BRB No. 10-0721 BLA

FOREE MARTIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	DATE ISSUED: 08/26/2011
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2010-BLA-05305) of Administrative Law Judge Janice K. Bullard (the administrative law judge) denying benefits on a subsequent claim filed pursuant to 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). Claimant filed this subsequent claim, his ninth, on June 14, 2006. His claim was denied by Administrative Law Judge Adele Higgins Odegard on November 11, 2008, because claimant did not establish the existence of pneumoconiosis, under 20 C.F.R. §718.202(a), or the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b), and, therefore, failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Director's Exhibit 61. Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibits 62, 63. The district director denied modification, and forwarded the case to the Office of Administrative Law Judges for a hearing, where it was assigned to Judge Bullard. Subsequently, the parties requested a decision on the record, in lieu of a hearing.

In her Decision and Order, issued on August 19, 2010, the administrative law judge credited claimant with more than thirty-seven years and seven months of coal mine employment,[1] of which at least fifteen years were underground, and adjudicated this claim pursuant to 20 C.F.R. Part 718. Decision and Order at 3, 6. The administrative law judge properly found that this claim is governed by Section 1556 of Public Law No. 111-148, which recently 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. Decision and Order at 6-8. Specifically, relevant to this living miner's claim, Section 411(c)(4) provides that 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)); Decision and Order at 6-8.

Noting that the Section 411(c)(4) presumption would be invoked if claimant could establish the existence of a totally disabling respiratory impairment, the administrative law judge first considered whether total disability was established. Decision and Order at 6, 8. Considering the new evidence submitted on modification, in conjunction with the evidence originally submitted in this subsequent claim, the administrative law judge found that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, demonstrated both a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and a basis for modification under 20 C.F.R. §725.310. Decision and Order at 10.

[1] The record indicates that claimant's coal mine employment was in Alabama. Director's Exhibit 12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Rather than invoking the Section 411(c)(4) presumption, however, the administrative law judge found that claimant had to establish, by a preponderance of the evidence, that his total disability is due to pneumoconiosis. Decision and Order at 8, *citing Lollar v. Ala. By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990)(holding, in a case where the Section 411(c)(4) presumption was not applicable, that the miner had to prove that pneumoconiosis was a substantial contributing factor in causing his total disability). The administrative law judge found that claimant failed to establish either the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), or that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that he was entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Claimant's Brief at 12. Additionally, claimant alleges that the administrative law judge erred in several ways: in admitting into evidence a reading of a June 11, 2009 x-ray submitted by employer; in failing to consider a March 2009 computerized tomography (CT) scan reading that was positive for pneumoconiosis; and in evaluating the medical opinion evidence regarding the existence of pneumoconiosis. Claimant's Brief at 8-11. Employer responds, urging affirmance of the denial of benefits. Employer challenges the applicability of the recent Section 1556 amendment to this case, but argues alternatively that, since claimant failed to establish the existence of pneumoconiosis, the Section 411(c)(4) presumption has been rebutted. The Director, Office of Workers' Compensation Programs (the Director), responds that, because claimant filed this claim after January 1, 2005 and it was pending on March 23, 2010, and because the administrative law judge accepted the parties' stipulation to more than thirty-seven years of coal mine employment and found total disability established, amended Section 411(c)(4) applies to this claim. Thus, the Director asserts, the administrative law judge erred in placing the burden on claimant to prove that he suffers from pneumoconiosis and that his disability is due to pneumoconiosis. Claimant filed a reply brief, agreeing with the Director that a remand is necessary for consideration of this case pursuant to Section 411(c)(4).[2]

[2] In his reply, claimant also renews his evidentiary assertions, and argues that employer's medical experts are biased and their opinions should have been discounted. In response, employer moves the Board to strike claimant's references to the March 2009 CT scan, which employer asserts is not of record, and to strike claimant's allegations of bias. Claimant, in turn, responds in opposition to employer's motion to strike. In view of our holdings that this case must be remanded to the administrative law judge for consideration under Section 411(c)(4), and that the administrative law judge, on remand, must allow the parties to submit additional evidence to address the change in law, we need not address these issues.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

After review of the administrative law judge's Decision and Order and the arguments on appeal, we agree that the denial of benefits must be vacated and the case remanded to the administrative law judge.

We first address employer's challenges to the application of Section 1556 to this case. Employer asserts that Section 1556, entitled "Equity for Certain Eligible Survivors," may not apply to living miners' claims, and that retroactive application of Section 1556 may be unconstitutional. Employer's Brief at 12, incorporating by reference Employer's Post Hearing Brief at 9-11. Further, employer asserts that amended Section 411(c)(4) represents a change in law and, as such, is not a proper ground upon which modification may be granted on this claim. Employer's Brief at 12. Finally, employer asserts that this case should be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court, and the promulgation of regulations by the Department of Labor implementing amended Section 411 (c)(4). Employer's Brief at 12, incorporating by reference Employer's Post Hearing Brief at 9-11. Employer's arguments lack merit.

Contrary to employer's assertion, the plain language of Section 1556(c) mandates the application of the amendments to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-211 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). Further, employer's arguments regarding the constitutionality of retroactive application of Section 1556 are substantially similar to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject them here for the reasons set forth in that decision. *Mathews*, 24 BLR at 1-198-200; *see also Stacy*, 24 BLR at 1-214; *Keene v. Consolidation Coal Co.*, 645 F.3d 844, BLR (7th Cir. 2011). Additionally, given the breadth of modification based on a mistake in fact, we reject employer's assertion that claimant is not entitled to seek

modification of the ultimate fact of entitlement. *See V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008). Finally, we deny employer's request that this case be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court, and the promulgation of regulations implementing amended Section 1556. Employer's Brief at 9-11. Consequently, we affirm the administrative law judge's determination that Section 1556 is applicable to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.

We next address the administrative law judge's finding that claimant failed to establish invocation of the Section 411(c)(4) presumption. Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or death 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.S.C. §§921(c)(4) and 932(*l*)). Contrary to the administrative law judge's finding, there is no additional requirement that claimant prove that his disability is due to pneumoconiosis. Decision and Order at 10. In this case, claimant filed his claim after January 1, 2005, he was credited with more than fifteen years of underground coal mine employment,[3] and he established a totally disabling respiratory or pulmonary impairment.[4] Accordingly, we must remand this case for the

[3] The Director, Office of Workers' Compensation Programs (the Director), states that the administrative law judge did not determine whether claimant's coal mine employment was in an underground mine, or in a surface mine in conditions substantially similar to those in an underground mine, as required for invocation of the Section 411(c)(4) presumption. Director's Brief at 3 n.5. Therefore, the Director contends that, on remand, the administrative law judge must render a finding regarding the nature of claimant's coal mine employment, in determining whether claimant is entitled to invocation of the presumption. Director's Brief at 3 n.5. Contrary to the Director's characterization, however, the administrative law judge explicitly found that claimant "prove[d] that he has worked for more than fifteen years in underground coal mines." Decision and Order at 6. The record reflects that claimant's employment was underground. Claimant testified, in his prior claim, that all of his coal mine employment was in an underground mine, and the administrative law judge incorporated his uncontradicted testimony into the record, by reference. Decision and Order at 3; Director's Exhibit 50 at 44.

[4] Employer has not challenged the finding of total disability, nor has it withdrawn its stipulation to thirty-seven years and seven months of coal mine employment, or asserted that claimant's coal mine employment was not underground.

administrative law judge to consider whether claimant has established invocation of the Section 411(c)(4) presumption.

Therefore, we vacate the administrative law judge's determination that claimant is not entitled to benefits. 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 burden of proof shifts to employer, and the administrative law judge must then determine whether employer has rebutted the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Contrary to employer's argument, as the burden of proof on rebuttal rests with employer, the administrative law judge's denial of benefits, based upon her finding that claimant did not establish the existence of pneumoconiosis by a preponderance of the evidence, cannot be affirmed. Thus, we vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.204(c), and remand this case to the administrative law judge.

On remand, the administrative law judge should 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).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated in part, 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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BETTY JEAN HALL
Administrative Appeals Judge