BRB No. 12-0556 BLA

JACKIE SLONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIAMOND MAY COAL COMPANY	)	
	)	
and	)	
	)	
PROGRESS FUELS CORPORATION	)	DATE ISSUED: 06/25/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Jonathan Rolfe (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-5661) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with nineteen years of qualifying coal mine employment,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), based on employer's concession that total respiratory disability is established pursuant to 20 C.F.R. §718.204(b).[3] The administrative law judge also found that claimant established invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding two reports of Dr. Vuskovich, that it submitted in rebuttal to pulmonary function and arterial blood gas studies, because the reports exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414. Employer also challenges the constitutionality of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), and its application to this case. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the award of benefits. Employer filed a reply brief, reiterating its prior arguments.[4]

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[1] Claimant filed his first claim on October 26, 1989. Director's Exhibit 1. It was finally denied by the district director on March 29, 1990, because the evidence did not establish that claimant has pneumoconiosis, that the disease arose out of coal mine work, and that he was totally disabled by the disease. *Id*. Claimant filed this claim (a subsequent claim) on August 26, 2008. Director's Exhibit 3.

[2] The administrative law judge noted that "[c]ounsel for the [e]mployer stipulated to nineteen years of coal mine employment at the hearing, but did not stipulate as to whether these years were spent underground. (Tr. 12-13)." Decision and Order at 3. The administrative law judge further found that "the [c]laimant met his burden of establishing that the work he performed above ground, primarily as a tipple operator, was substantially similar in terms of dust exposure to the work performed by underground coal miners." *Id*. at 17.

[3] As noted by the administrative law judge, in its post-hearing brief, employer withdrew the issue of total respiratory disability from contention. *See* Employer's Post-Hearing Brief at 2; Decision and Order at 15.

[4] Because the administrative law judge's finding that claimant established nineteen

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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. *See* Section 1556 of the PPACA, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). 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 claimant is 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. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

First, we will address employer's contention that the administrative law judge erred in excluding both of Dr. Vuskovich's reports from the record on the ground that they exceeded the evidentiary limitations set forth in Section 725.414. Employer argues that Dr. Vuskovich's reports were admissible as rebuttal evidence because Dr. Vuskovich analyzed and interpreted the results of pulmonary function and arterial blood gas studies reported by Dr. Baker. Employer further asserts that, because the regulations do not require an opinion or statement that objective evidence is valid, the administrative law judge improperly excluded Dr. Vuskovich's reports as inappropriate rebuttal evidence because Dr. Vuskovich did not address the validity or quality of the objective evidence he reviewed.

The administrative law judge noted that, by order dated April 4, 2012, he instructed the parties to submit position statements regarding whether the two reports of Dr. Vuskovich, that were characterized as evidence in rebuttal to pulmonary function and arterial blood gas studies, should be considered rebuttal evidence or medical reports for the purpose of the evidentiary limitations, given that "the reports failed to address the validity of the studies, and instead, offered an opinion as to the causes and degree of the

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years of qualifying coal mine employment is not challenged on appeal, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 4, 6; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[c]laimant's pulmonary and/or respiratory impairment."[6] Decision and Order at 4. After indicating the conflicting positions offered by the parties,[7] the administrative law judge noted that, in the final comments to the revised regulations, 65 Fed. Reg. 79990 (Dec. 20, 2000), the Department of Labor (the Department) explained:

> In rebuttal, each party would be able to submit one piece of evidence analyzing each piece of evidence submitted by the opposing side. For example, an operator could have each of the claimant's chest X-rays reread once, and could submit one report challenging *the validity* of each pulmonary function test submitted by the claimant.

Id. at 5 (emphasis added). Based on the parties' position statements and the Department's comments to the revised regulations, the administrative law judge stated that employer did not persuade him that Dr. Vuskovich's reports constituted permissible rebuttal evidence in this case.

The administrative law judge is granted broad discretion in resolving procedural matters, including evidentiary issues. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). A party seeking to overturn an administrative law judge's resolution of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co*., 24 BLR 1-109, 1-113 (2009), *citing Harris v. Old Ben Coal Co.*, 24 BLR 1-13, 1-17 n.1 (2007)(en banc recon.)(McGranery &

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[6] The regulations provide that each party shall be entitled to submit, in rebuttal of the opposing party's case, one physician's interpretation of each chest x-ray, pulmonary function study, arterial blood gas study, and autopsy or biopsy report that was submitted by the opposing party. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii).

[7] The administrative law judge noted that claimant moved to exclude Dr. Vuskovich's reports in their entirety because they exceeded the evidentiary limitations and employer had not offered good cause for their admission into the record. By contrast, the administrative law judge noted that employer argued that Dr. Vuskovich's reports did not exceed the evidentiary limitations because, employer alleged, the reports constituted permissible rebuttal evidence. The administrative law judge specifically noted that employer made the following arguments: that rebuttal evidence may include analysis and interpretation of evidence beyond its technical reliability, that "there is no rule or case law that limits rebuttal evidence under subsections 725.414(a)(2)(ii) or 725.414(a)(3)(ii) to whether a spirometry is valid or to whether arterial blood gases are technically valid," and that "validity" in the context of the Department of Labor's comments to the revised regulations "includes the interpretation of the medical diagnosis based on that same data." Decision and Order at 5.

Hall, JJ., concurring and dissenting), *aff'g* 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting). In this case, the administrative law judge rationally found that "validity" was used in the Department's comments to the revised regulations to refer to the inherent reliability of the pulmonary function and arterial blood gas studies, rather than a medical opinion that accepts the validity of the studies but offers an explanation regarding their significance. *See Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-153. In addition, the administrative law judge rationally found that a medical opinion that offers an explanation regarding the significance of the pulmonary function and arterial blood gas studies "is qualitatively different than a challenge to the validity of the studies, but is, in reality, a separate medical report addressing the issue of causality under the guise of rebuttal." Decision and Order at 5; *see Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-153; *see also Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-240 (2007) (en banc) (recognizing that the regulations contemplate that an opinion offered in rebuttal of the case presented by the opposing party will analyze or interpret the evidence to which it is responsive). We therefore conclude that, on the facts presented in this case, employer has not demonstrated that the administrative law judge's exclusion of Dr. Vuskovich's reports from the record was an abuse of his discretion. *See V.B.* [*Blake*], 24 BLR at 1-113.

Next, we address employer's contention that the retroactive application of amended Section 411(c)(4) of the Act in Section 1556 of the PPACA is unconstitutional, as a violation of its due process rights and an unconstitutional taking of private property, in violation of the Fifth Amendment to the United States Constitution. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-5 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the reason set forth in that decision. *See also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

In addition, employer contends that amended Section 411(c)(4) does not apply to subsequent claims. Employer argues that the date that the initial claim was filed should be the controlling date for applying the amended statute. Contrary to employer's contention, the plain language of Section 1556(c) of the PPACA mandates the application of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *See Stacy*, 671 F.3d at 388, 25 BLR at 2-82-83; *see also Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012) (holding that the automatic entitlement provisions of amended Section 932(*l*) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA). Thus, we reject employer's assertion that the presumption at amended Section 411(c)(4) does not apply to subsequent claims.

In light of employer's concession that total respiratory disability is established at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co*., 23 BLR 1-1 (2004).

Further, in view of our affirmance of the administrative law judge's finding that claimant established nineteen years of qualifying coal mine employment and employer's concession that total respiratory disability is established at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Finally, because employer does not challenge the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's award of benefits. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

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