

BRB No. 10-0117 BLA

GARY LEE HOWARD)
)
 Claimant-Petitioner)
)
 v.)
)
 MARTIN COUNTY COAL) DATE ISSUED: 09/29/2010
 CORPORATION)
)
 and)
)
 A.T. MASSEY, C/O ACORDIA)
 EMPLOYERS SERVICE)
)
 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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (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:

Claimant appeals the Decision and Order - Denying Benefits (2007-BLA-05351) of Administrative Law Judge Kenneth A. Krantz, rendered on a subsequent claim filed on January 13, 2006, 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).¹ The administrative law judge noted that claimant worked “at least” sixteen years as a coal miner and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. Decision and Order at 2-3. The administrative law judge initially determined that this subsequent claim was timely filed and noted that, in the prior claim, claimant established the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled by a respiratory or pulmonary impairment. *See* 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2). However, the administrative law judge found that the medical evidence developed since the prior denial of benefits was insufficient to establish that claimant’s total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge therefore found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

¹ Claimant filed his first application for black lung benefits on December 16, 1991. Decision and Order at 1. In a Decision and Order dated June 14, 1994, Administrative Law Judge Paul H. Teitler found that the evidence was insufficient to establish any element of entitlement and denied benefits. Director’s Exhibit 29. Claimant filed his second claim for benefits on February 10, 1998. Director’s Exhibit 1. In a Decision and Order on Remand dated June 13, 2001, Administrative Law Judge Thomas F. Phalen, Jr., found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment, but insufficient to establish that claimant’s total disability was due to pneumoconiosis. *Id.* Benefits were denied. Claimant appealed to the Board, which affirmed Judge Phalen’s denial of benefits. *Howard v. Martin County Coal Corp.*, BRB No. 01-0771 BLA (May 20, 2002) (unpub.). Claimant appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the denial of benefits on April 12, 2004. Claimant took no further action until he filed the current subsequent claim. Director’s Exhibit 3. After the district director issued a Proposed Decision and Order awarding benefits, employer requested a formal hearing and the case was referred to the Office of Administrative Law Judges. Director’s Exhibit 39. Administrative Law Judge Kenneth A. Krantz conducted a hearing on December 13, 2007, and issued his Decision and Order – Denying Benefits on September 30, 2009, which is the subject of this appeal.

On appeal, claimant challenges the administrative law judge's finding that the medical evidence developed since the prior denial of benefits was insufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in response to claimant's appeal of the denial 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.² 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).

By Order dated June 18, 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, which amended the Act with respect to the entitlement criteria for certain claims and became effective on March 23, 2010.³ *Howard v. Martin County Coal Corp.*, BRB No. 10-0117 BLA (June 18, 2010)(unpub. Order). Claimant, employer and the Director have responded.

Claimant states that the recent amendments to the Act affect this case, as the present claim was filed after January 1, 2005; claimant established over fifteen years of coal mine employment; and claimant has a totally disabling pulmonary impairment. Thus, claimant asserts that the case must be remanded to the administrative law judge for consideration under the amended version of Section 411(c)(4) of the Act. *See* 30 U.S.C. §921(c)(4).

² The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1-3.

³ Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 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 were pending on or after March 23, 2010. Under Section 411(c)(4), 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.S.C. §921(c)(4)).

Employer responds that, although Section 1556 may affect this case, the retroactive application of the amended version of Section 411(c)(4) to this claim is unconstitutional, as it violates employer's right to due process and constitutes a taking of private property. Alternatively, employer contends that, if the Board remands this case for consideration of claimant's entitlement to the Section 411(c)(4) presumption, due process requires that the administrative law judge allow the parties the opportunity to submit additional, relevant evidence to address the change in law.

The Director states that the recent amendments to the Act may affect this case, as the present claim was filed after January 1, 2005. Thus, the Director maintains that the case must be remanded to the administrative law judge to determine whether claimant is entitled to the Section 411(c)(4) presumption.⁴ 30 U.S.C. §921(c)(4). The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge, on remand, must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414, or to establish good cause for exceeding those limitations under 20 C.F.R. §725.456(b)(1).

Based upon the parties' responses, and our review, we agree that this case is affected by Section 1556 of Public Law No. 111-148, and that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge, for consideration of whether claimant is entitled to invocation of the Section 411(c)(4) presumption. If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Thus, we vacate the administrative law judge's findings under 20 C.F.R. §718.204(b), (c) and remand this case to the administrative law judge for consideration of whether claimant is entitled to the benefit of

⁴ The Director, Office of Workers' Compensation Programs (the Director), also notes that the administrative law judge did not make explicit findings regarding the length or nature of claimant's coal mine employment. Director's Supplemental Brief at 2. The Director maintains that, because such findings are necessary in order to determine whether claimant has invoked the Section 411(c)(4) presumption, on remand the administrative law judge should specifically address whether claimant established at least fifteen years of underground coal mine employment or employment in a surface mine in substantially similar conditions. *Id.* The Director further maintains that, if the administrative law judge finds that the requisite coal mine employment criteria are met, the administrative law judge must also determine whether claimant can establish that he suffers from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *Id.*

the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).⁵ If the administrative law judge finds that the presumption has been invoked, he must determine whether the medical evidence is sufficient to rebut it.

On remand, the administrative law judge must 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). Because the administrative law judge has not yet considered this claim under the amended version of Section 411(c)(4) of the Act, however, we decline to address, as premature, employer's argument that the retroactive application of the amendment is unconstitutional.

⁵ We agree with the Director that, although claimant established he was totally disabled in his prior claim, this finding is not binding in this subsequent claim because the prior claim was ultimately denied and employer was not adversely affected and therefore, did not have standing to appeal. *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge