

BRB No. 12-0403 BLA

IMOGENE SHEPHERD)
(Widow of TRAMBLE SHEPHERD))
)
 Claimant-Respondent)
)
 v.)
)
INCOAL, INCORPORATED) DATE ISSUED: 04/19/2013
)
 and)
)
AMERICAN BUSINESS & MERCANTILE)
INSURANCE MUTUAL, INCORPORATED)
)
 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 Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery Law Office), Prestonsburg, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-5618) of Administrative Law Judge Peter B. Silvain, Jr., with respect to a survivor's claim filed on August 27, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ The administrative law judge determined that employer was the properly designated responsible operator, and that the miner had 15.25 years of underground coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge also found that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer, in its brief and reply brief, argues that the administrative law judge erred in finding that it was the properly designated responsible operator. Employer also asserts that the administrative law judge erred in determining that the miner had 15.25 years of underground coal mine employment and, therefore, erred in invoking the amended Section 411(c)(4) presumption. Further, employer argues that the administrative law judge did not properly weigh the evidence in determining that employer failed to rebut the presumption.

Claimant responds, urging affirmance of the award of benefits, but defers to the Director, Office of Workers' Compensation Programs (the Director), on the responsible operator issue. The Director filed a motion to remand in which he urges the Board to remand the case for the administrative law judge to consider all of the evidence relevant to the responsible operator issue. The Director further asserts that the findings in the

¹ Claimant is the widow of the miner, Tramble Shepherd, who died on July 31, 2008. Director's Exhibit 11. The miner filed a claim for benefits on April 6, 1987, which was finally denied by Administrative Law Judge Daniel J. Roketenetz on June 23, 1989. Director's Exhibit 1.

² Amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

miner's claim do not preclude a finding that employer is liable in the survivor's claim. The Director also maintains that the administrative law judge acted within his discretion in considering the preamble to the amended regulations when weighing the medical opinion evidence.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 supported by substantial evidence, is rational, and is in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Responsible Operator

The administrative law judge initially noted that employer did not challenge its status as a "potentially liable operator" at 20 C.F.R. §725.494, but rather alleged that Trojan Mining Company (Trojan Mining) is the "potentially liable operator" that most recently employed the miner for at least one year. Decision and Order at 8. However, the administrative law judge found that, because the evidence was insufficient to establish that the miner worked for Trojan Mining for at least a year, even if the period when the miner received state workers' compensation was credited as "actual work," Trojan Mining could not be considered a "potentially liable operator." *Id.* at 8-9. The administrative law judge also found that, contrary to employer's contention, the doctrines of res judicata and collateral estoppel did not bar him from considering whether Trojan Mining is employer's successor. *Id.* at 10, 11-12. The administrative law judge concluded, therefore, that employer is the properly identified responsible operator. *Id.* at 12.

Employer asserts that the administrative law judge erred in failing to adopt the determination of Administrative Law Judge Daniel J. Roketenetz, in the miner's claim, that Trojan Mining was the successor operator of employer, as "findings made in a miner's claim that are not capable of change should apply with equal force to a survivor's

³ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁴ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. 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 (1989)(en banc).

claim.” Employer’s Brief at 10, citing *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). Employer states that the administrative law judge’s reliance on *Yates v. Golden Chip Coal Corp.*, BRB Nos. 06-0888 BLA and 06-0888 BLA-S (Nov. 23, 2007)(unpub.), was in error, as it does not constitute binding precedent in this case. Further, employer contends that the administrative law judge erred in finding that the responsible operator issue was not “actually litigated” and was not “essential” to the denial of benefits in the miner’s claim.⁵ Employer’s Brief at 11.

Regarding the findings of fact rendered by the administrative law judge, employer argues that the miner did not have to work for Trojan Mining for one year in order for it to be identified as a successor operator. In addition, employer maintains that remand is required because the administrative law judge did not consider the miner’s testimony or the Social Security records indicating that employer and Trojan Mining were the same company.

In response, the Director asserts that collateral estoppel does not prevent the administrative law judge from considering the responsible operator issue in this claim. The Director argues that, although Judge Roketenetz suggested at the hearing in the miner’s claim that Trojan Mining was a successor-in-interest to employer, he did not dismiss employer as a party or determine that Trojan Mining should have been designated as the responsible operator. Rather, the Director states that Judge Roketenetz identified employer as the responsible operator in the miner’s claim, as Trojan Mining was never a party to the claim. In the alternative, the Director contends that collateral estoppel does not apply because the successor-liability issue was not litigated before Judge Roketenetz and it was not essential to the denial of the miner’s claim. However, the Director concedes that, in the present case, the administrative law judge did not consider the miner’s testimony concerning any possible successor relationship between employer and Trojan Mining and, therefore, remand is required.⁶

⁵ In *Yates v. Golden Chip Coal Corp.*, BRB Nos. 06-0888 BLA and 06-0888 BLA-S (Nov. 23, 2007)(unpub.), the Board held that collateral estoppel did not apply to the responsible operator issue because, *inter alia*, the issue in the survivor’s claim was not identical to the issue in the miner’s claim due to the possibility of a change in the operator’s financial condition subsequent to the adjudication of the miner’s claim.

⁶ The Director, Office of Workers’ Compensation Programs (the Director), notes that “the only favorable evidence [employer] has mustered is [the miner’s] testimony” on the successor operator issue and that “[a]lthough the evidence may be a slender prop for [employer’s] argument, the [administrative law judge] alone may determine its probative value.” Director’s Brief at 12.

We reject employer's allegations of error regarding the administrative law judge's determination that he was not bound by the disposition of the responsible operator issue in the miner's claim. To successfully invoke the doctrine of collateral estoppel,⁷ employer was required to establish the following:

- (1) The precise issue raised in the present case was raised and actually litigated in the prior proceeding;
- (2) Determination of the issue was necessary to the outcome of the prior proceeding;
- (3) The prior proceeding resulted in a final judgment on the merits; and
- (4) The party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n, 821 F.2d 328 (6th Cir. 1987); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(en banc). Even assuming, as employer suggests, that there was a stipulation in the miner's claim that Trojan Mining was employer's successor,⁸ it was not binding on the administrative law judge in the present claim, as establishing a fact by stipulation does not constitute actual litigation of that fact. See *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97, 98 (2000). Further, at the hearing in the miner's claim, employer's counsel did not indicate that he intended his statements to be a stipulation to Trojan Mining's liability, nor did employer's counsel suggest that he represented Trojan Mining and had the authority to enter into any binding stipulations on its behalf. See *Zenith Radio Corp. v. Hazeldine Research, Inc.*, 395 U.S. 100 (1969). Because the responsible operator issue was not actually litigated in the miner's claim, the administrative law judge properly determined that employer failed to establish a required element of the doctrine of collateral estoppel. See *Hughes*, 21 BLR at 1-137; *Justice*, 34 BRBS at 98; see also *Otherson v. Department of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983). Therefore, the administrative

⁷ Although the administrative law judge and employer both referred to res judicata, or claim preclusion, in addition to collateral estoppel, the question in this case is not whether the findings in the miner's claim barred claimant from filing her survivor's claim. Rather, the question is whether collateral estoppel, or issue preclusion, barred the Director from relitigating the issue of the identity of the responsible operator in the survivor's claim.

⁸ During the hearing in the miner's claim, the miner testified that he worked for employer but the company changed its name to Trojan Mining Company (Trojan Mining). Director's Exhibit 1, 1988 Hearing Transcript at 15. Judge Roketenetz then asked employer's counsel if Trojan Mining was a successor to employer and he replied "[i]t appears so." *Id.*

law judge properly determined that the identity of the responsible operator was an issue before him in the survivor's claim.

However, the Director and employer are correct in asserting that remand is required, as the administrative law judge did not consider all relevant evidence when determining that employer failed to establish that Trojan Mining is a successor operator. A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). Based on employer's acknowledgement that it met the criteria for a "potentially liable operator," it had the burden of establishing that Trojan Mining is a successor operator that most recently employed the miner for a cumulative period of at least one year. 20 C.F.R. §725.495(c)(2).

In the present case, employer relies upon the miner's testimony at the 1988 hearing in his claim and the miner's Social Security earnings records. The miner testified as follows:

Mr. Boyd (the miner's counsel): Who was the last coal company you worked for?

A: Trojan Mining Company.

....

Judge Roketenetz: How long did you work for Trojan?

A.: I was 7 years at this other outfit, but they change switched [sic] names. It was [employer], then the last name was Trojan Mining Company.

Director's Exhibit 1 (1988 Hearing Transcript at 15). With respect to the Social Security earnings records, as employer contends, they indicate that employer and Trojan Mining had the same address, providing support for employer's position that Trojan Mining is a successor operator. *See* Director's Exhibit 7.

Because the administrative law judge did not address this evidence, we must vacate the administrative law judge's determination that employer is the properly named responsible operator and remand the case for reconsideration of this issue. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must address all relevant evidence in evaluating whether a successor relationship exists between employer and Trojan Mining and if the miner worked for Trojan Mining for at least one year. In so doing, the administrative law judge must consider that, although

employer bears the burden of establishing the successor relationship, a miner's tenure with a prior and successor operator may be aggregated to establish the required one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c).

II. Invocation of the Amended Section 411(c)(4) Presumption – Length of Coal Mine Employment

In determining whether the miner had at least fifteen years of underground coal mine employment, or employment in substantially similar conditions, the administrative law judge initially found that the stipulation in the miner's claim to seventeen years of coal mine employment is not binding in this case. Decision and Order at 6. The administrative law judge then noted that: The district director found that the miner had seventeen years of coal mine employment; employer stipulated to at least 14.5 years of coal mine employment; the miner reported seventeen years of underground coal mine employment to Dr. Skider; and claimant testified in her deposition that the miner worked underground for between fifteen and twenty years. *Id.*; *see* Director's Exhibits 15, 19, 29; Hearing Transcript at 9. The administrative law judge relied on the miner's Social Security earnings records, which he determined supported a finding that the miner worked for 15.25 years in underground coal mine employment. Decision and Order at 7; *see* Director's Exhibit 7. Specifically, the administrative law judge determined that "the records show that the [m]iner earned at least \$50.00 from coal mine employment in [sixty-one] quarters from 1963 to 1985" and that "[s]ince the records contain four quarters per year, this equals a total of 15.25 years." Decision and Order at 7.

Employer contends that the administrative law judge's finding cannot be affirmed, because it is not clear how the administrative law judge determined there were sixty-one quarters of coal mine employment when the Social Security earnings records for the period from 1978 to 1985 do not list earnings by quarter. Employer also avers that, to the extent that the administrative law judge credited the miner with four quarters of employment for each year from 1978 to 1984, and three quarters in 1985, this is inconsistent with letters, admitted into the record, in which employer reported that claimant worked in only two quarters in 1985. In addition, employer maintains that the administrative law judge's quarter-hour analysis is inconsistent with 20 C.F.R. §725.101(a)(32), which requires an administrative law judge to determine the beginning and ending dates of the miner's coal mine employment or, if they cannot be determined, to divide the miner's yearly income by the coal mine industry's average day earnings for the year, which employer contends does not add up to fifteen years of coal mine employment. Further, employer asserts that the administrative law judge erred in finding that all of the miner's coal mine employment was underground, as he did not consider the miner's testimony to the contrary and, therefore, did not determine whether the evidence establishes that the miner's work aboveground was in conditions substantially similar to those in an underground mine.

Contrary to employer's argument, 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. 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). Rather, the use of the formula is discretionary, such that 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. *See Muncy*, 25 BLR at 1-27. Relevant to this case, the Board has recognized that it is reasonable for an administrative law judge to credit a miner with a quarter of coal mine employment for every quarter in which his or her Social Security records reflect earnings of at least \$50.00 for such employment. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). However, employer is correct in maintaining that, in the present case, the administrative law judge's use of this method cannot be affirmed, as he did not adequately identify the evidence on which he relied and did not set forth his findings in adequate detail, including the underlying rationale, as required by the Administrative Procedure Act (APA).⁹ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In determining that the miner had sixty-one quarters of coal mine employment between 1963 and 1985, the administrative law judge did not set out the number of quarters that he credited the miner with per calendar year, based on the Social Security earnings records. We cannot discern, therefore, the number of years of coal mine employment with which the administrative law judge may have reasonably credited the miner from 1963 through 1977. In addition, employer is correct in stating that, because the Social Security earnings records do not list earnings by quarter for the period from 1978 through 1985, the basis for the administrative law judge's finding that "the [Social Security earnings] records show that the [m]iner earned at least \$50.00 from coal mine employment in 61 quarters from 1963 to 1985" is unclear. Decision and Order at 7; *see* Director's Exhibit 7. Employer is also correct in alleging that the administrative law judge did not consider letters from the miner's employer detailing the specific dates of his work history. *See* Director's Exhibit 1.

Because the administrative law judge did not adequately explain how he arrived at his finding of 15.25 years of coal mine employment and did not address all relevant

⁹ The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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) and 30 U.S.C. §932(a).

evidence as required by the APA, we must vacate his finding. *See Wojtowicz*, 12 BLR at 1-165. We further vacate, therefore, the administrative law judge's determination that claimant invoked the presumption at amended Section 411(c)(4). On remand, the administrative law judge must select a reasonable method by which to calculate the length of claimant's underground coal mine employment, weigh all relevant evidence and explain the bases for his findings in accordance with the APA.

In addition to reconsidering the length of the miner's coal mine employment on remand, the administrative law judge must address all evidence relevant to the location of the miner's coal mine employment, including the miner's testimony that only two-thirds of his coal mine employment was underground.¹⁰ *See* Director's Exhibit 1 (1988 Hearing Transcript at 15). If the administrative law judge finds that claimant has established that the miner had fifteen years of qualifying coal mine employment, he may reinstate his finding that claimant invoked the amended Section 411(c)(4) presumption. If claimant is unable to establish that the miner had at least fifteen years of qualifying coal mine employment, the administrative law judge must render findings as to whether claimant established entitlement pursuant to 20 C.F.R. Part 718 of the regulations without benefit of the presumption.

III. Rebuttal of the Presumption

In the interest of judicial economy, and to avoid the repetition of any error on remand, we will address employer's contentions concerning the administrative law judge's finding that it did not rebut the amended Section 411(c)(4) presumption. Employer asserts that the administrative law judge erroneously relied on the preamble to the regulations in discrediting the opinions of Drs. Caffrey and Jarboe, that the miner did not have legal pneumoconiosis and that his death was not due to pneumoconiosis. In the alternative, employer argues that the opinions of Drs. Caffrey and Jarboe are not contrary to the preamble.¹¹ These allegations of error are without merit.

¹⁰ Although claimant bears the burden of establishing that the miner worked for at least fifteen years in an underground coal mine or in conditions that were substantially similar, *see* 30 U.S.C. §921(c)(4), if the miner performed surface work at an underground mine site, claimant does not have to establish the comparability of the conditions, as the regulatory definition of an underground coal mine encompasses not only the underground mine shaft, but also all land, buildings and equipment. 20 C.F.R. 725.101(a)(30); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-23 (2011).

¹¹ Employer also contends that the administrative law judge erred in finding that the biopsy evidence was in equipoise. In light of the administrative law judge's finding that employer rebutted the presumed existence of clinical pneumoconiosis based on the x-ray evidence, error, if any, in the weighing of the biopsy evidence is harmless. *See*

As an initial matter, we reject employer's contention that the administrative law judge erred in relying on the preamble to the amended regulations when weighing the medical opinion evidence. The preamble sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

Regarding the administrative law judge's use of the preamble when weighing the opinions of Drs. Caffrey and Jarboe on the issue of the existence of legal pneumoconiosis, both physicians indicated that coal dust did not contribute to the miner's centrilobular emphysema. *See Employer's Exhibits 2, 4-6.* Dr. Caffrey acknowledged that "coal dust in a susceptible individual can cause emphysema" but stated that smoking is the "number one cause" of the disease. *Employer's Exhibit 4 at 31.* In addition, Dr. Caffrey testified that, in relation to the miner in this case, "no one can say exactly how much the coal dust would have contributed to his emphysema, but certainly there's no comparison with the amount of coal dust in the lungs . . . in the surgical pathology report and his 90-plus pack-years of smoking cigarettes." *Id. at 32.* Dr. Jarboe stated, "[w]e do know that coal miners can develop emphysema, but I feel that the medical literature strongly supports the fact that when it does, it is in proportion to the fibrotic reaction in the lung tissues." *Employer's Exhibit 5 at 11.*

The administrative law judge permissibly found that Dr. Caffrey's opinion was entitled to little weight, as he found it was contrary to the DOL's findings that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms" and "that exposure to coal mine dust can cause chronic airflow limitation . . . and emphysema . . . and this may occur independently of [coal workers' pneumoconiosis]." *Obush*, 24 BLR at 1-125-26; *see* 65 Fed. Reg. at 79,943 (Dec. 21, 2000): Decision and Order at 46. The administrative law judge also acted within his discretion in giving little weight to Dr. Jarboe's opinion for the same reason. *See Obush*, 24 BLR at 1-125-26; Decision and Order at 47-48. Therefore, we affirm the administrative law judge's

Johnson v. Jeddo-Highland Coal Co., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

determination that employer did not rebut the presumption that the miner had legal pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011); Decision and Order at 48.

The administrative law judge further found that employer did not rebut the existence of a causal connection between the miner's pneumoconiosis and his death, stating:

I have found that neither Dr. Caffrey nor Dr. Jarboe provided well-reasoned explanations for their exclusion of coal dust exposure as at least a contributing cause of the [m]iner's severe chronic obstructive pulmonary disease. Because each physician acknowledged that the [m]iner's obstructive disease contributed to his death, I find that their opinions are insufficient to show that pneumoconiosis was not a contributing or hastening factor to the miner's death.

Decision and Order at 49. Because we have affirmed the administrative law judge's finding that employer failed to affirmatively prove that the miner did not have legal pneumoconiosis, and he relied on these findings when considering death causation, we also affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by affirmatively proving that the miner's death did not arise out of, or in connection with, his coal mine employment. *See* 30 U.S.C. §921(c)(4); *Morrison*, 644 F.2d at 479, 25 BLR at 2-8; Decision and Order at 49. Consequently, if the administrative law judge again finds, on remand, that claimant has invoked the amended Section 411(c)(4) presumption, he may reinstate the award of benefits.

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