

BRB Nos. 11-0641 BLA
and 11-0869 BLA

JANICE L. TAYLOR)
(o/b/o and Widow of JOHN R. TAYLOR))
)
Claimant-Respondent)
)
v.)
)
AL HAMILTON CONTRACTING) DATE ISSUED: 06/21/2012
COMPANY)
)
and)
)
OLD REPUBLIC GENERAL INSURANCE)
CORPORATION)
)
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James R. Schmitt (Schmitt & Coletta), Carnegie, Pennsylvania, for claimant.

Laura Metcoff Klaus (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Awarding Benefits (2009-BLA-5046 and 2009-BLA-5047) of Administrative Law Judge Michael P. Lesniak rendered on a miner's claim, consolidated with a survivor's 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).

On March 23, 2010, amendments to the Act were enacted, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The amendments also revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

By Order dated April 1, 2010, the administrative law judge requested briefing from the parties as to the applicability of amended Sections 411(c)(4) and 422(l) of the Act, 30 U.S.C. §§921(c)(4) and 932(l), to this case. In response, employer submitted a Motion to Remand, urging that the case be remanded to the district director to allow the parties an opportunity to respond to the changes in law with proof. In addition, employer requested that the scheduled hearing be cancelled, pending the promulgation of new regulations to address the changes in the law. Employer also submitted a "Supplement to Employer/Carrier's Controversions Claims Subject to Section 1556 of the [PPACA], P.L. 111-148," wherein employer requested that the "previously-filed Controversions A-E submitted on behalf of the Employer/Carrier in this matter also are applicable as

¹ Claimant is the widow of the miner, who died on June 17, 2007. Survivor's Claim (SC) Director's Exhibit 11. The miner filed a claim for benefits on August 25, 2005. Living Miner's Claim (LM) Director's Exhibit 2. While his case was pending, the miner died. Claimant filed her survivor's claim on November 16, 2007. SC Director's Exhibit 2. The two cases were consolidated for decision purposes. SC Director's Exhibit 32.

appropriate in all claims affected by Section 1556 of the [PPACA].” Employer’s April 15, 2010 Response to April 1, 2010 Order. The Director, Office of Workers’ Compensation Programs (the Director), in response, set forth the requirements for entitlement under amended Sections 411(c)(4) and 422(l), and urged the administrative law judge to apply the amended sections to the current claims. Claimant did not respond to the administrative law judge’s April 1, 2010 Order. The administrative law judge denied employer’s Motion to Remand at the April 21, 2010 formal hearing.

In his Decision and Order Award of Benefits issued on May 11, 2011, the administrative law judge found that the miner worked for more than eighteen years in surface mining employment, based on a stipulation of the parties, but that he was exposed to coal dust in conditions substantially similar to those of an underground coal mine. Therefore, the administrative law judge found that claimant established that the miner had at least fifteen years of qualifying coal mine employment under amended Section 411(c)(4). The administrative law judge further found that the medical evidence established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found invocation of the rebuttable presumption set forth at amended Section 411(c)(4) established. The administrative law judge further determined that employer failed to rebut that presumption. Consequently, the administrative law judge found that claimant established entitlement to benefits in the miner’s claim. With regard to the survivor’s claim, the administrative law judge found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits in both the miner’s claim and the survivor’s claim.

On appeal, employer contends that the case should be held in abeyance until the legal challenges to the PPACA have been resolved. In the alternative, employer requests that the case be remanded to the district director to allow employer the opportunity to respond to the changes in law, arguing that the administrative law judge erred in denying its Motion to Remand to address the changes in law with proof. Employer also contends that the administrative law judge erred in finding that the miner’s surface coal mine employment was substantially similar to underground coal mining employment and, thus, that claimant established that the miner had at least fifteen years of qualifying coal mine employment. Employer further contends that the administrative law judge erred in finding the medical evidence sufficient to establish invocation of the amended Section 411(c)(4) presumption, and generally challenges the administrative law judge’s finding of rebuttal. Additionally, employer contends that the administrative law judge’s award of derivative survivor’s benefits was premature because there has not been a final award in the miner’s claim. In response, claimant urges affirmance of the administrative law judge’s award of benefits, as supported by substantial evidence. The Director submitted a limited response, urging the Board to reject employer’s contention that the administrative law judge erred in denying employer’s Motion to Remand and also urging

affirmance of the administrative law judge's finding that claimant established that the miner had at least fifteen years of qualifying coal mine employment. In a Reply Brief, employer reiterates its argument that the case should be held in abeyance pending the decision of the United States Supreme Court regarding the constitutionality and severability of the PPACA. Employer also reiterates its argument that, in the absence of a specific standard, the administrative law judge erred in finding that claimant established that the miner had fifteen years of qualifying coal mine employment pursuant to amended Section 411(c)(4), or, in the alternative, employer should be dismissed as the liable party.

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.² 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).

On appeal, employer raises several procedural and substantive challenges to the administrative law judge's award of benefits in both the miner's claim and the survivor's claim. Initially, employer requests that this case be held in abeyance pending the Court's resolution of the legal challenges to Public Law No. 111-148. Employer's Brief at 13-14. We reject that request. *See B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.).

Employer further contends that if the case is not held in abeyance, the Board should vacate the administrative law judge's decision and remand the case to the district director to allow employer the opportunity to submit evidence in response to the changes in law. Specifically, employer contends that the administrative law judge erred in denying its Motion to Remand, in which employer requested that the case be remanded to the district director to allow the parties to respond to the changes in law with proof. Employer's Brief at 15. The Director, in response, urges the Board to reject employer's contention, arguing that the administrative law judge acted within his discretion in denying employer's Motion to Remand because employer stated at the hearing that it did not intend to submit any additional evidence on remand, but the purpose of the remand

² Because the miner was last employed in the coal mining industry in Pennsylvania, we will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); LM Director's Exhibit 3.

was only to amend the list of controverted issues, such as to preserve its constitutional challenges and its contention that regulations need to be issued addressing the amendments.

Based on the facts of this case, we hold that there is merit to employer's contention. Employer correctly notes that, in a case such as this one, where there has been a change in law prior to the full adjudication of the case, general principles of due process support the contention that an administrative law judge must provide the parties with the opportunity to submit additional evidence relevant to the change of law, *e.g.*, the amended Section 411(c)(4) presumption. *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 Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986).

In this case, the administrative law judge inquired during the formal hearing whether the parties intended to submit "post-hearing" evidence, to which employer replied "no." Hearing Transcript at 22, lines 19-21. However, employer then stated that there was still its outstanding Motion to Remand, as well as the supplement to its controversion, both of which were submitted in response to the administrative law judge's order regarding the applicability of the new amendments. *Id.* at 22, lines 21-25. The administrative law judge, in apparent clarification, asked, "[y]our motion was to remand?" *Id.* at 23, line 2. Employer stated:

That's right, **and** to preserve other rights – for instance, constitutionality challenges and the right to – or, the acknowledgment that there are regulations that need to be issued yet in regard to the amendments.

Id. at 23, lines 3-7 [emphasis added]. The administrative law judge then denied employer's motion. *Id.* at 23, lines 8-9.

While employer stated that there was no post-hearing evidence, employer's counsel further stated that the administrative law judge had not addressed its outstanding motion to remand **and** its supplemental controversion page, which employer requested be included in the record. Hearing Transcript at 22-23 [emphasis added]. Specifically, employer's Motion to Remand requested that the case be remanded to the district director to allow the parties the opportunity to address the changes in law with proof. Therefore, because employer argued that both its Motion to Remand **and** its supplemental controversion had not been addressed by the administrative law judge, *see* Hearing Transcript at 22-23 [emphasis added]; Employer's Brief at 15, the administrative law judge did not adequately address employer's motion requesting the opportunity to respond to the change in law with proof. Because the administrative law judge did not adequately explain the bases for his denial of employer's Motion to Remand, we vacate his Decision and Order – Awarding Benefits and remand the case for the administrative

law judge to fully address employer's Motion to Remand, particularly in light of the change in the law that reallocated the burdens of proof. *See Lemar*, 904 F.2d at 1047-50, 14 BLR at 2-7-11; *Tackett*, 806 F.2d at 642, 10 BLR at 2-95.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is vacated and the case is remanded to the administrative law judge for further consideration of both the miner's claim and the survivor's claim consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge