BRB No. 10-0412 BLA

GLENN N. HELTON, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EVANS COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 04/21/2011
	)	
	)	
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 Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Glenn N. Helton, Sr., Hulen, Kentucky, *pro se*.

William Stacy Huff (Huff Law Office), Harlan, Kentucky, for employer.

Maia S. Fisher (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2008-BLA-5995) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed on November 13, 2007, 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). Based on a stipulation by the parties and the evidence of record, the administrative law judge credited claimant with at least sixteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found that the preponderance of the x-ray and medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3), (4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. In the alternative, employer requests that this case be remanded to the district director to permit it an opportunity to respond to the recent amendments to the Act, as enacted by Section 1556 of Public Law No. 111-148.[3] The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion To Remand In Response To Claimant's Appeal. The Director argues that the administrative law judge's Decision and Order Denying Benefits must be vacated and the case remanded so that the administrative law judge may consider entitlement under the recent amendments to the Act.

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[1] In a letter dated March 29, 2010, Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The administrative law judge accepted the parties stipulation to "at least" sixteen years of coal mine employment and claimant alleged "about thirty some years" of coal mine employment. Hearing Transcript at 6, 12.

[3] The recent amendments to the Act apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides, in relevant part, 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. 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)).

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law.[4] 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 argues that the administrative law judge's finding that the x-ray and medical opinion evidence does not establish the existence of pneumoconiosis is reasoned and supported by substantial evidence and that the amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), should not alter the outcome of this case. Employer maintains that, although the parties stipulated to sixteen years of coal mine employment, claimant testified that he only worked six to seven years underground and that there is no evidence establishing that the conditions of his ten years of surface mining were substantially similar to those in an underground mine. Alternatively, employer maintains that if the amendments are applicable, remand of the case is not necessary because the evidence is insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment to invoke the rebuttable presumption and that based on the administrative law judge's finding that claimant does not have coal workers' pneumoconiosis, it has rebutted the Section 411(c)(4) presumption. Employer also argues that, if the Board remands this case for consideration under Section 411(c)(4), due process requires that the administrative law judge allow the parties the opportunity to submit additional, relevant evidence to address the change in law. Employer suggests that the Board hold this case in abeyance because the constitutionality of the amendments has been challenged and that "20 C.F.R. §718.305 (2009) in its current form" is not applicable, unless the Department of Labor amends Section 718.305 through normal rule making procedures, to implement the recent amendments. Employer's Response Brief at 10 n.2.

The Director maintains that remand is required for the administrative law judge to determine whether claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis, set forth in the amended version of Section 411(c)(4) of the Act. 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. 30 U.S.C. §921(c)(4). The Director contends that, because the present

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

claim was filed after January 1, 2005, and the parties stipulated to sixteen years of coal mine employment, it is necessary for the administrative law judge to specifically determine the nature of claimant's coal mine employment, an issue that, prior to the recent amendments, was not relevant. The Director asserts that the administrative law judge must determine whether claimant is totally disabled due to a pulmonary or respiratory impairment, an issue that the administrative law judge did not reach, given his finding that the evidence did not establish the existence of pneumoconiosis. The Director further states that, because the presumption alters the required findings of fact and the allocation of the burden of proof, the administrative law judge must allow the parties the opportunity to submit additional, relevant evidence, in compliance with the evidentiary limitations at 20 C.F.R. §725.414.

After review of the parties' arguments, we agree with the Director and conclude that the administrative law judge's denial of benefits must be vacated and the case remanded to the administrative law judge for consideration under the amended version of Section 411(c)(4) of the Act. If the administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), he should then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 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). Further, 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).

Finally, we deny employer's request to hold this case in abeyance.[5]

[5]Because the administrative law judge has not yet considered this claim under Section 411(c)(4), 30 U.S.C. §921(c)(4), we decline to address, as premature, employer's argument that the Section 411(c)(4) limitations on rebuttal evidence do not apply to responsible operators. Employer's Brief at 10 n.2.

Accordingly, the administrative law judge's Decision and Order Denying 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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JUDITH S. BOGGS
Administrative Appeals Judge