BRB No. 09-0854 BLA

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| LEE ROY HAYES | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| CLINCHFIELD COAL COMPANY | ) | DATE ISSUED: 08/30/2010 |
| | ) | |
| and | ) | |
| | ) | |
| PITTSTON COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT | ) | |
| | ) | |
| 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 Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Lee Roy Hayes, Lebanon, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

Jeffrey S. Goldberg (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, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2008-BLA-5783) of Administrative Law Judge Paul C. Johnson, Jr. 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 considered the claim, which was filed on June 15, 2007,[2] to be a subsequent claim and adjudicated it pursuant to 20 C.F.R. Part 718. The administrative law judge credited claimant with twenty-five and one-half years of coal mine employment, finding that employer did not controvert this issue. Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Consequently, 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). However, addressing the merits of entitlement, the administrative law judge found that the weight of the medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of his claim. Employer responds, urging affirmance of the denial of benefits. However, employer further argues that the administrative law judge erred in adjudicating this claim as a subsequent claim pursuant to Section 725.309, and not as a request for modification pursuant to 20 C.F.R. §725.310, since the June 15, 2007 claim was filed within one year of the district director's June 29, 2006 denial of claimant's first claim. Employer contends, therefore, that because this case is a request for modification, the administrative law judge erred in admitting the medical opinion of Dr. Forehand, which was submitted by the Director, Office of Workers' Compensation Programs (the Director), pursuant to 20 C.F.R §725.406. The Director has filed a letter stating that he will not submit a formal response to claimant's appeal, unless requested to do so by the Board.

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[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed his initial claim on August 11, 2005 That claim was denied by the district director on June 29, 2006, because claimant failed to establish the existence of pneumoconiosis, total disability, or that claimant's total disability was due to pneumoconiosis. Director's Exhibit 1.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp*., 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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. The amendments, in pertinent part, 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, 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.

By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *Hayes v. Clinchfield Coal Co*., BRB No. 09-0854 BLA (June 18, 2010)(unpub. Order). The Director and employer have responded. The Director states that the recent amendment to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is applicable in this case because claimant filed his claim after January 1, 2005 and it was pending on March 23, 2010.[4] Director's Supplemental Letter Brief at 1. In addition, the Director contends that, because the administrative law judge credited claimant with 25.5 years of coal mine employment, described as underground coal mining, and also found that the new evidence established total respiratory disability, a finding not challenged by employer, claimant has

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

[4] The Director, Office of Workers' Compensation Programs (the Director), also notes employer's challenge to the administrative law judge's consideration of this claim as a subsequent claim under 20 C.F.R. §725.309, and not as a request for modification under 20 C.F.R. §725.310. However, the Director argues that for purposes of applying the 2010 amendments, the difference is immaterial because claimant filed both his request for modification and his present claim for benefits after the effective date of the amendments. Director's Supplemental Letter Brief at 1 n.2; Director's Exhibit 1.

established invocation of the Section 411(c)(4) presumption. *Id*. at 2. Therefore, the Director contends that remand of the case is necessary to permit the administrative law judge to determine whether employer has rebutted the Section 411(c)(4) presumption. *Id*. The Director further states that, on remand, because the 2010 amendments change the parties' respective burdens of proof, the administrative law judge must allow the parties the opportunity to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause under 20 C.F.R. §725.456. *Id*.

Employer responds, arguing that amended Section 411(c)(4) cannot apply to this claim. Employer contends that application of Section 411(c)(4) would be impermissibly retroactive because the administrative law judge issued his decision before the enactment of the amendments. Employer's Supplemental Brief at 2. Specifically, employer contends that, because the administrative law judge did not apply Section 411(c)(4), the Board would violate its own standard of review by applying the presumption, since it cannot weigh the evidence itself, but can only review the administrative law judge's findings. *Id*. at 2-3. However, employer further states that, if the Board finds revised Section 411(c)(4) applicable, then the Board must remand the case for the administrative law judge to consider it under Section 411(c)(4) and the administrative law judge should be directed to re-open the record, permitting the parties the opportunity to develop and submit evidence addressing the new legal standard. *Id*. at 3.

After review of the parties' responses, we are persuaded that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge for consideration under Section 411(c)(4). Moreover, we agree with the Director that the administrative law judge's error in considering this case as a subsequent claim, and not as a request for modification, does not affect the applicability of the 2010 amendments because claimant filed, not only his request for modification, but also his present claim for benefits, after the requisite January 1, 2005 filing date for application of the 2010 amendments.

On remand, the administrative law judge must initially determine whether at least fifteen years of the twenty-five and one-half years of coal mine employment that the administrative law judge found established in this case, occurred in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). The administrative law judge must then determine whether claimant has established a totally disabling pulmonary or respiratory impairment and, thus, has established invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(b).

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. 30 U.S.C. §921(c)(4). The administrative law judge, on remand, should allow for the submission of evidence by the parties to address the change in law.[5] *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).

[5] On remand, the administrative law judge should address employer's contention that Dr. Forehand's medical opinion is not admissible because this case involves a request for modification, which does not trigger the requirement that the Director provide claimant with a new, complete pulmonary evaluation under 20 C.F.R. §725.406. If, however, the administrative law judge determines that Dr. Forehand's opinion is not admissible pursuant to Section 725.406, the administrative law judge may consider its admissibility under 20 C.F.R. §§725.310; 725.414 on the submission by either party as its own affirmative evidence. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-62 (2004)(*en banc*), vacated on other grounds, *Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008).

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 consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge