

BRB No. 09-0721 BLA

WALTER L. HOOVER)
)
 Claimant-Petitioner)
)
 v.)
)
 KEYSTONE COAL MINING)
 CORPORATION)
) DATE ISSUED: 06/30/2010
 Employer-Respondent)
)
 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 – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Walter L. Hoover, Butler, Pennsylvania, *pro se*.¹

Lindsey M. Sbrolla (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

¹ Lynda Glagola, Program Director of Lungs at Work in McMurray, Pennsylvania, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Glagola is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand - Denying Benefits (06-BLA-6126) of Administrative Law Judge Daniel L. Leland rendered on a subsequent claim filed on August 2, 2005, 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). This case is before the Board for the second time. Initially, the administrative law judge credited claimant with thirty-one years and seven months of coal mine employment² and adjudicated this claim pursuant to 20 C.F.R. Part 718. Because the administrative law judge determined that the new evidence established that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, however, that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

In response to claimant's *pro se* appeal, the Board affirmed in part, and vacated in part, the administrative law judge's decision and remanded the case for further consideration. *W.H. [Hoover] v. Keystone Coal Mining Corp.*, , BRB No. 08-0221 BLA (Nov. 26, 2008)(unpub.). Specifically, the Board affirmed the administrative law judge's findings that claimant established thirty-one years and seven months of coal mine employment, and that the new evidence established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, as these findings were neither prejudicial to claimant nor challenged by employer on appeal. *Hoover*, slip op. at 3 n.3. The Board vacated, however, the administrative law judge's findings that claimant failed to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and instructed the administrative law judge to reconsider the relevant evidence and explain the bases for his findings. *Hoover*, slip op. at 7. In light of the determination to vacate the administrative law judge's findings at 20 C.F.R. §718.202(a), the Board also vacated the finding that claimant failed to establish that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), and instructed the administrative law judge to reconsider that issue, if reached.

² The record indicates that claimant's coal mine employment was in Pennsylvania. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

On remand, the administrative law judge again found that claimant failed to establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and, therefore, failed to establish that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally asserts that he is entitled to benefits. 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.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

By Order dated May 10, 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 parties have responded.

The Director contends that Section 1556 affects this case and that a remand is required. The Director states that, because claimant filed his claim after January 1, 2005, and it was still pending on March 23, 2010, the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), applies to this claim.³ The Director requests that this case be remanded to the administrative law judge to consider whether claimant has established entitlement pursuant to the Section 411(c)(4) presumption. The Director further states that, because the presumption alters the required findings of fact and the allocation of the

³ Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis and/or that the miner's death was 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)). The Director, Office of Workers' Compensation Programs, notes that claimant was credited with thirty-one years and seven months of coal mine employment, and established that he is totally disabled.

burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, consistent with the evidentiary limitations at 20 C.F.R. §725.414.

Claimant agrees that Section 1556 affects this case and that a remand is required. Claimant requests that, prior to remanding the case, the Board review the administrative law judge's findings under 20 C.F.R. §§718.202(a), 718.204(c).

Employer also agrees that Section 1556 is applicable to this case, but argues that, based on the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, the Section 411(c)(4) presumption has been rebutted. Thus, employer urges affirmance of the administrative law judge's denial of benefits.

After review of the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's findings, and the denial of benefits, must be vacated and the case remanded to the administrative law judge. Relevant to this living miner's claim, Section 1556 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. Under Section 411(c)(4), if a claimant establishes at least fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment, there is a rebuttable presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). In this case, claimant filed his claim after January 1, 2005, he was credited with thirty-one years and seven months of coal mine employment, and he established a totally disabling respiratory or pulmonary impairment.⁴ Section 411(c)(4) further provides that, if the presumption is invoked, the burden of proof shifts to employer to establish that claimant does not have pneumoconiosis or that claimant's "respiratory or pulmonary impairment did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4). Contrary to employer's assertion, therefore, we cannot affirm the denial of benefits because claimant did not establish the existence of pneumoconiosis. Accordingly, we must vacate the administrative law judge's findings under 20 C.F.R. §§718.202(a) and 718.204(c), and remand this case to the administrative law judge. Therefore, we deny, as premature, claimant's request to review these findings.

On remand, the administrative law judge must initially consider whether claimant is entitled to invocation of the presumption at Section 411(c)(4). If the administrative law judge determines that the presumption is applicable to this claim, he must allow both

⁴ In the current appeal, employer again does not challenge the administrative law judge's finding of total disability, or his finding of thirty-one years and seven months of coal mine employment. Employer's Supplemental Brief at 1-2.

parties the opportunity to submit evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge