail. Employer also contends that the case should be held in abeyance because there is no vehicle for employer to recoup improperly paid benefits in the event that Pub. L. No. 111-148 is overturned.

any element of entitlement. Decision and Order at 2; Director's Exhibit 1. Claimant filed his current claim on October 24, 2007. Director's Exhibit 3.

² On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

In response, the Director, Office of Workers' Compensation Programs (the Director), has submitted a Motion for Summary Affirmance of the administrative law judge's award of benefits. The Director argues that employer has not challenged the merits of the administrative law judge's award of benefits, or specifically challenged the validity of the provisions to the Act contained in Pub. L. No. 111-148. Consequently, the Director urges affirmance of the administrative law judge's award of benefits. In reply, employer objects to the Director's Motion for Summary Affirmance.

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

The Board is not permitted to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate that substantial evidence does not support the result reached or that the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'd* 7 BLR 1-610 (1984); *Sarf*, 10 BLR at 1-120; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

Herein, other than requesting that the Board hold this case in abeyance pending resolution of the challenges to the general provisions of Pub. L. No. 111-148, employer has not challenged the rationale provided by the administrative law judge for finding the medical evidence sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b) and, thereby, establishing invocation of the Section 411(c)(4) presumption. Nor has employer challenged the administrative law judge's rationale for finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Because employer has failed to identify any error made by the administrative law judge in finding claimant entitled to benefits under Section 411(c)(4), the Board has no basis upon which to review the administrative law judge's decision. *See* 20 C.F.R. §802.211(b); *Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. Consequently, we must affirm the administrative law judge's decision awarding benefits on this claim under Section 411(c)(4).

Furthermore, because employer does not indicate that any court has yet enjoined the application of, or ruled on the validity of, the recent amendments to the Act, at Pub. L. No. 111-148, we deny employer's request to hold this case in abeyance, as we did in our prior Order. *See Wright v. Tunnelton Mining Co.*, BRB No. 10-0490 BLA (Aug. 5, 2010) (unpub. Order).

Accordingly, the Director's Motion for Summary Affirmance is granted and the administrative law judge's Decision and Order – 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