BRB No. 09-0825 BLA

A.J. THORNSBERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHEELWRIGHT MINING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 09/07/2010
METLIFE INSURANCE OF CONNECTICUT	)	
	)	
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-Denial of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

John Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer/carrier.

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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (07-BLA-5698) of Administrative Law Judge Joseph E. Kane rendered on a subsequent claim[1] filed 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). The administrative law judge credited claimant with 16.25 years of coal mine employment,[2] and found that the medical evidence developed since the denial of claimant's prior claim established that he 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 established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of claimant's claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.

By Order dated June 8, 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. The Director and employer have responded.

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[1] Claimant's first claim for benefits, filed on June 1, 1994, was denied as abandoned on November 25, 1997. Director's Exhibit 1 at 2, 140. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Claimant filed his current claim on June 19, 2006. Director's Exhibit 3.

[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, 1-202 (1989)(*en banc*); Decision and Order at 2 n.1; Director's Exhibit 1 at 138.

The Director states that a recent amendment to the Act is applicable to this case, as the present claim was filed after January 1, 2005, claimant was credited with 16.75 years of coal mine employment, and the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the Director maintains that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of whether claimant can establish invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4).

Employer states that the amendment to Section 411(c)(4) "is potentially relevant to this claim," and requests that this case be remanded to the district director "to allow for proper development of the issues under the newly amended statutory provisions . . . ." Employer's Supplemental Brief at 2, 5.

After review of the parties' responses, we are persuaded that the Director is correct in maintaining 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.[4] If the administrative law judge, on remand, finds that claimant has established invocation of the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption by showing that claimant does not have pneumoconiosis or that his total disability "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge, on remand, should 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*

[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 are pending on or after March 23, 2010. Director's Brief at 1-2. 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.SC. §921(c)(4)).

[4] Employer has not challenged the administrative law judge's finding of total respiratory disability, or his finding that claimant had 16.25 years of coal mine employment. Employer states, however, that on remand, claimant will bear the burden to demonstrate that he worked for at least fifteen years in "qualifying underground employment or comparable employment. . . ." Employer's Supplemental Brief at 4.

Board, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Thus, although employer requests a remand to the district director for the parties to develop additional evidence, we agree with the Director that a remand to the administrative law judge is appropriate. Further, as the Director states, 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).

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings 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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REGINA C. McGRANERY
Administrative Appeals Judge