BRB No. 09-0768 BLA

VERNON R. MATNEY Claimant-Petitioner v. McNAMEE RESOURCES, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/18/2010 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Juliet Walker Rundle & Associates), Pineville, West Virginia, for claimant.

William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (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:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5542) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent claim[1] filed pursuant to the provisions of the 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). The administrative law judge noted that claimant alleged eighteen years of coal mine employment,[2] and found that the medical evidence developed since the denial of claimant's prior claim established that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of claimant's claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that it did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to submit a response brief in this appeal.

By Order dated May 10, 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. The parties have responded.

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[1] Claimant's first claim for benefits, filed on May 1, 1990, was denied on November 9, 1990, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant took no further action on that claim. Claimant filed his current claim on May 21, 2007. Director's Exhibit 3.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 11.

The Director states, and claimant agrees, that the recent amendments to the Act are applicable in this case, as the present claim was filed after January 1, 2005; claimant alleges eighteen years of coal mine employment; and, the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Thus, the Director maintains that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4).

Employer asserts that, because the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), the Section 411(c)(4) presumption of total disability due to pneumoconiosis has been rebutted, and therefore, Section 1556 "should not affect the adjudication of this claim." Employer's Supplemental Brief at 17. Employer further asserts that the retroactive application of the amended version of Section 411(c)(4) to this claim is unconstitutional.[4] *Id.* at 9-16. Alternatively, employer contends that, if the Board remands this case for consideration of claimant's entitlement to the Section 411(c)(4) presumption, the record should be reopened so that the parties may submit evidence to address the change in law. *Id.* at 6-8.

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[3] Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 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 are pending on or after March 23, 2010. Director's Brief at 1-2. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.SC. §921(c)(4)). With respect to qualifying coal mine employment, the Director notes that, in this case, the administrative law judge "made no explicit findings of fact regarding the length or nature of claimant's coal mine employment. Because those findings are necessary in order to invoke the Section 411(c)(4) presumption, the [administrative law judge] should specifically address those issues on remand." Director's Brief at 2 n.4.

[4] Employer also notes that the constitutionality of the recent amendments to the Act has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Therefore, employer requests that "[p]otentially affected federal black lung claims . . . be held in abeyance until resolution of this legal challenge. . . ." Employer's Supplemental Brief at 7 n.4. 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 is denied.

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of whether claimant is entitled to invocation of the Section 411(c)(4) presumption. If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits on the ground that claimant did not establish the existence of pneumoconiosis. Thus, we vacate the administrative law judge's findings under 20 C.F.R. §718.202(a), and remand this case to the administrative law judge.

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 the medical evidence rebuts the presumption. The administrative law judge, on remand, should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar,* 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, as the Director states, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.456(b)(1). Further, because the administrative law judge has not yet considered this claim under the amendment to 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.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge