BRB No. 10-0208 BLA

LARRY D. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONAKAY RESOURCES, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 12/30/2010
	)	
A.T. MASSEY	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Larry D. Smith, Inez, Kentucky, *pro se*.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Paul L. Edenfield (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (08-BLA-5549) of Administrative Law Judge Linda S. Chapman 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 adjudicated this claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725, and credited claimant with twelve years of qualifying coal mine employment. The administrative law judge found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, therefore, claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) since the denial of his prior claim. Considering all of the evidence of record, however, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office Workers' Compensation Programs (the Director), has declined to file a substantive response in this appeal.[2]

By Order dated September 13, 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. *Smith v. Conakay Resources, Inc.*, BRB No. 10-0208 BLA (Sept. 13, 2010) (unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section

[1] Claimant, Larry D. Smith, filed his first application for benefits on October 16, 1998, which was denied by the district director on February 2, 1999, based on claimant's failure to establish the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 1. Claimant filed a subsequent claim for benefits on June 22, 2007, which is pending on appeal herein. Director's Exhibit 3.

[2] We affirm the administrative law judge's findings that claimant established total respiratory disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b), 725.309, as these findings, which are not adverse to claimant, are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10.

411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Employer and the Director have responded. Employer avers that, while claimant filed his application for benefits after January 1, 2005, invocation of the presumption of total disability due to pneumoconiosis is precluded, based on the administrative law judge's finding that claimant established only twelve years of coal mine employment. Alternatively, in the event that the Board remands the case, employer asserts that due process requires that employer be permitted to develop whatever new medical evidence it deems necessary to respond to the change in the law.[4] In his supplemental letter brief, the Director contends that, even though claimant filed his application for benefits after January 1, 2005 and established total respiratory disability, the amended Section 411(c)(4) has no bearing on this case in the event that the Board affirms the administrative law judge's finding of twelve years of coal mine employment. Alternatively, the Director contends that, if the Board vacates or reverses the administrative law judge's length of coal mine employment determination, the case should be remanded for the administrative law judge to consider the duration of claimant's coal mine employment and, if applicable, whether claimant is entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). Further, the Director asserts that the administrative law judge must allow the parties to proffer additional evidence on remand, consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1) if the evidence exceeds the limitations. As set forth *infra*, we vacate the administrative law judge's determination that claimant established twelve years of qualifying coal mine employment, and remand the case to the administrative law judge for further consideration.

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

[3] Section 411(c)(4) provides that if a miner establishes 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 or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[4] In addition, employer challenges the constitutionality of the recent amendments to Section 411(c)(4), 30 U.S.C. §921(c)(4), arguing that retroactive application of these provisions denies employer its right to due process and constitutes an unconstitutional taking of private property. Employer recognizes that the Board recently addressed the constitutionality of the recent amendments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010). Nevertheless, employer has raised these issues to preserve them for appeal. Employer's Supplemental Brief at 5-14.

substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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. 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 establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[5] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In addressing the merits of a case, the administrative law judge must render a determination of the length of a miner's coal mine employment. Claimant bears the burden of proof in establishing the length of his coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The administrative law judge is given great latitude in the computation of years of coal mine employment and, as such, her calculation of years of coal mine work will be upheld, when based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578 (1983).

In addressing the length of coal mine employment, the administrative law judge acknowledged claimant's allegation that he worked in the coal mines for twenty-one years, and noted the district director's determination that claimant worked for twelve years. The administrative law judge concluded that claimant established twelve years of qualifying coal mine employment that ended in 1992 because she found that this determination was supported by claimant's Social Security earnings report. Decision and Order at 3. However, when the Social Security earnings report is reviewed in its entirety, it reveals that between the years of 1970 and 1992 claimant worked for multiple companies in the coal mining industry, yet the administrative law judge did not specify which periods of employment she credited. Director's Exhibit 7. Nor did the administrative law judge address the credibility of claimant's testimony at either the formal hearing on August 6, 2009, stating that he had worked "at least 21 years," or at his

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 16 at 7.

deposition on December 10, 2007, stating that he had worked "from 18 to 21 years" in the coal mines. Hearing Transcript at 12-13, 17-20, 22-25; Director's Exhibit 16 at 5. Because the administrative law judge's Decision and Order does not set forth the specific quarters of qualifying coal mine employment she credited in claimant's Social Security earnings report, and she failed to indicate how much weight, if any, she accorded to claimant's testimony or to any other relevant evidence in the record, we are unable to discern precisely how the administrative law judge computed twelve years of coal mine employment. *See Tressler v. Allen & Garcia Co.*, 8 BLR 1-365, 1-368 (1985) (administrative law judge's computation of time will be upheld provided that it is based on a reasonable method and supported by substantial evidence); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (length of coal mine employment based on Social Security earnings record and claimant's hearing testimony is a reasonable method of computation). Accordingly, we vacate the administrative law judge's denial of benefits and her determination to credit claimant with twelve years of qualifying coal mine employment, and remand the case for further consideration of the issue. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988); *Brewster v. Director,* OWCP, 7 BLR 1-120, 1-121-122 (1984).

If, on remand, the administrative law judge credits claimant with at least fifteen years of qualifying coal mine employment and claimant is found entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), the administrative law judge must then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge must allow the parties the opportunity to submit additional evidence 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), in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is proffered, its admission must be justified by a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge