

BRB No. 09-0844 BLA

JOYCE DEVINE)
(Widow of JAMES DEVINE))
)
Claimant-Petitioner)
)
v.)
)
PEABODY COAL COMPANY) DATE ISSUED: 08/20/2010
)
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 - Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (07-BLA-5959) of Administrative Law Judge Daniel F. Solomon on a survivor's claim¹ 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 accepted the parties' stipulation that the miner² worked in qualifying coal mine employment for at least twenty-seven years. Adjudicating the survivor's claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in failing to find that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c).³ In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response in this appeal.

By Order dated June 29, 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. *Devine v. Peabody Coal Co.*, BRB No. 09-0844 BLA (June 29, 2010) (unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. All parties have responded.

¹ Claimant, Joyce Devine, is the widow of the miner, who died on April 19, 2006. Director's Exhibit 10. Claimant filed a survivor's claim for benefits on October 16, 2006. Director's Exhibit 2.

² The miner filed his first application for benefits on December 6, 2000. This claim was denied by the district director on March 2, 2001, based on the miner's failure to establish the existence of pneumoconiosis or total respiratory disability. The miner did not pursue this claim but, instead, filed a second application on July 16, 2003, which was denied on February 11, 2004. Director's Exhibit 1. The July 2003 claim was administratively closed because the miner did not pursue it further.

³ In addition, claimant contends that the x-ray evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). However, we need not address this issue, as the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The Director states, and claimant agrees, that the recent amendments to the Act are applicable, as the present claim was filed after January 1, 2005 and the miner was credited with at least twenty-seven years of coal mine employment. The Director also maintains, therefore, that the denial of benefits must be vacated and the case remanded to the administrative law judge for consideration of the rebuttable presumption of death due to pneumoconiosis set forth in the amended version of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).⁴ In addition, the Director requests that the administrative law judge reopen the record, on remand, to provide the parties with the opportunity to submit additional evidence relevant to the Section 411(c)(4) presumption and in accordance with the evidentiary limitations pursuant to 20 C.F.R. §725.414. Employer argues that the Section 411(c)(4) presumption is not available in this case because there is no evidence that the miner worked at least fifteen years in an underground coal mine, or in substantially similar conditions. Employer also contends that the Section 411(c)(4) presumption is not available, as evidence obtained during the miner's lifetime is insufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). *See* 30 U.S.C. §921(c)(4). However, employer contends that, if the Board finds the amendments applicable, the case must be remanded to the administrative law judge to allow the parties the opportunity to respond to the changes in the law.

Based upon the parties' responses, we are persuaded that the Director is correct in maintaining that the administrative law judge's denial of benefits in the survivor's claim must be vacated and the case remanded to the administrative law judge. Entitlement to the Section 411(c)(4) presumption requires a determination that the miner was totally disabled due to a pulmonary or respiratory impairment. This is an issue that, prior to the recent amendments, was not relevant in this survivor's claim. In addition, if the presumption is invoked, the burden of proof shifts to employer to rebut the presumption.

In the present case, the administrative law judge found that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(5), because none of the physicians of record explained how pneumoconiosis hastened death "through a specifically defined process that reduce[d] the miner's life by an estimable time." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); Decision and Order at 13. The administrative law

⁴ Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner was totally disabled due to pneumoconiosis at the time of his death or that his 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)).

judge concluded that there is no evidence of record legally sufficient to support claimant's burden at Section 718.205(c) under *Williams. Id.*

Nevertheless, we must vacate the administrative law judge's denial of benefits,⁵ and remand the case to the administrative law judge for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4).⁶ The administrative law judge must initially determine whether the miner worked at least fifteen years in an underground coal mine or in a surface coal mine in conditions substantially similar to those in an underground mine, *see Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509 (7th Cir. 1988). The administrative law judge must also allow the parties the opportunity to submit additional evidence in compliance with the evidentiary limitations at 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1). If, on remand, the administrative law judge determines that claimant is entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), the administrative law judge must then determine whether employer has established rebuttal.

⁵ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4, 7-12.

⁶ Section 1556 of Public Law No. 111-148 also amended Section 422(l) of the Act, 30 U.S.C. §932(l), to provide that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as both of the miner's claims for benefits were denied. *See Director's Exhibit 1.*

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge