BRB No. 12-0118 BLA

FREELIN D. COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COLEMAN & YATES COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/07/2012
	)	
Employer-Petitioner	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Ann Marie Scarpino (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5815) of Administrative Law Judge Linda S. Chapman 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 23.92 years of underground coal mine employment, and adjudicated this claim, filed on September 15, 2009, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that the new evidence submitted in support of this subsequent claim established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby invoking the rebuttable presumption of total disability due to pneumoconiosis, and establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the new evidence outweighed the earlier evidence, and that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §§921(c)(4), as amended by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption.[3] Accordingly, benefits were awarded.

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[1] Claimant filed his first claim on August 11, 1987, which was ultimately denied by Administrative Law Judge Daniel A. Sarno on April 6, 1994. Claimant's request for modification was denied by Judge Sarno on January 17, 1996, and affirmed by the Board on January 27, 1997. *Coleman v. Coleman & Yates Coal Co*., BRB No. 96-0634 BLA (Jan. 27, 1997)(unpub.). Claimant's request for modification was denied by Administrative Law Judge Joseph E. Kane on January 22, 1999. Director's Exhibit 1.

Claimant's second claim was filed on February 13, 2006 and denied by the district director on November 29, 2006, because claimant failed to establish the existence of pneumoconiosis or that his total respiratory disability is due to pneumoconiosis. Claimant's request for modification was denied by the district director on August 8, 2007. Director's Exhibit 2. No further action was taken on this claim.

[2] 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. Relevant to this living miner's claim, the amendments 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 if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[3] Upon invocation of the amended Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not

On appeal, employer does not challenge the administrative law judge's findings on the merits of entitlement, but challenges the constitutionality of the PPACA. Employer argues that the application of amended Section 411(c)(4) to this case constitutes a denial of due process and an unconstitutional taking of private property. Employer maintains that the amendments to the Act are not severable if all or portions of the PPACA are found to be unconstitutional, and requests that this case be held in abeyance pending a decision by the United States Supreme Court regarding the constitutionality of the PPACA and the severability of its non-health care provisions, and a decision by the United States Court of Appeals for the Fourth Circuit regarding the constitutionality of retroactive application of the amendments contained in Section 1556 of the PPACA. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging the Board to reject employer's constitutional arguments and its request to hold the case in abeyance, and to affirm the award of benefits.

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. 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).

Subsequent to the filing of employer's brief, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S. Ct. 2566 (2012). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,[4] has rejected employer's argument that retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Thus, the

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arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

[4] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was 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 5.

administrative law judge properly found that the provisions of amended Section 411(c)(4) are applicable to this claim.[5]

As employer raises no other legal issues, nor any substantive challenge to the administrative law judge's findings on the merits of entitlement, we affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[5] Simultaneous with the filing of its Brief in Support of Petition for Review, employer filed a separate motion, requesting that the Board hold this case in abeyance. Employer's motion is denied as moot.