BRB No. 12-0074 BLA

CECIL MARLOW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOUNTAINSIDE COAL COMPANY	)	
	)	DATE ISSUED: 10/24/2012
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 Award of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Michelle S. Gerdano (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 Award of Claim (2010-BLA-05683) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on July 20, 2009.[1]

The administrative law judge credited claimant with twenty years of coal mine employment,[2] and noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this 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 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. Pub. L. No. 111-148, §1556(a), 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 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).

Applying amended Section 411(c)(4), the administrative law judge found that claimant worked as a surface miner for twenty years. The administrative law judge determined that claimant's surface coal mine employment took place in dusty conditions that were substantially similar to those in an underground mine. Additionally, the administrative law judge found that the new medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that employer did not rebut the presumption. Alternatively, the administrative law judge found that claimant established,

[1] Claimant's first claim for benefits, filed on June 19, 1991, was finally denied by the district director on November 4, 1991, because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant's second claim for benefits, filed on October 29, 1993, was finally denied by the district director on November 8, 1994, because claimant did not establish entitlement or a material change in conditions. Claimant filed his current claim on July 20, 2009.

[2] The record indicates that claimant's coal mine employment was in Tennessee. Director's Exhibits 1, 2. 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).

by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Accordingly, the administrative law judge awarded benefits, commencing as of July 2009, the month in which claimant filed his current subsequent claim.

On appeal, employer challenges the administrative law judge's application of Section 411(c)(4) to this case. Employer further asserts that the administrative law judge erred in finding that claimant's employment as a surface miner was substantially similar to underground coal mine employment. Finally, employer challenges the administrative law judge's alternative finding that claimant established entitlement pursuant to 20 C.F.R. Part 718, by a preponderance of the evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, arguing that the administrative law judge properly applied Section 411(c)(4) to this case, and that he properly found claimant's surface mining work to be qualifying coal mine employment for purposes of the Section 411(c)(4) presumption.[3]

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).

Employer initially asserts that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 6-18. Employer's contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision. Consequently,

[3] Employer does not challenge the administrative law judge's findings that the new medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and, thus, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Employer also does not challenge the administrative law judge's finding that employer did not meet its rebuttal burden 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). Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, which was filed after January 1, 2005, and was pending on March 23, 2010.[4] Accordingly, we turn to employer's contentions regarding invocation of the Section 411(c)(4) presumption.

Employer challenges the administrative law judge's finding that claimant worked for at least fifteen years in surface mining in dust conditions substantially similar to those in an underground mine. Employer specifically asserts that claimant provided no evidence as to the dust conditions prevailing in underground employment.

Contrary to employer's argument, to establish that his or her work conditions were substantially similar to those in an underground mine, a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011).

In this case, the administrative law judge analyzed claimant's testimony regarding his working conditions as a surface miner. Decision and Order at 8. The administrative law judge found that claimant's testimony established that he worked in extremely dusty conditions when he operated a rock drill in surface mining. *Id.* at 16. Based on his consideration of the evidence, the administrative law judge found that claimant's testimony established that his surface mine work took place in dusty conditions comparable to those in an underground mine:

> Claimant testified that he operated the rock drill without a cab for [eleven] years. Claimant then operated a rock drill with a cab for another [ten] to [eleven] years and the last rock drill he operated had a cab. However, Claimant testified the cab did not do a good job of keeping out the dust. He explained that the dust would come through the bottom of the doors. Claimant would have [to] clean out the cab's air conditioner to keep out the dust. Every three to four months, Claimant would have to clean dust out of

[4] Employer's request that this case be held in abeyance pending challenges in the federal courts to the constitutionality of the amendments to the Act is denied. Additionally, employer's request that this case be held in abeyance pending the resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

> the cab's air conditioner. . . . Claimant testified that operating the drill without a cab was really dusty. He stated that the controls of the drill would become so dusty, that if you didn't know how to control the drill, you would not know how to shut off the drill.
>
> . . . I find Claimant to have worked in extremely dusty conditions and that he was exposed to sufficient coal dust in his surface coal mine employment. Therefore, I find that Claimant has met his burden to show that his exposure [to dust in twenty years of surface mining] was an equivalent to [twenty] years of underground mining.

Decision and Order at 8 (internal record citations omitted).

Because it is based upon substantial evidence, the administrative law judge's finding, that claimant's surface mine employment occurred in dust conditions substantially similar to those in an underground mine, is affirmed. *See Leachman*, 855 F.2d at 512.

In light of our affirmance of the administrative law judge's findings that claimant worked for at least fifteen years in qualifying coal mine employment, and that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Further, as we previously affirmed, as unchallenged, the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption, we affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We, therefore, need not address employer's challenges to the administrative law judge's alternative finding that claimant established entitlement pursuant to 20 C.F.R. Part 718, by a preponderance of the evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 18-20; Employer's Brief at 18-20.

Finally, employer asserts that, having found claimant entitled to benefits, the administrative law judge erred in awarding those benefits as of July 2009, the month in which claimant filed his subsequent claim. Employer's Brief at 20. In a miner's claim, benefits are payable beginning with the month of onset of disability due to pneumoconiosis. 20 C.F.R. §725.503. Where the evidence does not establish the month of onset, benefits shall be payable beginning with the month during which the claim was filed, unless credited medical evidence establishes that claimant was not totally disabled at some point subsequent to the filing date of his claim. 20 C.F.R. §725.503; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In a subsequent claim, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d)(5).

Here, the administrative law judge found that claimant was totally disabled due to pneumoconiosis by December 1, 2009, based on Dr. Al-Khasawneh's opinion, and stated that it was reasonable to expect that claimant had the same symptoms just a few months earlier on July 20, 2009, when he filed his subsequent claim. Decision and Order at 20. Contrary to employer's argument, because the administrative law judge did not credit any contrary evidence prior to the date of Dr. Al-Khasawneh's opinion of total disability due to pneumoconiosis, it was not error to award benefits beginning with the date of filing. *See Edmiston*, 14 BLR at 1-69.

Accordingly, the administrative law judge's Decision and Order Award of Claim 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