BRB No. 12-0188 BLA

SHIRLEY M. FIELDS (Widow of HERSHEL FIELDS)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 11/29/2012
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.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (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 (2010-BLA-5764) of Administrative Law Judge Linda S. Chapman rendered on a request for modification

of the denial of a survivor's claim[1] filed on December 12, 2007 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).

On November 4, 2009, the administrative law judge denied survivor's benefits, finding that, although the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). On April 8, 2010, claimant filed a timely request for modification pursuant to 20 C.F.R. §725.310. Following a hearing, the administrative law judge credited the miner with twenty-nine years of coal mine employment, as stipulated by the parties, and determined that the evidence was insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, but that employer agreed that the miner had simple pneumoconiosis. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge found that "there was no dispute" that the miner had a totally disabling respiratory impairment and more than fifteen years of underground coal mine employment. The administrative law judge found that claimant is entitled to the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to amended Section 411(c)(4), and that employer failed to establish rebuttal of the

[1] Claimant is the widow of the miner, who died on July 30, 2007. Director's Exhibit 9. The miner's first claim for benefits, filed on February 10, 1981, was finally denied by the district director on April 1, 1981, because the miner failed to establish total disability due to pneumoconiosis. The miner's second claim was filed on June 2, 2005, and was finally denied by Administrative Law Judge Linda S. Chapman on August 22, 2007, because the miner failed to establish total disability due to pneumoconiosis and a change in an applicable condition of entitlement. Claimant's request for modification of the denial of the miner's claim was denied by the district director on October 1, 2008. No further action was taken on the miner's claim, and the denial of benefits became final.

[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 survivor's claim, Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment or comparable surface mine employment, and has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. *Id*.

presumption by showing that the miner did not have pneumoconiosis or that his totally disabling respiratory impairment did not arise from his coal mine employment. The administrative law judge further determined that, because claimant established that the miner was entitled to benefits at the time of his death, claimant was automatically entitled to survivor's benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*)(hereinafter Section 932(*l*)).[3] The administrative law judge concluded that granting modification pursuant to 20 C.F.R. §725.310 would render justice under the Act and, accordingly, awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case, arguing that retroactive application thereof constitutes a denial of due process and an unconstitutional taking of private property, and that a change in law is not a proper ground for modification. Alternatively, employer requests that this case be held in abeyance, pending the promulgation of implementing regulations.[4] Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, arguing that employer need only prove that the miner's death was unrelated to pneumoconiosis. Employer further asserts that the administrative law judge erred in concluding that claimant is derivatively entitled to benefits under amended Section 932(*l*). Lastly, employer challenges the administrative law judge's finding that granting claimant's request for modification would render justice under the Act. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that claimant is not derivatively entitled to benefits under amended Section 932(*l*), and that the administrative law judge applied the wrong rebuttal standard under amended Section 411(c)(4).[5]

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[3] The amendments also revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that the survivor of a miner who was receiving benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

[4] Employer's additional request, that this case be held in abeyance pending the resolution of the constitutional challenges to the PPACA, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings of twenty-nine years of coal mine employment; the existence of simple, but not complicated, pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203; total respiratory disability pursuant to 20 C.F.R. §718.204(b); and her finding that employer could not establish rebuttal of the amended Section 411(c)(4) presumption with proof that the miner did not have pneumoconiosis. *See Skrack v. Island*

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.[6] 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).

Initially, we reject employer's contention that retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005 constitutes a due process violation and an unlawful taking of private property, for the same reasons the Board rejected substantially similar arguments 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). *See W.Va. CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Furthermore, we deny employer's request that the case be held in abeyance pending the promulgation of implementing regulations. *See Mathews*, 24 BLR at 1-200; *Fairman v. Helen Mining Co.* 24 BLR 1-225, 1-229-30 (2011). We also reject employer's assertion that application of amended Section 411(c)(4) is not appropriate in this case involving a request for modification of the denial of claimant's survivor's claim. The plain language of Section 1556(c) of Public Law No. 111-148, 124 Stat. 119 (2010), mandates the application of the amendments contained therein to all claims filed after January 1, 2005 that are pending on or after March 23, 2010. *See Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-53 (2012). Here, because claimant filed her claim after January 1, 2005, and timely requested modification such that the claim was pending on March 23, 2010, amended Section 411(c)(4) is applicable, and we affirm the administrative law judge's finding that claimant is entitled to invocation of the rebuttable presumption thereunder. However, we agree with employer and the Director that the automatic entitlement provisions at amended Section 932(*l*) are not applicable in this case, as the miner was not receiving benefits at the time of his death, and his claim for benefits was finally denied. *See Campbell*, 662 F.3d at 252, 25 BLR at 2-43. We, therefore, vacate the administrative law

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Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Employer's Brief at 6; Hearing Transcript at 15-16.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

judge's finding that claimant is derivatively entitled to benefits pursuant to amended Section 932(*l*).

Turning to the issue of rebuttal under amended Section 411(c)(4), the Board has recently held that, in a survivor's claim filed after January 1, 2005, in order to rebut the presumption, the party opposing entitlement must establish either that the miner did not have pneumoconiosis, or that his death did not arise from his coal mine employment. *Copley v. Buffalo Mining Co.*, BLR , BRB No. 11-0713 BLA (July 31, 2012); *see* Fed. Reg. 19,456, 19,475 (Mar. 30, 2012)(to be codified at 20 C.F.R. §718.305). In the present case, the administrative law judge applied the wrong rebuttal standard, as she required employer to prove that the miner's totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment, rather than requiring employer to prove that the miner's death was unrelated to his coal mine employment. Consequently, we vacate the administrative law judge's finding that employer did not establish rebuttal, and her finding that modification pursuant to Section 725.310 is appropriate, and remand this case for the administrative law judge to reevaluate the relevant evidence and determine whether employer has rebutted the amended Section 411(c)(4) presumption by proving that the miner's death did not arise out of dust exposure in coal mine employment. On remand, the administrative law judge is instructed to reassess the conflicting medical opinions in light of the physicians' qualifications and explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). If, on remand, the administrative law judge again finds that rebuttal is not established, she must determine whether granting modification pursuant to Section 725.310 would render justice under the Act.[7] *See Sharpe v. Director, OWCP*, 495 F.3d 125, 130-131, 24 BLR 2-56, 2-70-71 (4th Cir. 2007).

[7] Employer argues that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), by providing only a "cursory" opinion that granting modification would render justice under the Act. Employer's Brief at 20.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, 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