BRB No. 12-0027 BLA

LARRY D. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONAKAY RESOURCES, INCORPORATED	)	DATE ISSUED: 10/31/2012
	)	
and	)	
	)	
A.T. MASSEY	)	
	)	
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 on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Tiffany B. Davis and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Richard A. Seid (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 on Remand Awarding Benefits (2008-BLA-5549) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim filed on June 22, 2007,[1] pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the second time. In her initial decision, the administrative law judge credited claimant with twelve years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2) and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). However, in reviewing the merits of the claim, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the denial of benefits because the administrative law judge did not explain the basis for her finding of twelve years of coal mine employment,[2] and specifically remanded the case for consideration under amended Section 411(c)(4) of the Act.[3] *Smith v. Conakay Resources, Inc.*, BRB No. 10-0208 BLA, slip. at 5 (Dec. 30, 2010) (unpub.). The Board instructed the administrative law judge on remand to determine whether claimant was entitled to the amended Section

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[1] Claimant filed an initial claim on October 16, 1998, which was denied by the district director on February 2, 1999, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until he filed the current subsequent claim. Director's Exhibit 3.

[2] The Board noted that the administrative law judge failed to set forth the specific quarters of qualifying coal mine employment she credited in claimant's Social Security earnings report and failed to indicate how much weight, if any, she accorded to claimant's testimony or any other relevant evidence in the record in reaching her finding. *Smith v. Conakay Resources, Inc.*, BRB No. 10-0208 BLA, slip op. at 5 (Dec. 30, 2010) (unpub.).

[3] Subsequent to the administrative law judge's denial of benefits, amendments to the Black Lung Benefits Act (the Act) contained in the Patient Protection and Affordable Care Act (PPACA) were enacted. Relevant to this 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). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and the evidence establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

411(c)(4) presumption and, as necessary, to determine whether employer established rebuttal of that presumption. *Id.* The Board also instructed the administrative law judge to allow the parties the opportunity to submit additional evidence to address the change in the law, in compliance with the evidentiary limitations at 20 C.F.R. §725.414. *Id*.

On remand, the administrative law judge found that claimant worked fifteen and three-quarter years in underground coal mine employment and, because he established total disability at 20 C.F.R. §718.204(b)(2), he was entitled to invocation of the amended Section 411(c)(4) presumption. The administrative law judge also determined that employer failed to establish rebuttal of the presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the application of amended Section 411(c)(4) is premature for lack of implementing regulations.[4] Further, employer argues that the rebuttal provisions of Section 411(c)(4) are inapplicable to coal mine operators. With respect to invocation, employer argues that the administrative law judge erred in crediting claimant with fifteen and three-quarter years of underground coal mine employment. Employer also challenges the administrative law judge finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, (the Director), has filed a letter brief, urging the Board to reject employer's arguments pertaining to the applicability of amended Section 411(c)(4). The Director also argues that, if the Board affirms the administrative law judge's finding of fifteen years of coal mine employment, the Board should reject employer's arguments regarding rebuttal of the presumption.[5] Employer also filed a reply brief, reiterating its contentions on appeal.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

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[4] Employer's request to hold the case in abeyance pending resolution of the constitutional challenges to the PPACA is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

[5] The Director, Office of Workers' Compensation Programs, does not take a position in this appeal as to whether claimant has fifteen years of qualifying coal mine employment.

[6] We affirm the administrative law judge's findings that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), as those findings are unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and is in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Application of the Amendments

We reject 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 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 also Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, for the reasons set forth in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2010), we also reject employer's argument that the rebuttal provisions at amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. *See also Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).[8] Lastly, there is no merit to employer's assertion that application of amended Section 411(c)(4) is barred, pending promulgation of regulations implementing the amendments. *See Rose*, 614 F.2d at 939; 2 BLR at 2-43*; Mathews*, 24 BLR at 1-201.

II. Invocation of the Presumption/Length of Coal Mine Employment

The length of a miner's coal mine employment must be determined pursuant to 20 C.F.R. §725.101(a)(32), which provides, in pertinent part:

[7] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 1-147, 4-3, 16-8; Hearing Transcript at 18. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[8] We deny employer's request to remand the case for further evidentiary development, based on employer's assertion that it was unaware of the rebuttal standard to be applied when it was developing its case. Employer was given the opportunity on remand to develop evidence to address the change in law, pursuant to the administrative law judge's Orders dated May 31, 2011 and July 7, 2011.

> (i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act.
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> (ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of coal mine employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.
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> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mining employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(i)-(iii); *see* 20 C.F.R. §725.301.

In this case, claimant alleged twenty-one years of coal mine employment on his application for benefits. Director's Exhibit 3. The administrative law judge found that claimant testified at the hearing that he worked for at least eighteen years in underground mines, but could not remember the exact beginning or ending dates of his employment. Decision and Order on Remand at 4; *see* Hearing Transcript at 13; Director's Exhibit 16.

In computing the length of claimant's coal mine employment, the administrative law judge prepared a chart identifying the number of quarters of coal mine employment she found each year, from 1974 to 1992, based on her consideration of the evidence "taken together."[9] Decision and Order on Remand at 4-5. The administrative law judge

[9] The administrative law judge indicated that she considered claimant's Social Security earnings report; an August 14, 2007 letter from Apollo Mining Services; employer's Operator Response and Controversion; the Description of Coal Mine Work,

stated that claimant's Social Security earnings report "reflects that for most of his coal mine employment, [claimant] consistently worked for four quarters each year, earning above $50.00 each quarter," with the exception of 1974, 1976 and 1977, when claimant did not work for all four quarters, and in 1992 when he worked only the first two quarters for employer.[10] *Id.* at 6. The administrative law judge considered claimant's hearing testimony and the Employment History Form (CM-911a) "to be generally consistent with his Social Security earnings records." *Id.* The administrative law judge added together the quarters of coal mine employment listed in her chart and concluded that claimant established fifteen and three quarters years of coal mine employment. *Id*. The administrative law judge specifically rejected employer's request that she apply the formula at 20 C.F.R. §725.101(a)(32)(iii), noting that it was inapplicable, based on her computation findings, and "goes solely to the issue of the identification of the responsible operator." *Id*.

Employer argues that the administrative law judge erred in finding that claimant's Social Security earnings report showed that claimant worked for four quarters in each year of his coal mine employment, as the report lists only annual earnings from 1978 to 1992. Employer contends that, because the evidence was insufficient to establish the beginning and ending dates of claimant's coal mine employment, the administrative law judge was required to apply the formula at 20 C.F.R. §725.101(a)(32)(iii). Employer also asserts that, based on the formula, claimant has established 12.44 years of qualifying coal mine employment and, therefore, is not entitled to the presumption at amended Section 411(c)(4).[11] Employer also argues that the administrative law judge erred in finding that claimant's testimony was consistent with the Social Security earnings report and in crediting claimant's work at Preparation Plant Maintenance, Incorporated, in 1992, as coal mine employment, without addressing claimant's specific deposition testimony that he "never worked at a preparation plant." Employer's Brief in Support of Petition for Review at 18, *quoting* Director's Exhibit 16 at 19.

Form (CM-913); and claimant's Employment History Form (CM-911a). Decision and Order on Remand at 5.

[10] The chart prepared by the administrative law judge reflects that claimant worked for two quarters in 1974; four quarters in 1975; one quarter in 1976; two quarters in 1977; four quarters each year from 1978-1991; two quarters in 1992. Decision and Order on Remand at 4-5.

[11] Employer notes, however, that the record, at best, could support a finding of 14.22 years of coal mine employment. Employer's Reply Brief at 7 n.6.

Employer's arguments have merit, in part. As an initial matter, the administrative law judge stated incorrectly that the formula at 20 C.F.R. §725.101(a)(32)(iii) "goes solely to the issue of the identification of the proper responsible operator" and that it cannot be used to determine a miner's length of coal mine employment for purposes of invocation of the amended Section 411(c)(4) presumption. Decision and Order on Remand at 5. The Department of Labor has stated that the definition of one year of coal mine employment is the same for identification of a responsible operator and application of the presumptions under the Act. *See* 65 Fed. Reg. 79,951 (Dec. 20, 2000) (20 C.F.R. §725.101(a)(32) contains a "single definition with general applicability."); Director's Brief at 3. n.4.

Contrary to employer's argument, however, there is no regulatory requirement that an administrative law judge apply the formula at 20 C.F.R. §725.101(a)(32)(iii) in determining the length of a miner's coal mine employment. Rather, the use of the formula is discretionary. 20 C.F.R. §725.101(a)(32)(iii). An administrative law judge may rely on any credible evidence to determine the dates and length of coal mine employment, and any reasonable method of computation will be upheld, if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In this case, for the period of 1974-1977, we conclude that the administrative law judge permissibly relied on the Social Security earnings report and reasonably credited claimant with coal mine employment for each quarter that he earned above $50.00, including: two quarters in 1974 for Smith Coal Company; four quarters in 1975 for Orison Coal Company and Brown & Greer Enterprises; one quarter in 1976 for Danny Boy Coal Company; and two quarters in 1977 for Danny Boy Coal Company, J & M. Coal Company and Teresa Coal Company. Decision and Order on Remand at 4, 6; Director's Exhibit 7. We therefore affirm the administrative law judge's finding that claimant established two and one-quarter years of coal mine employment from 1974-1977. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 335, 24 BLR 2-1, 2-24-25 (4th Cir. 2007); *Muncy*, 25 BLR at 1-27; *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003).

However, we agree with employer that, because the Social Security earnings report does not provide a quarterly breakdown of claimant's earnings from 1978 through 1992, and lists only the annual earnings for those years, the administrative law judge must explain her finding, based on the Social Security earnings report, that "claimant consistently worked for four quarters in each year" from 1978-1991. Decision and Order on Remand at 6; Director's Exhibit 7. The administrative law judge has also failed to explain how claimant's testimony corroborates the Social Security earnings report in terms of establishing that claimant worked for four quarters in any given year from 1978-1991. Thus, because the administrative law judge has not identified the bases for her

determination that claimant established fifteen and three-quarter years of qualifying coal mine employment, in accordance with the Administrative Procedure Act (APA),[12] we vacate that determination and her finding that claimant invoked the presumption at amended Section 411(c)(4). We, therefore, vacate the award of benefits and remand the case for further consideration.

III. Remand Instructions

On remand, the administrative law judge must select a reasonable method by which to calculate the length of claimant's coal mine employment and explain the bases for her findings in accordance with the APA. If the administrative law judge finds that the evidence is insufficient to establish the beginning and ending dates of claimant's coal mine employment or she finds that any of claimant's work lasted less than a calendar year, the administrative law judge may apply the formula at 20 C.F.R. §725.101(a)(32)(iii).[13] If the administrative law judge finds that claimant has established fifteen years of qualifying coal mine employment, she may reinstate her finding that claimant is entitled to the invocation of the amended Section 411(c)(4) presumption and, further, reinstate the award of benefits. Employer may then appeal from the award of benefits and reassert its arguments concerning the administrative law judge's finding that employer did not rebut the presumption.[14] If claimant is unable to establish the fifteen years of qualifying coal mine employment necessary for invocation of the amended Section 411(c)(4) presumption, the administrative law judge must consider whether claimant has established entitlement pursuant to 20 C.F.R. Part 718.

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[12] The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law.

[13] The administrative law judge may find that claimant established six years of qualifying coal mine employment for the years of 1979, 1982, 1984, and 1989-1991, as employer concedes that claimant has six years of combined coal mine employment for this period, based on application of the formula set forth at 20 C.F.R. §725.101(a)(32)(iii). Employer's Brief in Support of Petition for Review at 12-15. With regard to claimant's coal mine employment in 1992, the administrative law judge should address the significance, if any, of claimant's deposition testimony that he did not work at a preparation plant.

[14] Because we have vacated the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption, employer's arguments relevant to rebuttal of the presumption are not ripe for consideration and we decline to address them in this appeal.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding 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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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge